No. 15-485

In the Supreme Court of the United States

MARK WARREN TETZLAFF, PETITIONER

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION

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

REPLY BRIEF OF PETITIONER

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
JONATHAN R. FERENCE-BURKE
JOHN T. DEY
ROPES & GRAY LLP
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

JAMES M. WILTON
MARTHA E. MARTIR
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

D. ROSS MARTIN
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page(s)

In the Supreme Court of the United States

No. 15-485

MARK WARREN TETZLAFF, PETITIONER

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION

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

REPLY BRIEF OF PETITIONER

Despite respondent's attempt to dismiss as "different verbal formulations" (Opp. 10) the appellate courts' longstanding conflict regarding the "undue hardship" standard for student loan discharge in bankruptcy, that disagreement is well-recognized by all relevant parties, including the United States and even respondent in its earlier petition for certiorari on the same issue. Nor can respondent dispute the significance of the issue, which potentially implicates $1.2 trillion in student loan debt owed by 40 million Americans and has become the topic of seemingly constant public attention. See, *e.g.*, Josh Mitchell, *Should Anyone Be Eligible for Student Loans?*, Wall St. J., Dec. 6, 2015, http://www.wsj.com/articles/should-anyone-be-eligible-for-student-loans-1449436508; Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. Times, July 17, 2015, http://www.nytimes.com/2015/07/18/your-

money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html.

The Court should resolve that conflict in this case, which arises from an opinion adopting the strictest version of the *Brunner* test. Respondent won below under a standard that rendered the most salient features of petitioner's hardship irrelevant. Respondent's self-serving assertion that petitioner would have lost under the more flexible totality-of-the-circumstances test is no substitute for judicial consideration applying the proper standard.

I. THE COURTS OF APPEAL AND UNITED STATES, AS WELL AS SCHOLARS AND RESPONDENT (ELSEWHERE), AGREE THAT THERE ARE MEANINGFUL DIFFERENCES BETWEEN THE *BRUNNER* AND TOTALITY-OF-THE-CIRCUMSTANCES TESTS

The petition implicates two splits in authority—one between the *Brunner* and totality-of-the-circumstances circuits, and another among *Brunner* circuits. Respondent belittles these splits as "different verbal formulations" (Opp. 1), but that characterization is belied by the near-uniform acknowledgement by courts and commentators, as well as the United States, that the tests are substantively different.

1. The differences between *Brunner* and the totality-of-the-circumstances test are hardly superficial. *Brunner* courts have generated three elements as a gloss on the statutory term "undue hardship," each mandatory. A debtor who fails to satisfy *any single* element is automatically ineligible for discharge. *Brunner* v. *N.Y. Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). By contrast, totality-of-the-circumstances courts simply ask the statutory question

whether there is "undue hardship" and consider a broad range of factors, with no single dispositive consideration. *E.g.*, *Long* v. *Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554-555 (8th Cir. 2003). The "totality" approach rejects "strict parameters," allowing courts to exercise "the inherent discretion contained in § 523(a)(8)(B)." *Id.* at 554.

A wide range of authorities contradict respondent, including the Eighth Circuit, which explicitly "rejected the *Brunner* test." *Reynolds* v. *Pa. Higher Educ. Assistance Agency (In re Reynolds*), 425 F.3d 526, 532 (2005). The United States, for example, called this split an "important legal question" in 2006, while then recommending that the Court allow the issue to percolate further. U.S. Br. in Opp., *Educ. Credit Mgmt. Corp.* v. *Reynolds*, No. 05-1361 (July 28, 2006). More recently, the United States, as *amicus curiae*, urged the First Circuit to reject the totality-of-the-circumstances test, endorsed by that circuit's bankruptcy appellate panel, and adopt *Brunner*. Gov't C.A. Amicus Br., *Murphy* v. *Dep't of Educ. (In re Murphy)*, No. 14-1691 (Oct. 13, 2015). Ironically, the United States criticized the totality-of-the-circumstances test as "judicial legislation," *id.* at 24-25 (citation omitted), whereas it is the *Brunner* test that "superimposes an inflexible framework onto statutory text that is inherently flexible," *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014). Outside of litigation, the Department of Education has likewise recognized the meaningful differences between the two tests, describing the totality-of-the-circumstances test as a "more flexible alternative" to *Brunner*. U.S. Dep't of Educ., *Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings* (July 7, 2015),

http://www.ifap.ed.gov/dpcletters/attachments/GEN1513.pdf.

