**No. 2:16-CV-2838-CM**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

**EDUCATIONAL CREDIT MANAGEMENT CORPORATION,**

Defendant/Appellant,

v.

**ALAN AND CATHERINE MURRAY,**

Plaintiffs/Appellees,

Appeal from the United States Bankruptcy Court, District of Kansas
The Honorable Dale S. Somers

# BRIEF OF AMICUS CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEES SEEKING AFFIRMATION OF THE BANKRUPTCYCOURT'S DECISION

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## STATEMENT OF INTERESTED PARTIES

Pursuant to Fed. R. Bankr. P. 8012, *amici curiae*, the National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys, state that they are both nongovernmental corporate entities that have no parent corporations and do not issue stock.

Further, amici are not aware of any interested parties beyond those already disclosed by the parties to the case.

## CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. Bankr. P. 8017(c)(4), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than amici contributed money to fund this brief.

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## STATEMENT OF INTEREST OF AMICUS CURIAE

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization whose members are attorneys across the country. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

This case is of vital interest to NCBRC and NACBA. Since the enactment of the Bankruptcy Code in 1978, Congress has permitted debtors who can demonstrate undue hardship to obtain a discharge of student loans. But, the nature of student loan debt, the structure of student loan programs, and the Bankruptcy Code itself have all changed significantly since the undue hardship test was first developed by the Second Circuit in *Brunner v. New York State Higher Educ. Servs.*

*Corp.*, 831 F.2d 395 (2d Cir. 1987). Creditor, ECMC, urges this court to turn the undue hardship analysis into an insurmountable barrier to a fresh start that is not consistent with the Bankruptcy Code, or the Tenth Circuit's decision in *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004).

## SUMMARY OF ARGUMENT

The Tenth Circuit Court of Appeals has adopted the *Brunner* test for determining when repayment of student loans constitutes "undue hardship" under 11 U.S.C. § 523(a)(8) of the Bankruptcy Code. *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004). Applying *Brunner*, this Court should affirm the decision below because the bankruptcy court below properly applied that test. The *Brunner* test contains three elements. First, the debtor "must show that he or she "cannot maintain a minimum standard of living while repaying the student loan debt." *Id*. Second, the debtor must establish "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." *Id*. at 1310. Third, the debtor must demonstrate "good faith in seeking the discharge." *Id*. at 1309.

In its *Polleys* decision the Tenth Circuit emphasized that the *Brunner* test should not be applied harshly. The test must "be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged." *Id*. Regarding *Brunner's* second element, *Polleys* stressed that a court should examine a debtor's future prospects "on specific articulable facts, not unfounded optimism, and the inquiry into future circumstances should be limited to the foreseeable future, at most over the term of the loan." *Id*. at 1310. Significantly, the *Polleys*

court made clear that *Brunner's* undue hardship test does not require "a certainty of hopelessness" before a debtor is entitled to a discharge of student loans in bankruptcy. *Id*.

In the proceedings below, the bankruptcy court properly applied the *Brunner* test as interpreted by the Tenth Circuit's *Polleys* decision and granted Alan and Catherine Murray a partial discharge of their student loans. The court determined that requiring the Murrays to pay the full amount of their student loan debt would constitute an undue hardship under section 523(a)(8). Therefore, the bankruptcy court discharged the accumulated interest on the Murrays' loans, requiring them only to pay the principal, which is $77,000.

On appeal, Educational Credit Management Corporation (ECMC) argues that the bankruptcy court erred in its application of the *Brunner* test and that the Murrays should have enrolled in a 20- or 25-year income-driven repayment plan (IDR). ECMC's position, that the Murrays should be burdened by their student loans until they are in their late sixties or early seventies would guarantee "the certainty of hopelessness" in their declining years, the very outcome the *Polleys* decision explicitly rejected as unnecessary.

Moreover, such an outcome is contrary to the Bankruptcy Code's "fresh start" policy, which the Tenth Circuit made clear was not nullified by the *Brunner* framework. *Id*. at 1309. Indeed, although ECMC does not state so explicitly, "its

position would create a per se rule requiring enrollment in [an income-driven repayment plan] to satisfy the third *Brunner* prong and thus would, in effect, eliminate the discharge of student loans for undue hardship from the Bankruptcy Code." *Barrett v. Educ. Credit Mgmt. Corp*., 487 F.3d 353, 364 (6th Cir. 2007).

