William & Mary Business Law Review

Volume 13 (2021-2022)
Issue 1

Article 7

11-2021

Lending a Hand Instead of Breaking the Bank: The Imperative Need to Resolve the Circuit Split for Determining Undue Hardship for Section 523(A)(8) Student Loan Discharges

Rucha Pandit

LENDING A HAND INSTEAD OF BREAKING THE BANK: THE IMPERATIVE NEED TO RESOLVE THE CIRCUIT SPLIT FOR DETERMINING UNDUE HARDSHIP FOR SECTION 523(A)(8) STUDENT LOAN DISCHARGES

RUCHA PANDIT*

ABSTRACT

The Bankruptcy Code permits petitioners to discharge their student debts if they are able to demonstrate that their loans impose an undue hardship. Somewhat frustratingly, the Code does not define what exactly constitutes undue hardship in the context of student loan discharges. Moreover, neither Congress nor the Supreme Court has broken its silence to offer guidance on the issue. As a result, the rest of the federal judiciary has been once again, left to its own devices.

Over the past few decades, the Brunner *and totality-of-the-circumstances tests have emerged as the standards that federal circuits choose between to assess whether student loan repayment would cause the petitioner undue hardship. Although an overwhelming majority of circuits has endorsed the* Brunner *formulation, the test is considered by many to set an impossibly high burden for petitioners to surmount.*

This Note argues that the circuit split for determining undue hardship is purely illusory. The plain wording of both the Brunner *and totality-of-the-circumstances formulations indicates that there is no real difference in the substantive inquiry conducted by each test. Rather, the divergence stems from a history of a retributive*

* JD Candidate, William & Mary Law School, Class of 2022. BA in Economics, Penn State University, Class of 2019. The author would like to thank her family and friends for their unwavering support, encouragement, and love. She would also like to acknowledge the *William & Mary Business Law Review* staff and editorial board for their effort in preparing this publication. This Note is dedicated to the author's dog and arguably, co-author, Auro, who spent countless hours by her side as she researched and wrote this piece.

dicta being wrongly imputed to the Brunner *standard. This Note argues that if the* Brunner *Standard is properly applied, the notion of a circuit split will be dispelled. Furthermore, this Note also encourages Congress to assist the judiciary by providing guidance on how it defines undue hardship.*

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INTRODUCTION

The primary purpose of the United States bankruptcy system is to afford a fresh start to the "honest but unfortunate debtor."[1] Although the Bankruptcy Code precludes "the opportunity for a *completely* unencumbered new beginning" for financially overburdened petitioners, it nonetheless remains that a central purpose of the Code is to provide a mechanism through which "certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life ... unhampered by the pressure and discouragement of preexisting debt.'"[2]

Attempting to comport with the "principles of humanity [and] justice,"[3] upon which bankruptcy law is squarely founded, is section 523(a)(8) of the Bankruptcy Code.[4] Section 523(a)(8) provides that although student education loans are presumptively nondischargeable, they are not *exclusively* nondischargeable.[5] Rather, a student may obtain relief from the loan if she is able to demonstrate, by a preponderance of the evidence, that repayment of the debt imposes an "undue hardship on the debtor and [her] dependents."[6] The federal bankruptcy system attempts to strike a balance between the Code's goal of offering a fresh start to debtors who are oppressively overburdened by their financial obligations and Congress' goal of "preventing abuse of the student loan program."[7]

However, simply relying on the plain language of the statutory provision paints a deceptively optimistic picture of petitioners' realistic access to student loan discharges.[8] In an effort to

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[1] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[2] Grogan v. Garner, 498 U.S. 279, 279, 281 (1991) (emphasis added) (quoting *Hunt*, 292 U.S. at 244).

[3] WILLIAM BLACKSTONE, COMMENTARIES 2:471–73.

[4] 11 U.S.C. § 523(a)(8).

[5] *See* Daniel A. Austin, *Student Loan Debt in Bankruptcy: An Empirical Assessment*, 48 SUFFOLK U. L. REV. 577, 579, 579 n.24 (2015). Although "most types of consumer debt are [freely] dischargeable in bankruptcy," education loan debt is not. *Id.* at 579.

[6] *Garner*, 498 U.S. at 279 (holding that "[p]reponderance of the evidence is the standard of proof for § 523(a)'s dischargeability exceptions"); 11 U.S.C. § 523(a)(8).

[7] *In re* Cheesman, 25 F.3d 356, 361 (6th Cir. 1994); *see In re* Kelly, 582 B.R. 905, 909 (Bankr. S.D. Tex. 2018) (observing that § 523(a)(8) juggles competing policy objectives of protecting "the debtor's right to a fresh start" and ensuring "financial integrity of educational loan programs").

[8] *See, e.g.*, *In re* Chambers, 348 F.3d 650, 655 (7th Cir. 2003). *See generally* 11 U.S.C. § 523(a)(8).

reconcile these emulous policy interests and honor Congress' assertion that "some public policy considerations override the need to provide the debtor with a fresh start,"[9] the Bankruptcy Code designates certain kinds of debts as presumptively nondischargeable.[10] The Code identifies three types of student educational debts that, absent a showing of "undue hardship," are presumptively nondischargeable in bankruptcy:[11] (1) a debt for "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";[12] (2) a debt for "an obligation to repay funds received as an educational benefit, scholarship, or stipend";[13] or (3) a debt for "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual."[14]

As the analysis of this Note does not turn on the differentiation between the aforementioned types of educational loans, all three will be collectively referred to as "student loans."

Neither Congress nor the Supreme Court have purported to truly define undue hardship.[15] Although the Supreme Court has perfunctorily recognized the need for student loan discharge petitioners to demonstrate undue hardship,[16] it has not attempted

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[9] *In re* Chambers, 348 F.3d at 653.

[10] *Id.*

[11] *See infra* text accompanying notes 12–14.

[12] § 523(a)(8)(A)(i).

[13] *Id.* § 523(a)(8)(A)(ii).

[14] *Id.* § 523(a)(8)(B).

[15] *See generally* 11 U.S.C. § 101 (provision fails to include "undue hardship" among list of defined terms applicable to Bankruptcy Code); *In re* Burton, 339 B.R. 856, 869 (Bankr. E.D. Va. 2006) ("The term 'undue hardship' is undefined in the Bankruptcy Code."); *In re* Nys, 446 F.3d 938, 943 (9th Cir. 2006) ("Congress provided little in the way of express legislative intent specifically addressing the 'undue hardship' requirement when it passed the statute."); Scott Pashman, Note, *Discharge of Student Loan Debt Under 11 U.S.C. § 523(A)(8): Reassessing* "*Undue Hardship*" *After the Elimination of the Seven-Year Exception*, 44 N.Y.L. SCH. L. REV. 605, 608 (2001) ("The legislative history does little to assist a court in identifying when Congress intended student loans to be discharged for 'undue hardship.'").

[16] *See generally* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

to define the scope of the standard itself.[17] As a result, lower federal courts continue to bear the responsibility of identifying the scope and contours of what constitutes undue hardship for petitioners in the context of section 523(a)(8).[18]

Rising to the challenge, federal courts have developed numerous tests in an attempt to emulate Congress' intent of expressly including a statutory nondischargeability exception,[19] and at the same time, assessing on a per-case basis,[20] whether enforcing student loan debt repayment might impose an undue hardship on the petitioner.[21] Indeed, there is so ample scope for interpretation that there have been developed "as many tests for undue hardship as there are bankruptcy courts."[22] Several standards have been devised over the years to facilitate the assessment for undue hardship,[23] but contemporary opinions have "narrowed the field"[24] to two tests[25] and, as a result, seem to have created one faction on either side of a deeply entrenched circuit split.[26] Particularly, the dominant standards are the Second Circuit's *Brunner* test[27] and

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[17] *See generally* United Student Aid Funds, Inc., 559 U.S. 260 (2010).

[18] Pashman, *supra* note 15, at 608.