Courts recognize that the tests reflect fundamentally distinct approaches to "undue hardship." As noted above, the Eighth Circuit expressly rejected *Brunner* as unduly constrained. Likewise, in adopting the totality-of-the-circumstances test, the First Circuit Bankruptcy Appellate Panel held that "*Brunner* takes the test too far" by requiring a "certainty of hopelessness" and that "the 'good faith' requirement of *Brunner* is without textual foundation." *Bronsdon* v. *Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 798-800 (2010) (citation and quotation marks omitted). Other judges agree and have called for *Brunner* to be rejected in favor of considering "all the relevant facts and circumstances on a case-by-case basis." *Roth* v. *Educ. Credit Mgmt. Corp.*, 490 B.R. 908, 920, 923 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring). Even judges in the Seventh Circuit, from which this case arises, acknowledge that "'certainty of hopelessness' * * * sounds more restrictive than the statutory 'undue hardship.'" *Krieger* v. *Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 885 (2013) (Easterbrook, J.).

Legal scholars likewise recognize the significant differences between the two tests. The "totality" test is "more flexible and often more beneficial to the debtor." Adam J. Williams, Note, *Fixing the "Undue Hardship" Hardship: Solutions For The Problem of Discharging Educational Loans Through Bankruptcy*, 70 U. Pitt. L. Rev. 217, 228 (2008). Indeed, "[t]he two tests * * * often produce different results" because of the compulsory-checklist nature of the *Brunner* test. Kurtis K. Wiard, Comment, *Brunner's Folly: The Road to*

Discharging Student Loans Is Paved with Unfounded Optimism [Buckland v. Educ. Credit Mgmt. Corp. (In re Buckland), 424 B.R. 883 (Bankr. D. Kan. 2010)], 52 Washburn L.J. 357, 373 (2013). As these scholars recognize, in many cases the *Brunner* test results in no discharge where "the likelihood of discharge would have been vastly improved" in a "totality" jurisdiction. Adam Schlusselberg, Case Comment, *In re Davis*, 53 N.Y.L. Sch. L. Rev. 639 (2008/2009).

Respondent has itself previously argued in a petition filed with this Court that there is a "gross inconsistency" under which "[s]ome debtors who are able to repay their student-loan debt may be discharged in the Eighth Circuit when similarly situated debtors elsewhere will not be." Pet. at 15, *Reynolds, supra* (Apr. 26, 2006). Just two months ago, respondent urged the First Circuit to "bring some consistency to the undue hardship standard" by adopting "the *Brunner* test as so many of its sister circuits have already done." Educ. Credit Mgmt. Corp. Supp. C.A. Br. at 28, *Murphy*, *supra* (Oct. 25, 2015). Respondent's about-face in its Opposition, in order to preserve in the majority of circuits a standard that is virtually insurmountable for debtors, should not obscure the genuine conflict that only this Court can resolve.

2. Even if the Court adopts a version of the *Brunner* test, review is warranted to reconcile substantial disagreement about how to apply that test. The recent oral argument in *Murphy* exemplifies the absence of a uniform test. The First Circuit panel repeatedly expressed frustration with the differing formulations, noting, for example, that "truly exceptional circumstances" (a standard sometimes used in the First

Circuit) and "certainty of hopelessness" are "very far apart." Oral Arg. at 17:59, *Murphy*, *supra* (Dec. 10, 2015) (Lynch, J.).[1]

In this case, the Seventh Circuit further entrenched the split by adopting a per se rule requiring past payments on the student loan debt at issue as a necessary predicate to satisfying the past good faith element of *Brunner*. Pet. App. 8a-9a. While respondent seeks to minimize the disagreement (Opp. 13-14), the Seventh Circuit expressly held that "the question of good faith under *Brunner* necessarily implicates the debtor's past efforts to pay down the debt at issue." Pet App. 8a (citing *Krieger*, 713 F.3d at 884). To emphasize the point, the court of appeals deemed petitioner's repayment of *other* student loan debt, such as to Florida Coastal Law School (to secure his diploma and transcript), irrelevant to *Brunner*'s "good faith" inquiry. *Id.* at 8a-9a. This placed petitioner in a catch-22: he paid off one student loan debt entirely to obtain credentials necessary to apply to the bar (and improve his income), but was told that doing so, without paying *other* student loans, barred any discharge. In so holding, the Seventh Circuit created a direct conflict with the Tenth and Eleventh Circuits, which have expressly held that "failure to make a payment, standing alone, does not establish a lack of good faith." *Educ. Credit Mgmt. Corp.* v. *Polleys*, 356 F.3d 1302, 1311 (10th Cir.

[1] The day after oral argument, the First Circuit referred *Murphy* to mediation, raising the prospect that these issues will remain unresolved in the First Circuit for the foreseeable future. See Order (Dec. 11, 2015).

2004); see also *Educ. Credit Mgmt. Corp.* v. *Mosley (In re Mosley)*, 494 F.3d 1320, 1327 (11th Cir. 2007).