In this brief, amici argue that long-term, income-driven repayment plans are an inappropriate remedy for debtors seeking to discharge their student loans in bankruptcy. IDRs have three fundamental flaws. First, most debtors in IDRs will never pay back their student loans. Second, although debtors who fail to pay back their loans at the conclusion of an IDR will have their loans forgiven, the amount of cancelled debt is taxable to them unless they are insolvent at the time the debt is cancelled. Third, IDRs impose heavy psychological stress on debtors who are burdened with long-term debt they will never repay. Additionally, the legislative history of the undue hardship provision further suggests that IDRs should not be considered when considering whether the debtor may discharge student loan debt under section 523(a)(8).

In short, debtors who are denied bankruptcy relief and forced into long-term, income-based repayment plans will simply be "trading one nondischargeable debt for another." *Id.* (internal citation omitted). ECMC's position is contrary to the Tenth Circuit's interpretation of the *Brunner* test as set forth in the *Polleys* decision, contrary to public policy and Congressional intent, and contrary to

numerous bankruptcy court decisions around the United States that have rejected student-loan creditors' demands that bankrupt student-loan debtors be pushed into IDRs as an alternative to bankruptcy relief.

# ARGUMENT

## I. UNDER THE *BRUNNER* TEST, INCOME DRIVEN REPAYMENT PLANS ARE NOT RELEVANT TO THE UNDUE HARDSHIP DETERMINATION UNDER SECTION 523(A)(8).

Under the *Brunner* test, this Court should reject ECMC's invitation to require debtors to participate in income driven repayment plans in lieu of receiving a discharge of their student loan debt in bankruptcy. Research and case law demonstrate that IDRs have at least three serious drawbacks for debtors who enroll in them. First, a high percentage of people entering IDRs will never pay off their student loans. Second, borrowers who successfully complete their IDRs will see their loan balances forgiven, but the amount of the forgiven debt is taxable income unless they are insolvent at the time the debt is canceled. Third, as several federal courts have recognized, IDRs lock borrowers into long-term indebtedness, which puts them under serious psychological and emotional stress. Further, the legislative history of the student loan discharge provision demonstrates that payment amounts under IDRs should not be considered in determining undue hardship. Rather courts should consider the originally scheduled payment amount when considering whether to discharge all or a portion of the debtor's student loan debt.

Since the early 1990s, federal legislation has authorized various forms of income driven repayment programs ("IDR") for federal student loan borrowers. The earliest version was known as the Income-Contingent Repayment Plan. Eligibility for this program depends on the borrower's income, loan balance, and type of federal loan. In order to have the outstanding student loan debt forgiven, borrower are required to pay 15% of their discretionary income, must annually recertify, and must comply with all program guidelines for twenty-five years.[1]

In 2007, Congress established a new long-term repayment program, known as Income-Based Repayment Program ("IBR"), and a Public Service Loan Forgiveness Program ("PLSF").[2] The IBR originally set payments at 15% of discretionary income and allowed forgiveness after twenty years. PLSF is available to those who hold "qualifying" public service jobs. After ten years of full-time work in public service and reduced monthly payments borrowers are supposed to have the remaining portion of their loans forgiven.[3]

[1] 20 U.S.C. § 1098e; 34 C.F.R. § 682.215 and § 685.221.

[2] 20 U.S.C. § 1098e; 34 C.F.R. ¶ § 685.221.

[3] However, recently the Department of Education has attempted to retroactively disqualify students participating in the Public Loan Forgiveness Program. *See* Ron Lieber, They Thought They Qualified for Student Loan Forgiveness. Years Later, the Government Changes Its Mind," New York Times (Dec. 26, 2016), available at https://www.nytimes.com/2016/12/20/your-money/student-loans/they-thought-they-qualified-for-loan-forgiveness-years-later-the-answer-is-no.html. To date, no loans have been forgiven through the program.