[19] *Id.* ("[C]ourts have developed a number of tests for determining the existence of 'undue hardship' over the last two decades.").

[20] Kerry B. Melear, *The Devil's Undue: Student Loan Discharge in Bankruptcy, the Undue Hardship Standard, and the Supreme Court's Decision in* United Student Aid Funds v. Espinosa, 264 ED. L. REP. 1, 11 (2011) ("Because Congress did not provide a specific definition of undue hardship in the Code, bankruptcy courts are left to make that determination on a per-case basis.").

[21] *See supra* text accompanying note 9.

[22] Robert F. Salvin, *Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 149 (1996) (citing *In re* Johnson, 121 B.R. 91, 93 (Bankr. N.D. Okla. 1990)).

[23] *See, e.g.*, *id.* at 153–61 (discussing *Johnson*, *Bryant*, *Brunner*, and totality-of-the-circumstances tests).

[24] Hon. Terrence L. Michael & Janie M. Phelps, *"Judges?!—We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73, 83 n.57 (2005) (citing Nash v. Conn. Student Loan Found., 330 B.R. 323, 325–27 (D. Mass. 2005); Educ. Credit Mgmt. Corp. v. Durrani, 320 B.R. 357, 359–60 (N.D. Ill. 2005)).

[25] *See infra* text accompanying notes 26–28.

[26] *See* Dorsey v. U.S. Dept. of Educ., 528 B.R. 137, 143 (E.D. La 2015) (discussing that "circuits are split" between *Brunner* test and totality-of-the-circumstances test in context of "determining undue hardship.").

[27] *See* Brunner v. N. Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

the Eighth Circuit's totality-of-the-circumstances test.[28] Although the *Brunner* test has been adopted by a majority of the circuit courts to analyze a debtor's undue hardship,[29] it has garnered much criticism for setting a seemingly impossibly high standard for most student loan bankruptcy petitioners to realistically meet.[30]

This Note argues that the circuit split caused by the two standards is illusory and deceptive. Although the *Brunner* and totality-of-the-circumstances tests define undue hardship with different verbal formulations, there is no actual difference between the substantive considerations that the plain language of the two standards seeks to assess.[31] The two analytical frameworks appear deceptively different in application, not because of substantive differences in statutory interpretation of the undue hardship standard, but rather because courts have *incorrectly* applied *Brunner*.[32] In particular, courts claiming to adopt the *Brunner* formulation have, over the years, erroneously imputed to it, the punitive "certainty of hopelessness" dicta set forth in *In re Briscoe*.[33] They have done this with such frequency that *Brunner* has come to be applied in a retributive manner that is neither in accordance with Congress' intent in promulgating section 523(a)(8) nor the plain language of the test itself.[34]

Part I will first provide a brief history of the underpinnings and evolution of section 523(a)(8).[35] Part II will describe the tripartite frameworks of the *Brunner* and totality-of-the-circumstances tests.[36] Part III will then reject the notion of a circuit split.[37] Finally, Part IV discusses the ways through which the perceived circuit split can potentially be resolved.[38]

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[28] *See id.*; *In re* Andrews, 661 F.2d 702, 704 (8th Cir. 1981).

[29] Brief in Opposition for Respondent Educational Credit Management Corporation (No. 15-485 Supreme Court) at 3, 4 n.1.

[30] *In re* Rosenberg, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020).

[31] *See infra* Part III.

[32] *See infra* Part III.

[33] *See infra* Part III.

[34] *See infra* Part III.

[35] *See infra* Part I.

[36] *See infra* Part II.

[37] *See infra* Part III.

[38] *See infra* Part IV.

I. ORIGIN AND LEGISLATIVE HISTORY OF SECTION 523(A)(8)

Student loan debt has not always been nondischargeable in bankruptcy.[39] In fact, student loans, like most types of consumer debt, were dischargeable in bankruptcy proceedings until Congress promulgated the Education Amendments of 1976.[40] These amendments were a direct response to a 1973 Congressional Commission on Bankruptcy Laws (Commission) report revealing that the Commission had detected abuses in the discharge of student loans.[41] Notably, there is some evidence suggesting that the "problems with the educational loan program were not the result of students [abusing the availability of loan discharges but rather because of] the inadequate administration of [the] programs [themselves]."[42] In an effort to curb alleged abuse of the loophole in the Bankruptcy Act of 1898 that permitted "full dischargeability for student loans,"[43] Congress included in its codification of the Education Amendments of 1976, section 439A.[44] The addition of this section fundamentally altered the status of student loans and rendered them presumptively nondischargeable.[45] Specifically, section 439A provided that absent undue hardship, student debts

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[39] *See* Frank T. Bayuk, Comment, *The Superiority of Partial Discharge for Student Loans Under 11 U.S.C. § 523(a)(8): Ensuring a Meaningful Existence for the Undue Hardship Exception*, 31 FLA. ST. U. L. REV. 1091, 1094 (2004).

[40] Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (1976) (repealed 1978); *see* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAW OF THE UNITED STATES, JULY 1973, H.R. Doc. No. 93-137, at 11, 170, 176–77 (1973).

[41] *Id.*

[42] Jennifer L. Frattini, Comment, *The Dischargeability of Student Loans: An Undue Burden?*, 17 BANKR. DEV. J. 537, 545, 545 n.48 (2001).

[43] Bayuk, *supra* note 39, at 1094. Bayuk further notes that:

> Curiously, the Commission did not propose [limits on student loan dischargeability] based on a perceived widespread abuse of the bankruptcy system by student loan debtors, as it noted a lack of statistical evidence suggesting any significant problem. Rather, it justified the proposal on the belief that even a small number of "abuses discredit the system and cause disrespect for the law and those charged with its administration."

Id. at 1094–95 (emphasis added) (citations omitted).

[44] *See* Education Amendments of 1976, Pub. L. No. 94-482, § 439A, 90 Stat. 2081, 2141 (1976) (repealed 1978).

[45] *Id.*

were nondischargeable unless loan repayment had been due more than five years prior to the petition.[46]

Despite considerable congressional debate regarding the necessity of limitations on student debt repayment relief as mandated by the Education Amendments of 1976,[47] Congress opted to retain section 439A's student nondischargeability provision in the form of section 523(a)(8) when it promulgated the Bankruptcy Reform Act of 1978, the modern Bankruptcy Code that remains in effect today in modified form.[48] As it was originally written, section 523(a)(8), although upholding the presumption of nondischargeability of student loans, *also* retained the provisions from section 439A that offered petitioners two methods through which they could rebut this presumption.[49] When it was first promulgated, petitioners could still discharge student loans under 523(a)(8) by (1) demonstrating an undue hardship,[50] *or* (2) proving that the loan "first became due" at least five years prior to the debtor filing for bankruptcy.[51]

Since section 523(a)(8)'s enactment in 1978, however, Congress has further restricted bankruptcy petitioners' access to student loan discharges by periodically amending the provision.[52] Two of these section 523(a)(8) amendments are of particular

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[46] *See id.*

[47] *See id.*

[48] CONG. RSCH. SERV., BANKRUPTCY AND STUDENT LOANS 6, 6 n.38 (2019) [hereinafter BANKRUPTCY].

[49] *See infra* notes 50–51.

[50] Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2591 (1978).

