Case No. 7:20-cv-00688-PMH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re:<br>KEVIN JARED ROSENBERG,<br>*Debtor*. | Bankr. Case No. 18-35379-cgm<br>Adv. Pro. No. 18-09023-cgm |
| KEVIN JARED ROSENBERG,<br>*Plaintiff-Appellee*,<br>v.<br>EDUCATIONAL CREDIT MANAGEMENT CORP.,<br>*Defendant-Appellant*. | On Appeal from Order Granting Summary Judgment and Discharging Debtor's Student Loan Under 11 U.S.C. § 523(a)(8) entered on January 24, 2020, by the Hon. Cecelia G. Morris, Chief U.S.B.J. |

# BRIEF FOR THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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## INTEREST OF AMICUS CURIAE

The New York State Department of Financial Services (NYDFS), an executive agency of New York State government, is the regulator of the insurance, banking, and financial services industries in New York. In 2011, the N.Y. Financial Services Law created NYDFS by consolidating the State's Banking and Insurance Departments, and imposed mandates on the new agency to, *inter alia*: promote the prudent and continued availability of affordable credit to New York citizens, businesses, and consumers; promote, advance, and spur economic development and job creation in New York; protect the public interest with respect to banking, insurance, and financial services; and protect consumers from financial fraud.

In addition to these broad mandates, NYDFS has specific supervisory authority over various aspects of the student loan industry. In 2019, the New York State Legislature enacted the Student Loan Servicing Act, which requires student loan servicers in New York to be licensed by NYDFS, and established new protections for student loan borrowers and co-signors, to be enforced by NYDFS. *See* L. 2019, ch. 58, pt. L, § 1 (codified at N.Y. Banking Law art. 14-a). NYDFS additionally has brought administrative enforcement proceedings brought administrative enforcement actions against student loan servicers for engaging in deceptive practices.

NYDFS has a strong interest in ensuring that the courts' application of the statutory "undue hardship" test in 11 U.S.C. § 523(a)(8) is based on an accurate understanding of the significant burdens faced by student loan borrowers. NYDFS has a distinct perspective on this issue, as the agency's work touches on various aspects of student loans as financial obligations—e.g., origination, servicing, and debt collection—and on the impact of debt burdens on borrowers, due to its responsibility to protect student loan borrowers and its broader mandates to promote access to affordable credit and spur economic development. NYDFS thus offers its multifaceted perspective on the student loan borrower experience to assist this Court in determining the circumstances under which student loan debt should be discharged under § 523(a)(8).

NYDFS files this *amicus curiae* brief as of right pursuant to Federal Rule of Bankruptcy Procedure 8017(a)(2), which this Court's individual rules incorporate for bankruptcy appeals.

## SUMMARY OF ARGUMENT

At issue here is the proper interpretation and application of the statutory "undue hardship" test for discharging student loans in accordance with 11 U.S.C. § 523(a)(8). That statute provides that student loans are excepted from discharge in bankruptcy "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor."

The Second Circuit first articulated the test for "undue hardship" more than two decades ago in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987) (per curiam). Since that time, there have been significant changes in both the legal regime and the practical experience of student loan debt that should inform any application of the undue hardship test. The bankruptcy court here appropriately took account of these changes in applying the *Brunner* test, and its ruling should accordingly be affirmed.

Specifically, student loan debt has vastly increased over the last thirty years, and has become much more burdensome for many borrowers, leading to a nationwide crisis in student debt. This debt has significant indirect impacts on personal and professional financial activities, such as making it more difficult for borrowers to access the everyday consumer credit that is often necessary for maintaining a basic standard of living and imposing a barrier to accessing loans for homeownership or small business development. Repayment plans based on a borrower's income do not offer the same "fresh start" as bankruptcy discharges for eligible borrowers and can exacerbate hardships for these borrowers, which are magnified by these programs' administrative hurdles; these characteristics weigh against factoring the mere availability of such plans into discharge determinations to the extent courts have done and Appellant ECMC advocates. Finally, bankruptcy filings data suggest that student loan borrowers do not opportunistically file for bankruptcy, contrary to Appellant ECMC's argument that a more realistic assessment of student loan borrowers' hardships under 11 U.S.C. § 523(a)(8) will create a hazard of abuse. These factors, together with changes in the law in the years since the *Brunner* test was announced, and the current student loan debt crisis in the country and in New York, all support the understanding of the *Brunner* test adopted by the bankruptcy court in this case.