In 2012, the Department of Education introduced another IDR called PAYE (Pay As You Earn) that allows borrowers to make payments amounting to 10 percent of adjusted gross income over a period of 20 years.[4] In 2016, DOE rolled out yet another IDR labeled REPAYE.[5] REPAYE's payment terms are similar to the terms of the PAYE plan, but REPAYE expanded eligibility standards to allow more borrowers to qualify.[6]

Student loan creditors routinely oppose undue hardship discharges by highlighting potential availability of these long-term income driven repayment plans. The role, if any, that the existence of these programs should exert in a court's undue hardship determination has been the focus of extensive litigation.

### A. An IDR should not be required when it is clear the debtor will never repay his or her student loans

It might make sense for student borrowers to enter IDRs when there is a realistic chance that IDRs will enable borrowers to repay their loans. But it makes no sense at all to force a struggling student-loan debtor into an IDR as an alternative to bankruptcy relief when it is evident the debtor will never be able to repay his or her student loans.

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[4] Press release, U.S. Dep't of Educ., Education Department Launches 'Pay As You Earn' Student Loan Repayment Plan (Dec. 21, 2012).
[5] Michael Stratford, *Obama Admin Sets New Income-Based Repayment Goal*, INSIDE HIGHER ED, Apr. 28, 2016.
[6] Betsy Mayotte, *A Side-by-Side comparison of 3 Income-Based Repayment Plans*, U.S. NEWS & WORLD REP., Nov. 4. 2015.

But in fact, DOE, ECMC and other student-loan debt collectors have insisted that nearly all bankrupt student debtors enter IDRs, even under absurd circumstances. For example, in *Myhre v. U.S. Dep't of Educ.*, 503 B.R. 698 (Bankr. W.D. Wis. 2013), Bradley Myhre, a quadriplegic, sought to discharge $14,000 in student loans in bankruptcy over the opposition of the U.S. Department of Education. At the time of trial, Myhre was "paralyzed from the chest down." *Id*. at 699. He required an electric wheelchair to get around and relied on a full-time caregiver to assist him with all his daily needs, "including eating, dressing and bathing." *Id*. Myhre's salary did not allow him to meet his monthly expenses, and both Myhre and his caregiver filed for bankruptcy in 2012. *Id.* at 701.

DOE argued that Myhre had not met the "good faith" prong of the *Brunn*er test because he had not enrolled in an income-based repayment plan. Nevertheless, the bankruptcy court discharged Myhre's student loans. "Mr. Myhre has done his best to earn an income that would allow him to financially support himself," the court wrote, "and it is not his fault that even working full-time, he is unable to make ends meet." *Id.* at 705.

Under facts almost as absurd, ECMC opposed bankruptcy relief for Janet Roth, a woman in her late sixties with chronic health problems, who subsisted entirely on Social Security income of less than $800 a month. ECMC argued Roth did not meet *Brunner's* good faith test because she had not enrolled in an income-

based repayment plan and had not made a single voluntary payment. *Roth v. Educ. Credit Mgmt. Corp.*, 490 B.R. 908 (B.A.P. 9th Cir. 2013). But the Ninth Circuit's Bankruptcy Appellate Panel disagreed, concluding that Roth had met the good faith test by making "good faith efforts to obtain employment, maximize income, and minimize expenses." *Id*. at 919.

In addition, the BAP observed, Roth's income was so low she probably would never be required to make a monthly payment under an income-based repayment plan. Thus, the Ninth Circuit BAP reasoned, there was no real purpose in requiring Roth to report her income every year, which she would be required to do under an income-based repayment plan. "The IBRP was set up to allow borrowers to pay an affordable amount toward retirement of their student loan debt," the court pointed out. "However, when absolutely no payment is forecast, the law should not impose negative consequences for failing to sign up for the program." This was consistent, the court added, "with the general maxim that the law does not require a party to engage in futile acts." *Id*.

Likewise, in *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882 (7th Cir. 2013), the Seventh Circuit Court of Appeals injected a note of common sense into its interpretation of undue hardship under the *Brunner* test. In that case, Susan Krieger, an unemployed woman in her fifties who had never earned more than $12,000 a year, sought to discharge about $25,000 in student loan debt through

bankruptcy. *Id*. at 883-84. An Illinois bankruptcy court granted Krieger a discharge and specifically found that she had handled her student-loan debt in good faith. Krieger had diligently sought employment, the bankruptcy court observed, and she had used part of her divorce settlement to pay off as much of her student-loan debt as she could. *Id*. at 883.