[51] *Id.*

[52] *See* Bayuk, *supra* note 39, at 1096 ("It thus appears, in light of these changes, that Congress has increasingly narrowed the means by which a debtor may discharge his or her student loans."). Examples of amendments to section 523(a)(8) include the Bankruptcy Amendments and Federal Judgeship Act of 1984, the Omnibus Budget Reconciliation Act of 1990, the Crime Control Act of 1990, the Higher Education Amendments of 1998, and the Bankruptcy Abuse Prevention & Consumer Protection Act of 2005. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 454(a), 98 Stat. 375–76 (1984); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3007, 104 Stat. 1388-28 (1990); Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1)–(2), 104 Stat. 4964–65 (1990); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998); Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 59 (2005).

significance:[53] (1) the Crime Control Act of 1990,[54] and (2) the Higher Education Amendments of 1998.[55]

The 1990 amendment narrowed the scope of student loan dischargeability under section 523(a)(8) in two ways.[56] Firstly, it extended the "first became due" provision's range from five to seven years[57] and, in doing so, increased the "temporal window for non-dischargeability."[58] Additionally, the amendment also "broadened the type of educational loan debts excepted from discharge, [and set] forth the language found in the current version of section 523(a)(8)."[59]

Subsequently, in its promulgation of the 1998 Higher Education Amendments, Congress eliminated the "first became due provision" of 523(a)(8) entirely,[60] thereby leaving demonstration of undue hardship as the sole manner of recourse for student loan petitioners under section 523(a)(8).[61]

In its current form, section 523(a)(8) states:

> A discharge under section 727 ... 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; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.[62]

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[53] *See infra* notes 54–55.

[54] *See* Pub. L. No. 101-647 § 3621(1)–(2), 104 Stat. at 4964–65 (1990).

[55] *See* Pub. L. No. 105-244 § 971(a), 112 Stat. at 1837 (1998).

[56] *See infra* notes 57–58.

[57] *See* Pub. L. No. 101-647 § 3621(1)–(2), 104 Stat. at 4964–65 (1990).

[58] *See* Bayuk, *supra* note 39, at 1096, 1096 n.33.

[59] *Id.*

[60] *See infra* notes 61–62.

[61] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998).

[62] 11 U.S.C. § 523(a)(8).

II. ESTABLISHING A STANDARD FOR UNDUE HARDSHIP

A. The Brunner *Test*

Almost every federal court of appeals, barring the United States Court of Appeals for the Eighth Circuit, has adopted the tripartite *Brunner* standard to analyze the question of what constitutes undue hardship for the purposes of student loan discharges under section 523(a)(8).[63] The Seventh Circuit adopted the *Brunner* test in 1993 and was the first federal court of appeals to do so.[64] Over the next several decades, the Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits followed suit.[65]

Under *Brunner*, a petitioner claiming undue hardship must demonstrate:

> (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. [66]

A debtor must prove *each* element by a preponderance of the evidence in order to be discharged of her student loans.[67] The *Brunner* court discussed that satisfying the first prong of the tripartite test is the "minimum necessary to establish 'undue hardship.'"[68] The court further noted that a showing of undue hardship

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[63] *See* Brief in Opposition for Respondent Educational Credit Management Corporation (No. 15-485 Supreme Court) 1, 4 n.1 (citing *In re* Faish, 72 F.3d 298, 305–06 (3d Cir. 1995); *In re* Frushour, 433 F.3d 393, 400 (4th Cir. 2005); *In re* Gerhardt, 348 F.3d 89, 91 (5th Cir. 2003); *In re* Oyler, 397 F.3d 382, 385 (6th Cir. 2005); *In re* Pena, 155 F.3d 1108, 1112 (9th Cir. 1998); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); *In re* Cox, 338 F.3d 1238, 1241 (11th Cir. 2003)).

[64] *Id.* at 4.

[65] *Id.*

[66] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam) (emphasis added).

[67] Grogan v. Garner, 498 U.S. 279, 279 (1991).

[68] *Brunner*, 831 F.2d at 396 (citing Bryant v. Pa. Higher Educ. Assistance Agency, 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987); N.D. State Bd. of Higher Educ. v. Frech, 62 B.R. 235 (Bankr. D. Minn. 1986); Marion v. Pa. Higher Educ. Assistance Agency, 61 B.R. 815 (Bankr. W.D. Pa. 1986)).

under the subsequent two prongs of the test is necessary "in light of the clear congressional intent ... to make the discharge of student loans more difficult than that of other nonexcepted debt."[69]

Under *Brunner*, the debtor must first overcome the minimal standard of living test in which a petitioner must demonstrate more than just tight finances or that repayment of debt necessitates "personal and financial sacrifices."[70] The first prong indicates that a petitioner does not demonstrate undue hardship for the purposes of student loan discharge simply for failing to maintain her preexisting standard of living or facing discomfort.[71] However, courts have consistently held that under the plain language of the *Brunner* test, a petitioner need not live in poverty in order to demonstrate undue hardship under the first prong.[72]

In determining whether a petitioner has satisfied the first prong of the *Brunner* test, courts typically compare the petitioner's disposable income, given the debtor's budget and allocation of expenses, with the monthly payment necessary to pay off the student loan.[73]

If a court is convinced that loan repayment would force the debtor into a subminimal standard of living, it must next consider whether or not such a quality of life will persist such that the burden imposed on the petitioner might be truly undue.[74] Requiring a demonstration that the debtor's inability to pay and subminimal standard of living is likely to persist comports with Congress' intent that student debt discharges ought to be less freely awarded relative to other nonexcepted debt in bankruptcy proceedings.[75]

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[69] *Id.*

[70] *In re* Elmore, 230 B.R. 22, 26 (Bankr. D. Conn. 1999) (citing Pa. Higher Educ. Agency v. Faish, 72 F.3d 298, 306 (3rd Cir. 1995)).

[71] *See, e.g.*, *In re* Halatek, 592 B.R. 86, 97 (Bankr. E.D.N.C. 2018) (quoting *In re* Gesualdi, 505 B.R. 330, 339 (Bankr. S.D. Fla. 2013)).

[72] *See Elmore*, 230 B.R. 22, 26 (citing Correll v. Union Nat'l Bank of Pittsburgh, 105 B.R. 302, 306 (Bankr. W.D. Pa. 1989)).

[73] *See In re* McLaney, 375 B.R. 666, 674 (M.D. Ala. 2007); *see also* BANKRUPTCY, *supra* note 48, at 12 n.87 (citing *In re* Miller, 409 B.R. 299, 312 (Bankr. E.D. Pa. 2009) (explaining that the court must evaluate "the debtor's household income and those expenses necessary to meet his or her basic needs"). "On the income side, courts consider all sources of income and revenue streams." *In re* Tuttle, 600 B.R. 783, 796 (Bankr. E.D. Wis. 2019).

[74] *See, e.g., Tuttle*, 600 B.R. at 795.

[75] *Id.*

Lastly, the third prong of the *Brunner* test recognizes that the decision to discharge a student loan is premised on the assumption that the debtor has made good faith efforts to pay off the debt.[76] The third element of the tripartite test, undue hardship, "encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from 'factors beyond his reasonable control.'"[77] Notably, a student loan petitioner's obligation to make a good faith effort at full repayment persists *even in* the case that her loan is discharged, in the form of attempts to "obtain employment, maximize income and minimize expenses."[78]

While the *Brunner* standard has enjoyed a great deal of popularity[79] and is the majority approach taken by federal appellate courts grappling with the decision of whether to discharge a student loan,[80] the fact-intensive nature of its inquiry has also led to "subsidiary splits in the courts with respect to a host of issues" in terms of applying the tripartite test.[81] Examples of inter-court rifts in inquiry include:

> [(1)] the types of expenses a debtor seeking an undue hardship discharge may permissibly incur;
> [(2)] the legal standard the debtor must satisfy to prove that his inability to repay the student loans will likely persist into the future;
> [(3)] whether a debtor who claims that a medical condition prevents him from repaying his student loans must introduce corroborating medical evidence to support his claim;
> [(4)] whether a debtor seeking an undue hardship discharge must attempt to maximize his income by seeking employment opportunities outside his field of training;
> [(5)] whether it is proper to consider the value of the education that the loan financed when determining a debtor's eligibility for an undue hardship discharge; and

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[76] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam) (emphasis added).

[77] *In re* Elmore, 230 B.R. 22, 27 (Bankr. D. Conn. 1999) (quoting *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993)).

[78] *Id.*

[79] *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 496 (2012).

[80] *See id.* ("Although judges devised numerous tests, in recent years, the Brunner standard has come to dominate the field.").

[81] *See* BANKRUPTCY, *supra* note 48, at 11.