## ARGUMENT

### I. ANY APPLICATION OF THE UNDUE HARDSHIP TEST MUST TAKE INTO ACCOUNT DRAMATIC CHANGES IN STUDENT LOAN DEBT IN THE DECADES SINCE THE *BRUNNER* TEST WAS ARTICULATED.

When the Second Circuit first articulated the three-prong undue hardship test in *Brunner* more than three decades ago, student loans bore little resemblance to what they are today. The amount of student loan debt incurred by borrowers was significantly lower than is typically the case today; the debtor in *Brunner*, for example, had only "approximately $9,000 in [undergraduate and graduate] student loans," *In re Brunner*, 46 B.R. 752, 753 (S.D.N.Y. 1985). *See* Mem. Dec. & Order Granting Summ. J. at 6 n.3. Moreover, the law of bankruptcy treated student loans differently then: as the bankruptcy court correctly noted, the law at the time presumptively excepted student loans from bankruptcy discharge for only five years—not indefinitely, as under current law. *See* Education Amendments of 1976, Pub. L. No. 94-482, § 127, 90 Stat. 2081, 2141.

The state of student loans has dramatically changed over the last thirty years. There is a nationwide student loan debt crisis in the United States that harms both individual households and state and local economies. Student loan debt has become the highest household consumer debt after mortgages, greater than auto loans and credit card debt. Fed. Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit: 2020Q1*, at 3 (May 2020) (internet).[1] In 2020, student loan debt represents over 10 percent of all household debt, up from only 3 percent in 2004. *See id.* From the fourth quarter of 2019 to the first quarter of 2020, outstanding student loan debt rose $27 billion to $1.54 trillion. *Id.* at i. In New York State, approximately 2.4 million borrowers owe approximately $90 million in federal student loan debt alone. *See* U.S. Dep't of Educ., Federal Student Loan Portfolio by Borrower Location (as of Mar. 31, 2020) (internet).

Student loan debt has risen in part because of the rising cost of education. Adjusting for inflation, between the 2006–07 and 2016–17 academic years, the price for undergraduate tuition, fees, room, and board increased 31 percent at public institutions and 24 percent at private institutions (in 2016–17 dollars). Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Digest of Education Statistics: 2018, tbl. 330.10 (average undergraduate tuition and fees and room and board rates) (internet).

[1] For authorities available on the internet, URLs appear in the table of authorities. All websites were last accessed on July 3, 2020.

A decline in public funding for higher education—per capita funding in 2015 was 15.3 percent lower than in 2008, and 20 percent below its 1990 level—means the costs of education are more heavily borne by students. State Higher Educ. Exec. Officers Ass'n, *State Higher Education Finance: FY 2015*, at 21 (2016) (internet)

Increased enrollments have also contributed to the growth of total outstanding debt. The premise of the federal student loan program is to expand access to education. Indeed, an expansion in college enrollment accounted for approximately one quarter of the growth in student loans from 1989 to 2018. Judith Scott-Clayton, *The Looming Student Loan Default Crisis is Worse than We Thought* 3 (Econ. Studies at Brookings, Evidence Speaks Reps., Vol. 2, No. 34, Jan. 10, 2018) (internet).

While the amount of student loan debt and tuition have risen dramatically, overall wages have mostly stagnated. *Compare* U.S. Bureau of Labor Statistics, *Real Earnings News Release, January 2020* (Feb. 13, 2020) (real average hourly earnings at $10.99), *with* U.S. Bureau of Labor Statistics, *Real Earnings News Release, January 2010* (Feb. 19, 2010) (real average hourly earnings at $10.32) (internet).