On appeal, an Illinois district court reversed the bankruptcy court's ruling on the grounds that Krieger had failed to demonstrate good faith as required by *Brunner*. In the district court's view, Krieger had not looked hard enough to find a job and she had rejected a 25-year, income-based repayment plan.

Krieger appealed this ruling to the Seventh Circuit Court of Appeals, which affirmed the bankruptcy court's decision to discharge Krieger's student loans. The district court had erred, the Seventh Circuit panel ruled, in concluding that good faith "entails commitment to future efforts to repay." *Id*. at 884. If this were so, the Seventh Circuit reasoned, "no educational loan *ever* could be discharged, because it is always possible to pay in the future should prospects improve." *Id*.

Section 523(a)(8) does not forbid discharge of student loans altogether, the Seventh Circuit instructed: "[A]n unpaid educational loan is not treated the same as debt incurred through crime or fraud." *Id*. On the contrary, "[t]he statutory language is that a discharge is possible when payment would cause an 'undue hardship.' It is important not to allow judicial glosses . . . to supersede the statute

itself." *Id*. In short, the Seventh Circuit ruled, "[t]o the extent that the district judge thought that debtors always must agree to a payment plan and forgo a discharge," that is an incorrect proposition of law. *Id*.

Similarly, in a 2007 opinion, the Sixth Circuit Court of Appeals rejected ECMC's implicit argument (implicitly made again in this appeal), that a debtor fails *Brunner's* good faith test if he or she does not enroll in an income-driven repayment plan. *Barrett v. Educ. Credit Mgmt. Corp*., 487 F.3 353 (6th Cir. 2007). This position, the court observed, "would create a per se rule requiring enrollment in [an income contingent repayment plan] to satisfy the third *Brunner* prong and thus would, in effect, eliminate the discharge of student loans for undue hardship from the Bankruptcy Code." *Id*. at 364. Moreover, requiring debtors to enroll in a long-term repayment plan "runs counter to the Bankruptcy Code's aim in providing debtors a 'fresh start.'" In essence, the Sixth Circuit concluded, a debtor forced into a long-term repayment plan is simply "trading one nondischargeable debt for another." *Id*.

More recently, in *Fern v. FedLoan Servicing*, 563 B.R. 1 (B.A.P. 8th Cir. 2017), the Eighth Circuit Bankruptcy Appellate Panel upheld a bankruptcy court's decision to discharge the student-loan debt of Sara Fern, a 35-year-old mother of three who owed approximately $27,000 in student loans she acquired to pursue postsecondary programs that did not improve her income. Fern's take home pay,

the court found, was only about $1,500 a month, which Fern supplemented with food stamps and public assistance. *Id*. at 5.

The Department of Education maintained that Fern should be put into an income-based repayment plan, arguing that Eighth Circuit precedent (*Educ. Credit Mgm't. Corp. v. Jesperson*, 571 F.3d 575 (8th Cir. 2009)) required that outcome even though the Department conceded that Fern's income was so low that her monthly payments would be zero. But the Eighth Circuit BAP rejected DOE's argument. "We do not interpret *Jesperson* to stand for the proposition that a monthly payment in the amount of zero automatically constitutes an ability to pay." *Id*. at 5.

It might be argued that the Murrays are in totally different circumstances from Myhre Roth, Krieger and Fern; and indeed the Murrays' combined income puts them solidly in the middle class. But the underlying rationale of all these decisions—four by appellate courts (*Roth*, *Krieger*, *Barrett* and *Fern*)—applies to student-loan debtors regardless of income bracket. There is simply no point in putting debtors in 20- or 25-year repayment plans when it is virtually certain they will never pay off their student loans. Indeed, placing the Murrays in such a plan, as suggested by ECMC, will cause their student loan debt to grow by tens of thousands of dollars over the life of the repayment plan. For many people, like the Murrays, income driven repayment plans are cement life preservers pitched by

student loan creditors that, in the end, will only cause borrowers to sink further into debt.