> [(6)] whether the "additional circumstances" mentioned in Brunner's second prong must predate the issuance of the loan.[82]

The *Brunner* test furthers two policy goals.[83] Firstly, the standard comports with Congress' intent to limit the Bankruptcy Code's notion of a fresh start.[84] The test reflects the broader societal opinion that education debts should be exempt from discharge because of the benefits associated with student loans.[85] For example, making education more affordable and, therefore, accessible by permitting it to be financed by loans might outweigh the benefits of later absolving students of their obligation to repay the debt.[86] Additionally, the notion that debtors knowingly accept the burden of repaying their education debts supports the proposition that petitioners are not entitled to a student loan discharge simply because they entered into an unfortunate or unlucky bargain.[87]

Secondly, the *Brunner* test also curtails fraud and abuse by ill-intentioned debtors.[88] By setting such a high bar to student loan discharges, the standard practically eliminates frivolous proceedings instituted by petitioners seeking to take advantage of the bankruptcy system by cunningly absolving themselves of debt, encourages debtors to truly attempt repayment, and promotes judicial efficiency by reducing the resources and costs associated with litigating student loan discharges.[89]

Notably, neither the plain language of the *Brunner* formulation,[90] Congress' intent in promulgating section 523(a)(8),[91] nor general societal interests in cautiously limiting the availability of

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[82] *Id.*

[83] *See infra* text accompanying notes 84–89.

[84] Ben Wallen, *One Standard to Rule Them All: An Argument for Consistency in Education Debt Discharge in Bankruptcy Proceedings*, 16 HOUS. BUS. & TAX L.J. 232, 233 (2016).

[85] *Id.* at 240 (citing Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 413–14 (2005)).

[86] *Id.*

[87] *Id.*

[88] *Id.* at 240–41.

[89] *Id.*

[90] *See supra* text accompanying note 64.

[91] *See supra* Introduction.

student loan discharges[92] seems to be motivated by a desire to punish honest but unfortunate debtors who are unable to repay their student loans.

B. The Totality-of-the-Circumstances Test

Out of all the federal courts of appeals, only the Eighth Circuit applies the totality-of-the-circumstances test.[93] Under this standard, a court will consider: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) the debtor's reasonable and necessary living expenses; and (3) any other relevant circumstances."[94] Unlike the perceived rigidity of the *Brunner* test, the totality-of-the-circumstances standard attempts to take a holistic consideration of the petitioner's condition by not allowing "a single factor [to] bar [the debtor] from discharge."[95]

Particularly, the third "catchall" prong of the Eighth Circuit's formulation acknowledges the equity powers of the adjudicating court and imputes deference to its ability to determine the existence of petitioners' undue hardship on a case-by-case basis after having considered all facts relevant to the inquiry.[96] By encouraging a holistic determination of the debtor's present financial condition rather than requiring a debtor to satisfy *all* three elements of the standard in order to successfully demonstrate undue hardship, the totality-of-the-circumstances test seemingly advances the "fresh start" principle of the Bankruptcy Code more efficiently than the *Brunner* formulation.[97]

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[92] *See supra* text accompanying note 85.

[93] *See, e.g.*, *In re* Long, 322 F.3d 549, 553 (8th Cir. 2003); *In re* Andrews, 661 F.2d 702, 704 (8th Cir. 1981).

[94] *Long*, 322 F.3d at 554.

[95] *See* Wallen, *supra* note 84, at 243.

[96] *Id.* at 242–43; *see* B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(A)(8) of the Bankruptcy Code?*, 34 TEX. TECH. L. REV. 89, 106–07 (2002).

[97] *See, e.g.*, Educ. Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) ("[T]he totality of circumstances test better considers the debtor's situation in light of the 'fresh start' policies of § 523(a)(8), because it does not let a single factor become dispositive against a finding of undue hardship.") (citing *In re* Afflitto, 273 B.R. 162, 170 (Bankr. W.D. Tenn. 2001); *In re* Law, 159 B.R. 287, 292–93 (Bankr. D.S.D. 1993)).

C. Other Formulations

Interestingly, circuit courts did formulate and apply other tests to determine undue hardship prior to ultimately adopting either the *Brunner* or totality-of-the-circumstances framework.[98] For example, in *Johnson v. Pennsylvania Higher Education Assistance Agency*, the Bankruptcy Court formulated the *Johnson* Tripartite test in which the court assessed undue hardship based on a three-part test comprised of (1) a mechanical test of income and expenditures, (2) a good faith test, and (3) a policy test.[99] Similarly, in *Bryant v. Pennsylvania Higher Education Assistance Agency*, the court expressed its dissatisfaction with the *Johnson* test and instead chose to assess student loan discharge petitioners' undue hardship using the Federal Poverty Guidelines as a benchmark.[100]

As these standards have long been overshadowed and rendered obsolete by the *Brunner* and totality-of-the-circumstances formulations,[101] this Note addresses only the circuit split created by these two enduring and contemporary standards.[102]

III. REJECTING THE CIRCUIT SPLIT

The differences between the plain language of the *Brunner* and totality-of-the-circumstances tests are purely cosmetic and thereby render the perceived circuit split illusory.[103] As a practical matter, the two formulations at the root of the circuit split are identical in their substantive considerations and will likely

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[98] *See* Salvin, *supra* note 22, at 153–59, 161–62 (describing *Johnson* Tripartite and *Bryant* Poverty Level tests that were used to determine undue hardship prior to being overshadowed by *Brunner* and totality-of-the-circumstances formulations).

[99] *See id.* at 153 (citing Johnson v. Pa. Higher Educ. Assistance Agency, 5 Bankr. Ct. Dec. (CRR) 532 (Bankr. E.D. Pa. 1979)).

[100] *See id.* at 161–62 (citing Bryant v. Pa. Higher Educ. Assistance Agency, 72 B.R. 913 (Bankr. E.D. Pa. 1987)).

[101] *See* Julie Swedback & Kelly Prettner, *Discharge or No Discharge? An Overview of Eighth Circuit Jurisprudence in Student Loan Discharge Cases*, 36 WM. MITCHELL L. REV. 1679, 1684 (2010) ("Over the years, courts have developed several legal tests to give practical effect to the legal standard intended by Congress, but only two of these tests effectively remain: the *Brunner* test and the totality-of-the-circumstances test.").

[102] *Id.*

[103] Educ. Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004).

always lead to similar conclusions regarding whether a petitioner faces undue hardship.[104] Rather, any divergences in the scope and severity of judicial inquiry between the two standards are the result of courts incorrectly imputing a punitive overlay on the *Brunner* standard and thereby applying the test in a manner inconsistent with its plain language.[105]

A. Courts Have Rejected the Notion of a Circuit Split

Several courts that have purported to adopt the *Brunner* test have also rejected the notion that there is a stark diversion in the substantive considerations of the tests,[106] and noted that "the distinctions between the two tests [, if any,] are modest, with many overlapping considerations."[107] Remarkably, even the Eighth Circuit has, to an extent, acknowledged that the substantive differences between its totality-of-the-circumstances test and the *Brunner* test "may not be that significant," practically speaking.[108]

1. The First Circuit

Perhaps most notably, the First Circuit has refused to pick a side in the circuit split.[109] While a split panel of the Bankruptcy Appellate Panel for the First Circuit has supported the Eighth Circuit's standard,[110] the First Circuit has *not* formally adopted either the *Brunner* or the totality-of-the-circumstances test.[111]

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[104] *See* Brief in Opposition for Respondent Educational Credit Management Corporation (No. 15-485 Supreme Court) at 10.

[105] *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp., 610 B.R. 454, 458–59 (Bankr. S.D.N.Y. 2020) (noting how the certainty of hopelessness standard, coined by the *In re* Briscoe court, has been conflated with the *Brunner* test so consistently, that "many cases have pinned on *Brunner* punitive standards that are not contained therein").

[106] *See infra* note 103.

[107] Educ. Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) ("As a practical matter, ... the two tests will often consider similar information [such as] the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment."); *see, e.g.*, Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 n.1 (8th Cir. 2009); *In re* Oyler, 397 F.3d 382, 385 (6th Cir. 2005).