Petitioner's case also presents the other primary intra-*Brunner*-circuit conflict because the Seventh Circuit has adopted a particularly stringent form of *Brunner*'s "future hardship" element, requiring a debtor to show a "certainty of hopelessness." Pet. App. 5a. Other courts applying *Brunner* have expressly *rejected* requiring a "certainty of hopelessness." See *Educ. Credit Mgmt. Corp.* v. *Mason (In re Mason)*, 464 F.3d 878, 882-883 (9th Cir. 2006); *Polleys*, 356 F.3d at 1310 (Tenth Circuit). The Tenth Circuit, instead, calls for taking a "realistic look" at a debtor's future situation. *Polleys*, 356 F.3d at 1310. The United States has also criticized the "certainty of hopelessness" standard; while urging the First Circuit to adopt *Brunner*, the United States acknowledged that "certainty of hopelessness" interjects an unwarranted "element of existential despair." Oral Arg. at 35:49, *Murphy*, *supra*.

Notably, in attempting to minimize the discrepancies between the *Brunner* and totality tests (Opp. 10), respondent cites not the Seventh Circuit rule applied in petitioner's case, but the articulation of the Tenth Circuit, which has rejected the Seventh Circuit's test as to both the future hardship and past good faith prongs. Only this Court can resolve these longstanding conflicts.

II. These Differences Are Often Outcome-Determinative, Including In This Case

The differences between these tests identified above are not mere window dressing; they are substantive and frequently outcome-dispositive, including in this case. As respondent itself wrote in 2006: "similarly

situated debtors" in totality-of-the-circumstances jurisdictions may be granted discharge where debtors in *Brunner* jurisdictions are not. Pet. at 15, *Reynolds*, *supra*. That is true in petitioner's case as well.

1. As petitioner has already shown (Pet. 28-32), analogous cases from totality-of-the-circumstances jurisdictions demonstrate that petitioner would likely have received a discharge under that test. See *Reynolds*, 425 F.3d 526; *Bronsdon*, 435 B.R. 791; *Monroe* v. *Dep't of Educ. (In re Monroe)*, Nos. 13-BK-71026, 14-AP-7030 (Bankr. W.D. Ark. Sept. 23, 2015), slip op. Respondent's attempts to distinguish those cases miss the mark; indeed, in many ways, respondent faces a greater degree of hardship than the debtors in *Reynolds*, *Bronsdon*, and *Monroe*.

For example, respondent's attempt (Opp. 15) to distinguish *Bronsdon* is unavailing. The similarities between petitioner and Ms. Bronsdon—both applied to law school late in life, took out student debt, failed the bar multiple times, subsisted on social security payments, and lived with a parent, 435 B.R. at 794—are so overwhelming that the different results can only be explained by the Seventh Circuit's adoption of a mandatory past good faith element and a per se rule precluding discharge absent payments against the debt in question. If anything, the fact that petitioner had a history of alcohol addiction and depression as well as a criminal record and faces three times the debt of Ms. Bronsdon, suggests petitioner would have been *more likely* than Ms. Bronsdon to obtain a discharge in a totality jurisdiction. See also *Reynolds*, 425 F.3d at 528 (debtor had annual household income of $59,000, had passed the bar, and had half the debt of petitioner); *Monroe*, slip op. 2-3

(debtor with secure employment and only $56,010.68 in loan debt). The critical difference between the outcomes of petitioner and these debtors was differing jurisdictions, not their circumstances.

2. Respondent (Opp. 11-12, 17) cites cases in which debtors were *denied* discharges under the totality-of-the-circumstances test as evidence that petitioner would also have lost under that standard, but petitioner's situation presents a far greater hardship than the situations of those debtors.

Respondent relies most heavily on *Educational Credit Management Corp.* v. *Jesperson*, 571 F.3d 775 (8th Cir. 2009), a 2-1 decision reversing a bankruptcy court grant of an undue hardship discharge. The *Jesperson* debtor was substantially younger than petitioner (43 years old versus 56 at trial), passed the bar exam on the first attempt instead of failing repeatedly,[2] was in "good health" without any physical or mental impairments, and had a legal job where he earned $4,000 a month, giving him a surplus of "approximately $900 per month" to repay his loans. *Id.* at 779-780. In this case, petitioner had *no* surplus for loan repayment. Pet. App. 4a.

The other three cases respondent cites to show that petitioner would have been denied discharge under the totality-of-the-circumstances test also differ mark-

[2] Respondent simply asserts, with no authority, that petitioner "has not tried" to pass the bar exam since failing a second time. Opp. 5 n.3. If the Court is going to look beyond the bankruptcy court record, it should be aware that petitioner failed the Wisconsin bar twice more, in February and July 2015.

edly from this case. Petitioner bears no real resemblance to the debtor in *Shadwick* v. *Department of Education (In re Shadwick)*, who was 28 years old, secured a legal job directly from law school earning $36,000 a year, had no history of mental health challenges, and filed for a discharge "almost immediately after graduation and failing the bar exam" the single time he took it. 341 B.R. 6, 9-14 (Bankr. W.D. Mo. 2006).