### B. Tax consequences of IDRs defeat the Bankruptcy Code's fresh start policy

In its appellant's brief (p. 23-24), ECMC downplayed the tax consequences of IDRs for borrowers whose student loans are forgiven after a 20- or 25-year repayment period. Tax consequences are speculative, ECMC argued, and should not have been considered by the bankruptcy court. Appellant brief at 25. But of course, tax consequences for debtors in IDRs are not speculative, as several courts have acknowledged. *See, e.g.*, *Roth*, 490 B.R. at 920; *Barrett v. U.S. Dep't of Educ*., 545 B.R. 625, 633 (Bankr. N.D Calif. 2016). Certainly, tax consequences of an IDR are not speculative for the Murrays.

The Murrays currently owe $311,000 on their student loans, a sum that is accruing interest at an annual rate of 9 percent. By the bankruptcy court's calculation, the Murrays' student-loan debt is growing by $65 a day, or about $2,000 a month. *Id*.

ECMC presented evidence to the bankruptcy court that the Murrays were eligible for two IDRs. The REPAYE plan, which is the most generous IDR option, would require the Murrays to pay $605.20 each month, which is approximately $1300 less than monthly accruing interest. Because interest accrues at the rate of $65 a day, the Murrays would owe considerably more than $311,000 at end of a

20-year income-driven repayment plan, even if DOE subsidizes half of the accruing interest under a REPAYE plan (as explained in Appellant Brief at 18). By then, Mr. Murray would be 69 years old and Ms. Murray would be 68. And of course, if they elected a 25-year IDR, they would be in their early seventies before their loan obligations would cease.

In *Abney v. U.S. Dep't of Educ.*, 540 B.R. 681 (W.D. Mo. 2015), a bankruptcy court took note of the tax consequences for a debtor who successfully completes a 25-year income-based repayment plan. "Thus, if the Debtor were able over the next 25 years to timely pay his IBRP payments, as well as pay his child support and other expenses, and to somehow accumulate reserves to fall back on for retirement or otherwise, he would then be rewarded with a tax bill based on the amount of principal, interest and other charges owed to the Department at the time of forgiveness, when the Debtor is likely to be at least 65 years old," the court observed. *Id*. at 689-90.

Likewise, in *Marshall v. Student Loan Corp.* (*In re Marshall*), 430 B.R. 809 (Bankr. S.D. Ohio 2010), a court predicted the outcome of a long-term, income-based repayment plan for a man in his 50s. "At the end of the 25-year repayment period, if the debt is cancelled, there are tax consequences for the Debtor. The Debtor would be 81 years old at the end of the 25-year repayment period, and

likely still on a fixed income. The tax consequences for someone in that position could be devastating." *Id*. at 815.

As ECMC correctly noted in its brief, forgiven loans are not considered taxable income to the extent the debtor is insolvent at the time the debt is cancelled.[7] "Thus, those who elect repayment under an alternate repayment plan will only experience a taxable event if his assets are greater than his liabilities before the loan is forgiven at the end of the 25-year period." (Appellant brief at 24, emphasis in original.) Essentially, ECMC is asking this court not to consider the tax consequences of an IDR for the Murrays because they will be so broke 25 years from now that they will suffer no tax consequences when more than half a million dollars in student loan debt is forgiven. "[I]t is almost absolute," ECMC argues in its brief, "that the Murrays will not have assets exceeding liabilities (including unpaid Loans) at the end of the 25-year repayment period and therefore no tax consequences." Appellant brief at 26. That is, ECMC is acknowledging that 20 or

[7] 26 U.S.C. §§ 108(a)(1)(B), 108(d)(3). Insolvency is defined as an excess of liabilities ovr ther fair market value of assets immediately prior to cancellation of the debt. In this analysis, property that may be exempt in a bankruptcy case, such as a home, car or certain retirement assets, will be included as assets for purposes of determining the extent of the borrower's insolvency.