[108] *Jesperson*, 571 F.3d at 779 n.1.

[109] *Bronsdon*, 435 B.R. at 797.

[110] *Id.* at 797 n.9, 798, 800.

[111] *Id.* at 797.

Instead, the court has, on a number of occasions, been cautious to endorse either standard precisely because the differing verbal formulations of both tests ultimately result in an identical substantive inquiry of facts and considerations in the determination of whether a petitioner's student loans impose a dischargeable undue hardship.[112] Essentially, the choice between the *Brunner* and totality-of-the-circumstances formulations make so little substantive difference, that the First Circuit has simply refused to choose between the two.[113]

2. The Tenth Circuit

While the Tenth Circuit has formally endorsed the *Brunner* standard,[114] it has similarly refused to entertain the idea that the *Brunner* and totality-of-the-circumstances truly tests diverge in terms of the scope, severity, and substance of judicial inquiry.[115] Particularly, in *Educational Credit Management Corp. v. Polleys*, the court rejected the notion that the *Brunner* test confines the scope of judicial inquiry strictly to the three prongs delineated by the standard.[116] Instead, the *Polleys* court, while adopting the *Brunner* formulation, endorsed and engaged in conducting a holistic, totality-of-the-circumstances type analysis of all the factors relevant to the petitioner's demand for relief.[117]

3. The Sixth Circuit

Similarly, in *Oyler v. Education Credit Management Corp.*, upon recognizing the lack of substantive difference between inquiries under the totality-of-the-circumstances and *Brunner* tests,

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[112] *See* Brief in Opposition for Respondent Educational Credit Management Corporation (No. 15-485 Supreme Court), 5 n.2 (citing Judgment, Bronsdon v. Educ. Credit Mgmt. Corp., No. 10-9009 (1st Cir. Sept. 23, 2011)); *see also In re* Nash, 446 F.3d 188, 190–91 (1st Cir. 2006).

[113] *Nash*, 446 F.3d at 190–91.

[114] Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004).

[115] *Id.* ("We do not read *Brunner* to rule out consideration of all the facts and circumstances .... [*Brunner*, like the totality-of-the-circumstances analysis,] necessarily entails an analysis of all relevant factors, including the health of the debtor and any of his dependents and the debtor's education and skill level.").

[116] *Id.*

[117] *Id.* at 1308–12.

the Sixth Circuit transitioned from using a holistic, "hybrid-*Brunner*"[118] model, to adopting *Brunner*'s tripartite test as its exclusive analytical framework for determining undue hardship in student loan bankruptcy proceedings.[119]

Up until *Oyler*, the court's application of a hybrid-*Brunner* formulation served to promote a more flexible judicial inquiry beyond just the *Brunner* prongs and provide the adjudicator with a more holistic understanding of the specific petitioner's circumstances.[120] Among the factors considered by the court in the hybrid-*Brunner* test were (1) the petitioner's debt amount; (2) the interest rate; (3) the petitioner's claimed expenses in relation to her current standard of living; (4) the petitioner's income, earning potential, education, age, wealth, and status of dependents; and (5) the petitioner's attempt to maximize income by obtaining or seeking employment "commensurate with her education and abilities."[121]

The *Oyler* court, although having abandoned the hybrid-*Brunner* model in favor of exclusively adopting the *Brunner* formulation,[122] did not dispense with the hybrid test's holistic analysis that was notably reminiscent of the totality-of-the-circumstances approach.[123] Rather, the court simply recognized the lack of substantive difference between its hybrid-*Brunner* formulation and the *Brunner* test itself.[124] It acknowledged that its previous holistic, multifactorial inquiry "actually fit easily into the well-accepted *Brunner* analytical template"[125] and accommodated all the factors it considered determining undue hardship under the hybrid-*Brunner* test.[126]

B. Explaining the Source of Divergence

Rather than a difference in substantive inquiry between the *Brunner* and totality-of-the-circumstances tests, the discordance and harsh application of the *Brunner* formulation is the direct

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[118] *In re* Oyler, 397 F.3d 382, 385 (6th Cir. 2005).
[119] *Id.*
[120] *Id.*
[121] *Id.* (citing Miller v. Pa. Higher Educ. Assistance Agency, 377 F.3d 616, 623 (6th 2004)).
[122] *Id.*
[123] *Id.* at 386.
[124] *In re* Oyler, 397 F.3d 382, 385 (6th Cir. 2005).
[125] *Id.*
[126] *Id.* at 385–86.

result of the "certainty of hopelessness" threshold being incorrectly imputed and conflated with *Brunner*'s analytical framework.[127] As a result, courts often misinterpret the straightforward language of the *Brunner* model by applying a punitively harsh standard that is neither supported by the plain language of the *Brunner* test nor congressional intent in promulgating section 523(a)(8) of the Bankruptcy Code.[128]

1. Origins of the Certainty of Hopelessness Standard: Briscoe

The certainty of hopelessness threshold was first formulated in *Briscoe* by a court that, in fact, preceded the *Brunner* court.[129] In the absence of much guidance in the way of determining undue hardship for the basis of discharging a student loan, the *Briscoe* court concluded that, based on the legislative history of section 523(a)(8) and Congress' increasing aversion to absolving education debts, a valid basis of undue hardship should only be recognized if forcing repayment would result in "certainty of hopelessness" for the student.[130] Under the court's new standard, a mere present inability to repay the loan or unfortunate financial adversity was insufficient to qualify for undue hardship under the "certainty of hopelessness."[131] The practical result of the *Briscoe* court's opinion was that it set a degree of hardship for student loan discharge petitioners that was prohibitively high and nearly impossible to meet.[132]

2. History of Courts Incorrectly Imputing the "Certainty of Hopelessness" Standard to the Brunner *Test*

The *Brisco* court's punitive certainty of hopelessness standard has been so often implicated in the context of *Brunner* that

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[127] *See In re* Rosenberg, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020).

[128] *See infra* Sections III.B.1–2.

[129] *In re* Briscoe, 16 B.R. 128, 131 (S.D.N.Y. 1981).

[130] *Id.* at 130–31.

[131] *Id.* at 131 ("For the purposes of 11 U.S.C. § 523, the dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment.").

[132] *See, e.g.*, *In re* Kohn, 1979 Bankr. LEXIS 884, at *32 (Bankr. S.D.N.Y. 1979) ("[M]ere financial adversity without more will not do. There must be present such unique circumstances to render it less likely, or likely only with extreme difficulty, or unlikely at all, that the bankrupt will within the foreseeable future be able to honor his commitment.").

it has essentially "subsumed the actual language of the *Brunner* test."[133] As a result, although the plain language of the *Brunner* formulation does itself not presume to impose impossibly high standards of demonstrating undue hardship for the purposes of punishing unfortunate debtors,[134] courts incorrectly imputing *Briscoe*'s dicta to *Brunner* create such an effect.[135]

For example, in *In re Roberson*, the court held that the petitioner did not qualify for a student loan discharge under the *Brunner* test.[136] Even though the debtor's financial condition at the time of the proceedings prevented him from maintaining a minimal standard of living, he had failed to establish a certainty of hopelessness demonstrative of the fact that his dire financial position would persist.[137] The *Roberson* court erroneously imputed *Briscoe*'s dicta onto the *Brunner* test's second prong which requires the petitioner to demonstrate that he would persistently face substandard living conditions if forced to repay the debt.[138] The plain language of *Brunner*'s second prong does not indicate that a petitioner must demonstrate a certainty of hopelessness in order to convince a court that her subminimal standards of living are likely to persist for a significant portion of the time.[139] Yet, the *Roberson* court's conflation of the certainty of hopelessness standard with the *Brunner* test resulted in an application of *Brunner* where a petitioner could not possibly demonstrate undue hardship but for a showing that she is certain to face persistent and impossibly burdensome dire financial straits if forced to comply with loan repayment.[140]

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[133] *In re* Rosenberg, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020); *see, e.g., In re* Jean-Baptiste, 584 B.R. 574, 588 (Bankr. E.D.N.Y. 2018); *In re* Johnson, 550 B.R. 874, 880 (Bankr. M.D. Ala. 2016); *In re* Mosley, 494 F.3d 1320, 1326 (11th Cir. 2007); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993).