Loftus v. *Sallie Mae Servicing (In re Loftus)* likewise involved a substantially younger debtor with greater financial resources than petitioner, including $100 to $400 of monthly disposable income from which to repay student loans. 371 B.R. 402, 410-411 (Bankr. N.D. Iowa 2007). And, similarly, the debtor in *Tyer* v. *SLM Corp. (In re Tyer)* had substantial financial resources that petitioner lacks: she earned $37,500 annually in a steady position and had $50,000 in retirement savings. 384 B.R. 230, 232, 234 (Bankr. N.D. Iowa 2008).

Respondent's attempt to elide the differences between petitioner's situation and those above simply reflects respondent's desire for a test in which individual circumstances are irrelevant and debtors face almost uniform denial of discharge.

3. Finally, it is telling that respondent relies on its own characterization of the *bankruptcy court*'s decision instead of the *Seventh Circuit*'s opinion to suggest that the difference in standards was not outcome-determinative. The Seventh Circuit's opinion, which is the judgment this Court reviews, makes clear that the court expressly relied on the "certainty of hopelessness" standard and a requirement of past payments

against the debt in issue to demonstrate past good faith. Pet. App. 5a, 8a-9a. These were independent grounds for the Seventh Circuit to deny petitioner a discharge. *Id.* at 4a.

Despite respondent's self-serving attempt to predict the outcome under a test not applied by the bankruptcy court or Seventh Circuit, that question can only be resolved on remand.[3] Indeed, if this Court rejects the Seventh Circuit's strict version of *Brunner*, the appropriate course would be to remand to the lower courts to develop the record and "apply [the new standard] in the first instance." *Johnson* v. *California*, 543 U.S. 499, 515 (2005). Under the totality-of-the-circumstances test, petitioner's preparation would have been entirely different; he would have offered additional evidence responsive to the broader list of relevant factors. See *Jesperson*, 571 F.3d at 783-784 (Smith, J., concurring) (collecting list of nine additional factors). It is also impossible to predict how a bankruptcy court might have balanced the *entire* picture of petitioner's situation if permitted to consider all relevant factors instead of hewing to *Brunner*'s rigid mandate. For example, petitioner's payments to Florida Coastal School of Law, made to obtain a diploma that was essential for obtaining employment, would have been weighed differently.

---

[3] Respondent (Opp. 14-15) over-reads an alternative finding made by the bankruptcy court. The "lesser standard" that petitioner did not satisfy was an undefined milder formulation of "certainty of hopelessness" (the Seventh Circuit's second element of the *Brunner* test), not the totality-of-the-circumstances test. Pet. App. 24a.

III. This Case Could Be The Last Available Vehicle To Resolve A Critical Circuit Split, As Almost Every Circuit Has Ruled

"[T]he confusion surrounding undue hardship" is ready for this Court's review. See *Bronsdon*, 435 B.R. at 806 (Haines, J., concurring). The Federal Circuit does not hear bankruptcy appeals, and the D.C. Circuit hears very few; every other circuit court has ruled—except the First Circuit, which just decided to refer a case presenting the issue to mediation, making it likely to evade this Court's review.

Another suitable vehicle is unlikely to present itself. In many circuits applying stringent versions of the *Brunner* test, pro se debtors face certain loss in the lower courts and lack resources to pursue several layers of futile appeals for the chance to seek this Court's discretionary review. For their part, creditors have little incentive at this point to seek review of adverse decisions from the Eighth Circuit, in light of the fact that they have now obtained acceptance of *Brunner*'s harsh standard in most other jurisdictions.

Without this Court's review, a circuit split over perhaps the most important consumer bankruptcy issue of our day may go unresolved. As the ongoing national discussion proves, the problem of expanding student loan debt is not going away: "the total amount of outstanding [student loan] debt continues to increase, because many borrowers are not paying back their older loans." Kevin Carey, *Student Debt in America: Lend With a Smile, Collect With a Fist*, N.Y. Times, Nov. 27, 2015, http://www.nytimes.com/2015/11/29/upshot/student-debt-in-america-lend-with-a-smile-collect-with-a-fist.html. With $1.2 trillion in student loan debt

currently outstanding and roughly one in seven debtors defaulting within three years of beginning repayment as of September 2013, see Gov't C.A. Amicus Br. at 1, *Murphy*, *supra*, this Court's guidance is necessary to ensure uniformity across all of the country's bankruptcy courts as debtors seek relief from their debts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
JAMES M. WILTON
D. ROSS MARTIN
JONATHAN R. FERENCE-BURKE
MARTHA E. MARTIR
JOHN T. DEY
ROPES & GRAY LLP

Counsel for Petitioner

DECEMBER 2015