25 years from now, when the Murrays will be in their late sixties or early seventies, they will be insolvent.[8]

In any event, courts have considered the tax consequences of income-based repayment plans even when it is probable that the debtor will be insolvent at the time the time the unpaid debt is forgiven and will likely suffer no tax consequences. For example, the Ninth Circuit's Bankruptcy Appellate Court recognized potential tax implications for a woman in her sixties if she participated in a long-term income-based repayment program, even though she was living on Social Security income of only $774 a month and was destitute. *Roth*, 490 B.R. at 913. "Potentially disastrous tax consequences could await her at the termination of the twenty-five year payment period or could await her estate and thus her heirs upon her death," the court stated. *Id*. at 920.

In sum, IDRs are never appropriate for student-loan debtors seeking bankruptcy relief. As one court explained, "An income contingent repayment plan is not the functional equivalent of a Chapter 7 discharge, particularly given the possibility that a debtor may face a substantial tax liability when the student debt is forgiven. *Barrett*, 545 B.R. at 633.

**C. IDRs place participants under severe psychological stress**

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[8] To make matters worse, ECMC objected to the modest contributions the Murrays made to a retirement plan, maintaining that saving for retirement is an "unnecessary" expense. Appellant brief at 42.

In addition, long-term repayment plans have significant psychological costs for debtors who pledge to devote a percentage of their income to student-loan payments for terms stretching as long as a quarter century. As one commentator noted:

> Studies have consistently found that socioeconomic status and debt-to-income ratio are strongly associated with poor mental health. Debt from student loans is often viewed as necessary by most Americans, but can be a chronic strain on an individual's financial and emotional well-being. The mere thought of having thousands upon thousands of dollars' worth of debt can severely impact those with already fragile mental health, especially if they will carry that debt for the rest of their lives. There is also the relentless nature of debt collection, the incessant calls from creditors, and the hassle of continuing to put student loans in forbearance. Financial difficulties "can also contribute to a sense of continuing entrapment and hopelessness that can in turn serve to extend an episode."

Katheryn E. Hancock, *A Certainty of Hopelessness, Depression, and The Discharge of Student Loans Under the Bankruptcy Code*, 33 L. & PSYCHOL. REV. 151, 160-161 (2009) (internal citations omitted).

In recent years, several courts have rejected IDRs for bankrupt student-loan debtors based at least partly on the psychological costs such debt imposes. An Ohio bankruptcy court took psychological considerations into account when it refused to place a 35-year-old single mother of two children into a long-term income-based repayment plan, instead discharging her student-loan debt in its entirety. "Given [the debtor's] desperate circumstances, and her status as the proverbial honest but unfortunate debtor," the court wrote, "she is entitled to sleep

at night without these unpayable debts continuing to hang over her head for the next 25 years." *In re Lamento*, 520 B.R. 667, 679 (Bankr. N.D. Ohio 2014).

Likewise, in a 2015 decision, a Missouri bankruptcy court rejected the U.S. Department of Education's argument that Michael Abney, a single father in his 40s living on less than $1200 a month, should be placed in an IBRP. *Abney v. U.S. Dept. of Educ. (In re Abney)*, 540 B.R. 681 (W.D. Mo. 2015). The court pointed out that Abney's payments under such a plan would be so low that interest would continue to accrue, meaning that the total debt would grow. Moreover, "[t]he overhang of such debt could well impact not only [Abney's] access to credit over the 25–year IBRP period, but could also affect future employment opportunities and access to housing." *Id.* at 689. In addition, the court observed, "decades of mounting indebtedness, even with a zero or minimal payment amount, can impose a substantial emotional burden as well." *Id*. The court noted sympathetically that Abney had "already suffered emotionally from his ongoing debt struggles and was in fact hospitalized in part because of it." *Id*.

In *Halverson v. Educ. Credit Mgmt. Corp*., 401 B.R. 378 (Bankr. D. Minn. 2009), a Minnesota bankruptcy court rejected ECMC's argument that Steven Lee Halverson, a 65-year old debtor, be placed in a long-term income-based repayment plan based partly on Halverson's age and health condition. The court pointed out that Halverson's debt was accruing interest at the rate of nearly $2,000 a month

and Halverson would likely never make more than his then current wage of $13.50 an hour. "If Halverson elected to participate in the ICRP, he would pay for twenty-five years, and then any remaining balance would be forgiven and assessed for taxes as income. He would be ninety years old." *Id* at 382. The court also noted that long-term indebtedness under an income-based repayment plan could adversely affect Halverson's marriage. "Already, [Halverson's wife] has suffered physical manifestations of the stress and it is not clear that their marriage will survive the hardship," the court wrote. "Their ability as a married couple to finance their retirement years and to spend those years in peace will be greatly diminished by the emotional toll of these loans." *Id*. at 388.