[134] *See supra* text accompanying note 66.

[135] *See Rosenberg*, 610 B.R. at 458 ("The harsh results that often are associated with *Brunner* are actually the result of cases interpreting *Brunner*.").

[136] 999 F.2d at 1138.

[137] *Id.* at 1137.

[138] *Id.*

[139] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

[140] *Roberson*, 999 F.2d at 1136 ("[T]he dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment.") (quoting *Briscoe*, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981)).

In *Johnson v. Sallie Mae Inc.*, the court similarly imputed *Briscoe*'s certainty of hopelessness dicta to the second prong of the *Brunner* test.[141] It held that the debtor failed to demonstrate undue hardship under the second element because she did not present any evidence showing "'a certainty of hopelessness' that she would be able to repay her loans."[142] By making such a conclusion, the *Johnson* court erroneously established that a student loan petitioner, in order to successfully prove undue hardship under *Brunner*, must necessarily demonstrate a certainty of hopelessness.[143] This court, like the *Roberson* court, incorrectly integrated the *Briscoe* dicta into the *Brunner* test such that the petitioner had to demonstrate a severity of her financial hardship that is simply not called for under a plain reading of the *Brunner* formulation's language.[144]

Education Credit Management Corp. v. Mosely led to the same conflation of the *Briscoe* dicta with *Brunner*'s second prong.[145] The *Mosely* court incorrectly concluded that under *Brunner*:

> [U]ndue hardship does not exist simply because the debtor presently is unable to repay ... her student loans; the inability to pay must be "likely to continue for a significant time," such that there is a "certainty of hopelessness" that the debtor will be able to repay the loans within the repayment period.[146]

Most recently, in *Jean-Baptiste v. Education Credit Management Corp.*, the court once again reaffirmed the erroneous projection of the certainty of hopelessness threshold to *Brunner*'s model.[147] As in *Roberson*, *Johnson*, and *Mosely*, the result in *Jean-Baptiste* was that although the court purported to apply the *Brunner* test,[148] it held the petitioner to an extremely high standard of showing hardship that simply is not called for under a plain reading of

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[141] *In re* Johnson, 550 B.R. 874, 880 (Bankr. M.D. Ala. 2016).

[142] *Id.* (citing Educ. Credit Mgmt. Corp. v. Mosely, 434 F.3d 1320, 1326 (11th Cir. 2007)).

[143] *Id.*

[144] *Id. See also Brunner*, 831 F.2d at 396 (per curiam).

[145] *In re* Mosley, 494 F.3d 1320, 1326 (11th Cir. 2007) (citing Hemar Insur. Corp. of America v. Cox, 338 F.3d 1238, 1242 (11th Cir. 2003); Brightful v. Pennsylvania Higher Educ. Assistance Agency, 267 F.3d 324, 328 (3rd Cir. 2001)).

[146] *Id.*

[147] *In re* Jean-Baptiste, 584 B.R. 574, 588 (Bankr. E.D.N.Y. 2018).

[148] *Id.* at 586–88.

Brunner's analytical and doctrinal framework.[149] While *Brunner*'s second prong requires a debtor to demonstrate that her subminimal standard of living is likely to persist for a significant portion of the loan repayment period,[150] the wording does *not* purport to require a petitioner to show that the severity of her standard of living and her financial condition prove an absolute certainty of hopelessness.[151]

The consequence of courts incorrectly applying the *Briscoe* dicta to *Brunner*'s doctrinal framework is grave. The certainty of hopelessness threshold, without much justification at all, imposes an impossibly high standard for petitioners to surpass.[152] It does so even when demonstration of such severe hardship is not warranted, neither by the language of the *Brunner* test[153] nor by Congress' intent in promulgating section 523(a)(8).[154]

In fact, courts applying the *Brunner* formulation while simultaneously incorporating *Briscoe* in effect subvert the underpinnings of the Bankruptcy Code itself because they inadvertently punish honest but unfortunate debtors who would truly face undue hardship if forced to repay their educational debts.[155] The fundamental purpose of the Bankruptcy Code and, in particular, section 523(a)(8) is to provide well-intentioned but unlucky students relief in the event that repayment of their student debt would be financially oppressive and effectuate a subminimal standard of living.[156]

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[149] *Id.* at 588 (holding that in order to satisfy *Brunner*'s second prong, "a debtor must demonstrate that the additional circumstances point to a 'certainty of hopelessness' and not merely a present inability to pay student loan debt." (citing Mosely, 434 F.3d at 1326; Johnson v. Sallie Mae Inc., 550 B.R. 874, 880 (Bankr. M.D. Ala. 2016))).

[150] *Id.* ("In order to satisfy the second *Brunner* factor, a debtor must establish that her current inability to pay her student loan debt is likely to persist for a significant portion of the repayment period.").

[151] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

[152] *See In re* Rosenberg, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020) (noting that *Briscoe*'s retributive dicta was erroneously imputed to *Brunner* so frequently that it has 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.").

[153] *Brunner*, 831 F.2d at 396 (per curiam).

[154] *See supra* Introduction.

[155] *See Rosenberg*, 610 B.R. at 459; *see also infra* text accompanying notes 156–59.

[156] *See* Salvin, *supra* note 22, at 143–44, 174.

Section 523(a)(8) is designed to offer relief to students who experience dire financial straits, *even if* they are not impoverished.[157] What is most clear, however, is that section 523(a)(8) is not meant to *punish* students who qualify for its protections.[158] If students are able to demonstrate undue hardship under the plain meaning of the *Brunner* or totality-of-the-circumstances tests, then they should be permitted to avail themselves of the protections statutorily afforded to them by the Code.[159]

IV. PROPOSING A SOLUTION

A. The Brunner *and Totality-of-the-Circumstances Tests Would Lead to Similar Conclusions if Courts Did Not Erroneously Impute* Briscoe*'s Dicta to* Brunner*'s Analytical Framework*

Given that the verbal formulations of the *Brunner* and totality-of-the-circumstances tests both lead to the same or very similar substantive inquiry,[160] petitioners' cases should theoretically be decided the same way regardless of which standard is applied.[161] Indeed, this hypothesis has proven to be true for courts that have conducted judicial inquiry into the debtor's case-specific circumstances by even-handedly applying the *Brunner* test according to its plain meaning.[162]

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[157] *See, e.g.*, *In re* Correll, 105 B.R. 302, 306 (Bankr. W.D. Pa. 1989) ("We do not believe, however, that Congress intended a fresh start under the Bankruptcy Code to mean that families must live at poverty level in order to repay educational loans .... [u]se ... of poverty level or minimal standard of living guidelines is not necessary ....").

[158] *Id.*

[159] *Id.*

[160] *See supra* Part III.

[161] *See supra* Part III.

[162] *See* Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1141 (2016) ("The data reveal that debtors experienced litigation success 38.8% of the time in Brunner jurisdictions and 40.6% of the time in totality jurisdictions .... the difference ... is not statistically significant."); *see also* Brief in Opposition for Respondent Educational Credit Management Corporation (No. 15-485 Supreme Court) at 17 ("There is simply no reason at all to suppose that a totality-of-circumstances 'test' [as opposed to the *Brunner* test applied without *Briscoe*'s 'certainty of hopelessness' dicta] would find [petitioner's] evidence of undue hardship any more persuasive.").