Together, these factors have had the practical effect, over time, of making student loan debt far more burdensome for most borrowers. *See* Andrew F. Haughwout et al., Fed. Reserve Bank of N.Y., Staff Rep. No. 882, *Trends in Household Debt and Credit* 28-29 (Mar. 2019) (internet). This burden is reflected in drops in repayment rates and increases in default rates. *See*, *e.g.*, Jennie H. Woo et al., Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Repayment of Student Loans as of 2015 Among 1995–96 and 2003–04 First-Time Beginning Students* 16 (Oct. 2017) (internet) (documenting increased rates of default within twelve years of entering repayment by first-time postsecondary students who began in 2003–04 relative to those who began in 1995–96). For these reasons—increased enrollment, borrowing, and defaults—the State has an interest in ensuring that its residents struggling with student loan debt can receive appropriate relief in bankruptcy proceedings.

The bankruptcy court here was right to recognize that the *Brunner* test should take into account these changed circumstances—particularly for its first and second factors, namely whether the debtor is able to maintain a minimal standard of living and whether any inability to do so is likely to persist. *Brunner*, 831 F.2d at 396. As courts have recognized, these factors require that "a realistic look must be made into debtor's circumstances and the debtor's ability to provide for adequate shelter, nutrition, health care, and the like." *Educational Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1310 (10th Cir. 2004). The significantly more onerous burden of student loans as they are today has limited borrowers' life choices and stunted their productivity far more than was typically the case when *Brunner* was decided. It would make little sense for the *Brunner* test to apply as strictly to prohibit discharges of student loans today, when by any measure the hardships imposed by such debt have drastically increased and when the test was articulated in the specific context of only five years of presumptive nondischargeability.

## II. In Determining Whether Nondischarge Poses an Undue Hardship, the Court Should Account for the Indirect Ways in Which Debt Harms Borrowers.

The outsized burden of student loan debt also has collateral consequences for borrowers that should be considered in any application of the *Brunner* test. When student loan borrowers struggle to afford their debts and are unable to discharge them, they experience not only the prolonged effects of the loans' direct costs, but also the subtler and significant drag that these obligations have on their ability to access financing for homeownership, entrepreneurship, or other means of securing their economic futures. These harms were previously much less severe given the smaller amounts of student loans and their dischargeability in bankruptcy after only a few years. A modern undue hardship analysis should take into account the reality of student loans today, including the direct and indirect costs these loans impose on struggling borrowers if they are not discharged.

### A. Student loan debt has significant indirect impacts on borrowers' personal and financial activities.

For borrowers struggling to pay their student loans, the true cost of their debt extends beyond an unaffordable monthly payment; outstanding student loan debt is an obstacle for borrowers seeking access to affordable forms of other credit. Credit is a wealth-building tool. *See*, *e.g.*, William Elliot et al., *Is Student Debt Compromising Homeownership as a Wealth-Building Tool?* 6 (Wash. Univ. Ctr. for Soc. Dev. Working Paper No. 13-33, 2013) ("most young adults must use credit as the key mechanism for smoothing consumption when purchasing wealth-building assets such as a home"). However, outstanding student loan debt can raise the cost of credit for borrowers or altogether prevent them from being approved for credit.

One recent study of consumer credit report data provided by Experian analyzed the impact of student loan debt on the cost of other financial products. *See* Student Borrower Prot. Ctr. & Credit Builders All., *Data Point: The Secret Price of Student Debt* 3 (May 2020) (internet). Comparing credit-reporting data for consumers with similar levels of mortgage, auto, and credit card debt but with varying levels of student loan debt revealed that borrowers with high levels of student loan debt, defined as monthly student loan debt-to-income (DTI) ratios of greater than 10 percent, pay $29,066 more for a typical bundle of other consumer credit products during those loans' terms than similarly situated borrowers with only baseline levels of student debt stress, defined as a student loan DTI ratio of less than 5 percent. *Id*. at 12.