Finally, in a 2016 decision, an Iowa bankruptcy court considered the emotional burden of long-term indebtedness when it discharged student-loan debt owed by Sara Fern, a 35-year-old single mother of three children. *Fern v. FedLoan Servicing*, 553 B.R. 362 (Bankr. N.D. Iowa 2016), *aff'd*, 563 B.R. 1 (B.A.P. 8th Cir. 2017). Fern's student loans (totaling approximately $27,000) had always been in deferment or forbearance due to her low income. At the time of her adversary proceeding, Fern's take-home pay was about $1,500 a month; and she was receiving food stamps an and rent assistance to make ends meet. *Id*. at 365. The Department of Education argued that Fern should be placed in an income-driven repayment plan, pointing out that her monthly payments would be zero based on

her current income. But the bankruptcy court rejected that argument and discharged Fern's student loans. In ruling in Fern's favor, the court noted that Fern's debt, which was growing due to accrued interest, would have a continuing negative effect on her credit. And the court also took notice of the emotional toll of long-term indebtedness:

> This mounting indebtedness has also indisputably been an emotional burden on Debtor. Debtor testified that knowing that the debt is hanging over her, constantly growing, and that she will never be able to repay this debt, is distressing to her. Debtor testified that she feels like she will never be able to get ahead because she will always have this debt.

*Id*. at 370.

The court found Fern's testimony to be persuasive, and took the emotional burden of long-term indebtedness into account in deciding that repaying her student loans would be an undue hardship. The Court would not ignore a hardship "simply because it is not reflected on a balance sheet." *Id*.

It might argued that the facts in *Abney*, *Fern*, *Lamento* and *Halverson* are distinguishable because in all four cases the debtors' income was lower than the Murrays'. But regardless of a student-loan debtor's income, the psychological stress of long-term indebtedness is severe, particularly when it is virtually certain that the debt will never be repaid.

Indeed, it is not unreasonable to conclude that stress about massive student-loan indebtedness has contributed to the nation's rising suicide rate among middle-aged Americans. According to a recent report by Katherine Hempstead and Julie Phillips, the suicide rate for people in the 40-64 age group has gone up 40 percent since 2007. Hempstead and Phillips suggested that economic problems may have contributed to the rising suicide rate among Baby Boomers, and that "adverse effects of economic difficulties on psychological well-being may have been greater for those who did not anticipate them." Katherine A. Hempstead & Julie A. Phillips, *Rising Suicide Among Adults Aged 40 to 64 Years: The Role of Job and Financial Circumstances*, 48 AM. J PREV. MED 491 (2015).

**D. The legislative history of the undue hardship provision also does not support the consideration of IDRs when evaluating the debtor's undue hardship.**

An undue hardship standard that appropriately implements section 523(a)(8) must focus on the debtor's ability to make the originally scheduled loan payments. In considering whether now and in the foreseeable near future the debtor can maintain a reasonable standard of living and at the same time afford to make payments on the student loan, a critical issue any court must address is: what are the student loan "payments" that form the basis for this evaluation? The *Brunner* test requires that a court evaluate the hardship the debtor is likely to incur if the debtor actually makes payments due on the loan.

In determining the appropriate monthly payment amount for the undue hardship assessment, the appropriate place to begin is with Congress's enactment of the operative Code provision in 1978. There were no IDRs in 1978. Congress could not have intended that courts evaluate undue hardship using payment figures derived from programs that did not exist at the time. Given the clear, absolute five-year discharge option that existed in 1978, any type of long-term repayment program running for twenty-five years would have been irrelevant to the undue hardship determination as envisioned by Congress at the time. Congress has not revisited the undue hardship standard since 1978.