Rather, the only instance where a court's finding of undue hardship might depend on the test it has used, is the situation in which the court incorrectly imputes *Briscoe*'s certainty of hopelessness dicta onto the *Brunner* test.[163] In such a situation, *Brunner*, in practice, imposes an impossibly high threshold for petitioners to surmount, despite the test's plain language suggesting that it should not be too harsh a standard for the honest but unfortunate debtor to meet.[164]

B. Circuit Courts and Congress Should Both Standardize Undue Hardship

Considering that no substantive difference exists between *Brunner* and the totality-of-the-circumstances formulations,[165] both the federal courts as well as Congress should use their authority to dispel notions of a circuit split. Simply put, the perceived circuit split is merely illusory.[166] It is high time that there be a standardized approach for determining undue hardship for section 523(a)(8) student loan discharge proceedings.

1. The Judicial Solution

The federal circuit courts should uniformly strip *Briscoe*'s certainty of hopelessness dicta from *Brunner* and even-handedly apply the *Brunner* formulation according to its plain language. This proposed approach is based in both practical and doctrinal justifications.[167]

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[163] *See, e.g.*, *In re* Armstrong, Bankr. No. 10-82092, Adv. No. 10-8118, 2011 WL 6779326, at *8–*9 (Bankr. C.D. Ill. Dec. 27, 2011) ("Under the totality of circumstances test, it could be concluded that these circumstances constitute a hardship that is undue. However, the ... *Brunner* test [that is erroneously made more restrictive by *Briscoe*'s dicta] does not clearly admit such an exception.").

[164] *See supra* Part III.

[165] *See supra* Part III.

[166] *See* Brief in Opposition for Respondent Educational Credit Management Corporation (No. 15-485 Supreme Court) at 10 ("Despite the different verbal formulations, there is no substantive split between the circuits on how to analyze undue hardship cases.").

[167] *See infra* Sections III.B.1–2.

a. Practical Advantages of Courts Uniformly Adopting the Brunner *Standard*

Firstly, this solution accounts for the fact that practically speaking, it makes more sense to resolve the illusory circuit split by adopting the *Brunner* test as opposed to the totality-of-the-circumstances test.[168] While the verbiage of both tests is substantively identical and thus renders the importance of which standard is used as technically unimportant,[169] the reality is that the vast majority of circuit courts do adhere to the *Brunner* standard.[170] It would not make much realistic sense to advocate for the adoption of a minority test when the majority framework, when correctly applied according to its plain meaning, functions as a substantive equivalent.[171] Thus, the most practical and efficient method of ensuring judicial predictability in determining the undue hardship posed by student loans on a petitioner would be to promote uniformity and encourage the straightforward application of the overwhelmingly favored *Brunner* standard—just without *Briscoe*'s retributive overlay.[172]

b. Doctrinal Advantages of Courts Uniformly Adopting the Brunner *Standard*

From the perspective of doctrinal uniformity, resolving the illusory circuit split by ensuring the *Brunner* standard's application without *Briscoe*'s retributive dicta also lays the groundwork for a clearer cut and more predictable framework for determining a

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[168] *See infra* text accompanying notes 169–72.

[169] *See supra* Section III.A.

[170] *See, e.g.*, Brief in Opposition for Respondent Educational Credit Management Corporation (No. 15-485 Supreme Court) at 4 n.1 (citing *In re* Faish, 72 F.3d 298, 305–06 (3d Cir. 1995); *In re* Frushour, 433 F.3d 393, 400 (4th Cir. 2005); *In re* Gerhardt, 348 F.3d 89, 91 (5th Cir. 2003); *In re* Oyler, 397 F.3d 382, 385 (6th Cir. 2005); *In re* Pena, 155 F.3d 1108, 1112 (9th Cir. 1998); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); *In re* Cox, 338 F.3d 1238, 1243 (11th Cir. 2003)).

[171] *See supra* Section III.A.

[172] *See, e.g.*, *In re* Grigas, 252 B.R. 866, 874 n.8 (Bankr. D.N.H. 2000) (noting that the *Brunner* standard is more predictable than totality-of-the-circumstances test because of *Brunner*'s popularity among federal circuit courts).

debtor's undue hardship than does the totality-of-the-circumstances test.[173]

Considering that the variance in results between applications of the two tests is both substantively and statistically insignificant,[174] it is unclear that the totality-of-the-circumstances framework's widely perceived flexibility and holistic approach actually provides a substantial benefit to litigants whose undue hardship is assessed along its framework.[175] Since petitioners' chances of success are statistically equal under the *Brunner* and totality-of-the-circumstances formulations,[176] it makes sense to then argue that federal circuits should simply adopt the test that is doctrinally the easiest to apply.[177]

Out of the two formulations, *Brunner*'s more rigid analytical framework provides greater predictability and encourages far more consistent application of the doctrine.[178] The totality-of-the-circumstances formulation, in its pursuit of encouraging a holistic analysis of the petitioner's circumstances,[179] is far more open ended and does not specify factors for consideration as acutely as the *Brunner* test.[180] While the totality-of-the-circumstances test is relatively more flexible because it permits courts to consider factors beyond the scope of the test's formulation itself,[181] it is precisely this

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[173] *See infra* notes 174–85.

[174] *See* Pardo, *supra* note 162, at 1141.

[175] *See* BANKRUPTCY, *supra* note 48, at 30 ("The central difference between the totality-of-the-circumstances test and the Brunner test concerns their relative flexibility. Whereas the totality-of-the-circumstances test is a more open-ended standard that permits the court to consider a wide variety of factors, the Brunner test is somewhat less malleable .... Courts and commentators disagree, however, regarding the extent to which the Brunner test actually varies from the totality-of-the-circumstances test as a practical matter.").

[176] *See* Pardo, *supra* note 162, at 1141.

[177] *See* G. Michael Bedinger VI, Note, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1830 (2014).

[178] *See* BANKRUPTCY, *supra* note 48, at 30 ("[S]upporters of the Brunner test have opined that the totality-of-the-circumstances test is insufficiently predictable and affords judges too much discretion in determining whether any particular debtor qualifies for an undue hardship discharge.").

[179] *See* Wallen, *supra* note 84, at 243.

[180] *Id.*

[181] *Id.*

flexibility that makes the formulation more unpredictable and susceptible to inconsistent application.[182] On the other hand, the *Brunner* standard explicitly sets forth the three—and only three—factors that a court must consider when determining whether a petitioner's student loans impose an undue hardship.[183] Its self-contained framework and explicit factors provide greater predictability and, therefore, will also likely lead the judiciary to uniformly apply the test's tripartite considerations in a manner that will promote consistency in results among the circuit courts.[184]

All in all, it makes sense that judicial efficiency, uniformity, and predictability are all likely to be enhanced with the application of the plain meaning of the *Brunner* standard because it clearly sets forth all factors to be considered in the assessment of undue hardship.[185]

2. The Congressional Solution

Congress should also amend section 523(a)(8) in a manner that guides uniformity throughout the judiciary and advances the fundamental principles of the Bankruptcy Code in the context of student loan discharges.[186] The most efficient way for Congress to do this is to codify a definition of undue hardship.[187] Particularly, it should explicitly state that a debtor need not demonstrate a certainty of hopelessness in order to qualify for a student loan

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[182] *See* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) ("[A] totality of the circumstances analysis of each debtor's situation .... has an unfortunate tendency to generate lists of factors that should be considered—lists that grow ever longer as the case law develops.").

[183] *See supra* text accompanying note 66.

[184] *See* Bedinger, *supra* note 177, at 1830 ("Brunner provides 'concrete factors' that increase predictability ....") (citing Grigas v. Sallie Mae Servicing Corp., 252 B.R. 866, 874 n.8 (Bankr. D.N.H. 2000)).

[185] *See supra* text accompanying notes 173–84.

[186] *See supra* text accompanying notes 1–6; *see also* Salvin, *supra* note 22, at 143–44.