The initial version of the ICRP was developed in 1993. After Congress removed the time-based automatic bankruptcy discharge option in 1998, the undue hardship standard was left as the only discharge option. The legislative history indicates that in 1998 Congress was aware that the long-term payment plans and other options could serve as fallbacks for borrowers who did not qualify for an undue hardship discharge.[9] However, Congress did not repeal the bankruptcy hardship provision; indeed, it expressly stated that it did not intend that these new payment alternatives should displace or in any way change the undue hardship standard drafted into the Code in 1978. According to the relevant 1998 Conference Report addressing the elimination of the time-based automatic

[9] Higher Education Amendments of 1998, Conference Report 105-750 (Sept. 25, 1998); 1998 U.S. Code Cong. & Admin. News 404.

discharge," [t]he conferees note that this change does not affect the current provisions allowing any student borrower to discharge a student loan during bankruptcy if they can prove undue economic hardship."[10] Finally, among the substantial revisions to the Code made in 2005, Congress added section 523(a)(8)(B) to extend the nondischargeability exception to cover private student loans. Here again, Congress did not alter the 1978 language related to the discharge for undue hardship. By this time, the IDRs had been available for more than a decade.

When Congress created the undue hardship discharge option in 1978, there was no ambiguity about what it meant to make payments on a student loan. As is the case today, students typically executed notes with a fixed repayment period. As is true today, this period was usually ten years. In creating the undue hardship discharge option, Congress clearly referred to the hardship caused by making the payment needed to pay off the loan within the original ten-year amortization period. *See In re Bene,* 474 B.R. 56, 73 (Bankr. W.D. N.Y. 2012) (opining that today Second Circuit would not define relevant repayment period by reference to long term payment plans); *Polleys*, 356 F.3d at 1310 (under *Brunner*, "inquiry into future circumstances should be limited to the foreseeable future, at most over term of the loan"). Today, just as in 1978, courts must evaluate hardship based on the

[10] *Id*.

impact that making payments due under the original note terms will have upon the debtor.

## CONCLUSION

Numerous scholars have argued that student debtors should have easier access to bankruptcy relief than the undue hardship standard as interpreted by *Brunner* now provides.[11] Indeed, the existing Brunner test strays far from the plain language of section 523(a)(8). But even under the undue hardship standard articulated by *Brunner*, it makes no sense to deny distressed debtors relief from oppressive student loans because they failed to enroll in a long-term income-driven repayment plan. Student debtors in such plans rarely repay their loans, and they suffer disastrous tax consequences for forgiven debt unless they are insolvent at the time the debt is canceled. In addition, income-driven repayment plans impose serious psychological and emotional stress that comes from being burdened by debt that will never be repaid.

[11] *See, e.g.*, SANDY BAUM, STUDENT DEBT: RHETORIC & REALITIES OF HIGHER EDUC. FINANCING 98 (2016) ("eliminate the difference between student loans and other forms of credit in the bankruptcy law"); Robert Cloud & Richard Fossey, *Facing the Student-Debt Crisis: Restoring the Integrity of the Federal Student Loan Program*, 40 J.C. & U.L. 468, 497 ("'undue hard-ship' provision in the Bankruptcy Code should be repealed"); Terence 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, 105 (2005) (income contingent repayment plans "are the direct antithesis of the concept of a 'fresh start'").

Income-driven repayment plans that stretch for as long as a quarter of a century are never appropriate for student-loan debtors who come to the bankruptcy courts in good faith and seek the fresh start the Bankruptcy Code is intended to provide. Whether student loan debtors are in their sixties (*Roth*), fifties (*Krieger*), forties (*Murrays*, *Abney* ) or even their thirties (*Lamento*, *Fern*), income driven repayment plans impose "the certainty of hopelessness" on student-loan debtors, a result that the Tenth Circuit Court of Appeals ruled was not necessary to establish undue hardship. *Polleys*, 356 F.3d at 1310.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. Bankr. P. 8017(d) because this brief contains 5,592 words, excluding parts exempted by Fed. R. Bankr. P. 8015(a)(7)(B)(iii).

2. This filing complies with L.R. 8015-1(b) and the type style requirements of Fed. R. Bank. P. 8015(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Kansas by using the Appellate CM/ECF system on April 25, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

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