[187] *See, e.g.,* Salvin, *supra* note 22, at 170 ("It is thus imperative that the underlying policies of the Bankruptcy Code be accurately identified and defined in order to give meaning to the undue hardship standard."); Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 187 (2012) ("Undue hardship is an undefined concept, flummoxing debtors, creditors, and judges alike. The result of its ambiguous contours is rampant inconsistency.").

discharge under the statute.[188] In defining undue hardship, Congress could also set forth the tripartite considerations of the *Brunner* test.[189] Doing so would provide affirmative and streamlined guidance for courts attempting to analyze whether a student loan discharge is warranted.[190] Preferably, Congress should do both.

a. Congress Should Explicitly State that a Certainty of Hopelessness Is Not Required for a Petitioner to Demonstrate Undue Hardship

In codifying a definition of undue hardship, Congress should swiftly dispel the notion that student loan discharges under section 523(a)(8) are conditional on a debtor's demonstration of a certainty of hopelessness.

The primary justification for clarifying that satisfying *Briscoe*'s retributive dicta is *not* needed for relief under the statute[191] is that the certainty of hopelessness standard is flagrantly antithetical to the inherent purpose of the Bankruptcy Code.[192] The Bankruptcy Code serves to afford debtors a fresh start and free them from oppressive debt.[193] Indeed, the legislative history of the Code itself demonstrates that student loan discharges should be available to any debtor who is "legitimately unable to afford repayment."[194] Yet the certainty of hopelessness standard unconscionably punishes petitioners who are hardly able afford bare necessities simply because they cannot satisfy an arbitrary and unduly harsh judicial threshold that fundamentally subverts the Code's fresh start policy in the first place.[195]

The certainty of hopelessness standard deprives petitioners, who would otherwise qualify for relief, not only of their statutory right to obtain relief, but also of the hope that they can reestablish themselves as unburdened and productive members of

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[188] *See, e.g.*, C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 107 (2007) ("Congress needs to establish a universally accepted test of 'undue hardship'").

[189] *See infra* Section IV.B.2.b.

[190] *See infra* Section IV.B.2.b.

[191] *See supra* Section III.B.

[192] *See, e.g.*, Salvin, *supra* note 22, at 143.

[193] *Id.*

[194] *Id.* at 180, 180 n.259.

[195] *Id.* at 178–80.

society.[196] In short, Congress explicitly excluding a petitioner's certainty of hopelessness from the definition of undue hardship would reaffirm the fundamental principle that the Bankruptcy Code's purpose is to empower, not punish, honest but unfortunate debtors.[197] Such a resounding statement in return, would make courts who retributively scrutinize student loan petitioners under the certainty of hopelessness standard think twice.[198]

In addition to the aforementioned policy justification, Congress should statutorily overrule *Briscoe*'s certainty of hopelessness dicta under section 523(a)(8)'s definition of undue hardship because undue hardship has been indirectly defined without a retributive gloss elsewhere in the Bankruptcy Code.[199] Section 524(m) of the Code sheds some light on how Congress might intend to generally define undue hardship.[200] This section asserts that an agreement "is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses ... is less than the scheduled payments on the reaffirmed debt."[201] Notably absent from this implicit definition is any assertion that a petitioner must be facing dire or hopeless conditions in order to successfully demonstrate undue hardship under the section.[202] Admittedly, section 524(m)(1)'s definition cannot be a perfect definition of undue hardship under section 523(a)(8) because the subject matter of the sections is different.[203] While section 523(a)(8) concerns discharging student loans,[204] section 524(m)(1) guides the process of reviving discharged debt.[205] Nevertheless, section 524(m)(1) at least hints at the fact that Congress leans towards a broader definition of undue hardship and does not intend to retributively restrict petitioners' satisfaction of the requirement.[206]

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[196] *Id.* at 180–81.
[197] *Id.* at 143–44.
[198] *See supra* Section III.B.1.
[199] *See* Bedinger, *supra* note 177, at 1838–39.
[200] *Id.*
[201] 11 U.S.C. § 524(m)(1) (2012).
[202] *See* Bedinger, *supra* note 177, at 1838–39.
[203] *See infra* notes 204–05 and accompanying text.
[204] 11 U.S.C. § 523(a)(8).
[205] *See* Bedinger, *supra* note 177, at 1838; *see also* 11 U.S.C. § 524(m)(1).
[206] *See supra* notes 197–203 and accompanying text.

b. Congress Should Include Brunner*'s Tripartite Framework When It Codifies a Definition of Undue Hardship*

Congress should set forth the three factors considered under the *Brunner* framework[207] when it defines undue hardship for the purposes of a section 523(a)(8) discharge.[208] The legislature endorsing an analytical framework that is as clear and self-contained as *Brunner*[209] will help resolve the circuit split by offering courts a relatively straightforward process through which undue hardship can be reliably assessed without burdening petitioners with prohibitively high standards of proof.[210] In short, inclusion of the *Brunner* factors would further contour a uniform definition of undue hardship and reduce inconsistencies in statutory interpretation.[211] It would also ensure the predictability of the judiciary's determination of undue hardship, at least in terms of ensuring that courts are not incorrectly applying the *Briscoe* dicta in their application of the *Brunner* test.[212]

CONCLUSION

It is high time for federal circuits to apply a standardized and predictable framework in its analysis of whether a student loan petitioner is entitled to debt discharge under section 528(a)(8). Consistent and reliable interpretation of the statute's requirement of undue hardship is necessary to comport with the Bankruptcy Code's fresh start policy.[213]

The Code seeks to afford relief to those petitioners who are truly unable to free themselves from the shackles of insurmountable debt.[214] It serves as a vehicle for empowerment. Incorrectly

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[207] Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam).

[208] *See infra* text accompanying notes 209–12.

[209] *See supra* note 177 and accompanying text.

[210] *See* BANKRUPTCY, *supra* note 48, at 39–41.

[211] *See, e.g.*, *id.* at 41 n.293.

[212] *See id.* at 39–41.

[213] *See* Salvin, *supra* note 22, at 174 ("The goal of the fresh start policy is to give the honest-but-unfortunate debtor a new opportunity in life free from the pressure and discouragement of pre-existing debts.").

[214] *See id.* at 180, 180 n.259.

imputing *Briscoe*'s retributive certainty of hopelessness dicta onto the *Brunner* fundamentally subverts the essence of the Bankruptcy Code.[215] It impermissibly punishes the very honest but unfortunate debtors whom the statute seeks to protect.[216] More so, it perpetuates the illusion of a circuit split when in reality, the two leading analytical frameworks of undue hardship are substantively identical.[217]

Judicial standardization of the undue hardship analysis through the adoption of a *Brunner* framework without *Briscoe*'s overlay will resolve this illusory circuit split and ensure the even-handed determination of undue hardship among the federal circuits.[218] Congress can also help dispel the notion of a circuit split by codifying a definition of undue hardship.[219] Specifically, it can explicitly state that, for the purposes of section 523(a)(8), undue hardship does *not* include a showing of a certainty of hopelessness.[220] It can also include *Brunner*'s tripartite factors in its definition to streamline the considerations that courts should take into account when conducting their undue hardship analysis.[221]

As of 2021 student loan debt in the United States is about $1.7 trillion.[222] Courts need to understand the urgency with which they must determine undue hardship in a manner that comports with the essence of the Code.[223] Doing so will resolve the illusory circuit split that has been perpetuated by principles which are directly antithetical to the notion of awarding debtors a fresh start.[224] Now more than ever, students truly burdened by insurmountable loans should be shielded by the very Bankruptcy Code that was designed to protect them.[225]

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[215] *See supra* Part III.
[216] *See, e.g.*, Salvin, *supra* note 22, at 174.
[217] *See supra* Part III.
[218] *See supra* Part IV.
[219] *See supra* Part IV.
[220] *See supra* Part IV.
[221] *See supra* Part IV.
[222] Zack Friedman, *Student Loan Debt Statistics in 2021: A Record $1.7 Trillion*, FORBES (Feb. 20, 2021, 8:30 AM), https://www.forbes.com/sites/zackfriedman/2021/02/20/student-loan-debt-statistics-in-2021-a-record-17-trillion/?sh=9d0972314310 [https://perma.cc/4NUN-XYUM].
[223] *See supra* Part IV.
[224] *See* Salvin, *supra* note 22, at 174.
[225] *See supra* Introduction.