In addition to higher DTI ratios, consumers with student loan debt may encounter barriers to accessing credit markets or increased cost of credit due to lower credit scores attributable to their outstanding student loans. *See* Meta Brown & Sydnee Caldwell, Liberty St. Econs., Fed. Reserve Bank of N.Y., *Young Student Loan Borrowers Retreat from Housing and Auto Markets* (Apr. 17, 2013) (internet) (observing that consumers at ages 25 and 30 without student loan debt have higher credit scores than those with student loans, and proposing consumers with student debt have limited access to housing and auto debt); Emily Starbuck Gerson, Experian, *Why Do Higher Credit Scores Mean Better Interest Rates?* (Mar. 5, 2020) (internet) (lower credit scores tend to result in higher interest rates, thereby increasing the cost of credit). Student loan borrowers' generally lower credit scores are in turn attributable in part to high rates of student loan delinquency. Kelly D. Edminston et al., Fed. Reserve Bank of Kan., Cmty. Dev. Working Paper No. 12-05, *Student Loans: Overviews and Issues* 13 (rev. Apr. 2013) (internet); *cf. my*FICO, *What's in my FICO® Scores?* (internet) (at 35 percent, payment history is the largest type of credit data used to calculate credit scores). Student loans now become delinquent at greater rates than credit card debt, auto loans, and mortgages. *See Quarterly Report on Household Debt and Credit: 2020Q1*, *supra*, at 12-14. But although borrowers experience delinquency more readily with student loans, they nonetheless face greater barriers to relief from these burdens in bankruptcy.

### B. Student loan debt impedes borrowers' access to wealth-building tools such as homeownership and business development.

Borrowers incur student loan debt to pursue one pillar of American economic mobility—education. Unfortunately, the burdens imposed by such debt tend to create obstacles to two other classic means of wealth creation and economic security: homeownership and business development.[2]

Economists at the Federal Reserve Bank of Boston found that "individuals with student loan debt are 12 percentage points less likely to own a home than those without student loan debt," and that "the relationship between student loan debt and homeownership is relatively invariant to the length of time someone has been out of school." Daniel Cooper & J. Christina Wang, Fed. Reserve Bank of Bos., Current Pol'y Perspectives No. 14-7, *Student Loan Debt and Economic Outcomes* 19 (Oct. 2014) (internet). As the amount of consumers' student loan debt increases, homeownership rates decrease. S*ee* Alvaro Mezza et al., Divs. of Research & Statistics and Monetary Affairs, Fed. Reserve Bd., Fin. & Econs. Discussion Series

[2] Although high student loan debt may suggest high income through advanced educational attainment, outstanding balances still impact borrowers' behaviors and creditworthiness. Uncertainty about future income and lenders' underwriting restrictions can prevent entry into the housing market for borrowers with large debt loads, particularly during times of economic fluctuation. *See* Meta Brown et al., Fed. Reserve Bank of N.Y., Staff Rep. No. 668, *Measuring Student Debt and Its Performance* 15-16 (Apr. 2014) (internet).

No. 2016-010, *On the Effect of Student Loans on Access to Homeownership* (2016) (internet) (finding a 10 percent rise in student loan debt reduces the homeownership rate of borrowers by one to two percentage points in the first five years after leaving school).

Student loan debt can also inhibit borrowers from developing new small businesses or engaging in entrepreneurship. One study by the Philadelphia Federal Reserve Bank found that student loan debt has a negative impact on the creation of small businesses. *See* Brent W. Ambrose et al., Fed. Reserve Bank of Phila., Working Paper No. 15-26, *The Impact of Student Loan Debt on Small Business Formation* (July 2015) (internet). The study suggested that this impact is in part because small business entrepreneurs with fewer than ten employees often rely on personal credit to finance business start-ups, and that student debt is unique relative to other types of debt in affecting access to credit in this way. *Id*. at pdf pgs. 6, 15. *See* Brandon Busteed, *Student Loan Debt: Major Barrier to Entrepreneurship*, Gallup Bus. J. (Oct. 14, 2015) (internet) (poll of U.S. college graduates between 2005 and 2015 found 19 percent report delaying starting a business due to student loan debt; the percentage rises to 25 percent for graduates with over $25,000 in debt upon graduation).

Any drag on business development attributable to student loans is of significant interest to the State of New York, beyond its commitment to supporting individual borrowers. Small businesses—firms under 100 employees—make up 98 percent of all businesses and 54 percent of all employment in the State. N.Y. Empire State Dev., *Annual Report on the State of Small Businesses*–2019, at 1 (internet). Sixty percent of these small businesses have five or fewer employees. *Id*. at 3.

The undue hardship test should account for these significant and long-term hardships on student loan borrowers. These harms are significant even though they take the form of forgone opportunities, rather than direct reductions to borrowers' welfare. Student loan borrowers are harmed when they lose opportunities that are available to others not saddled with the tens or even hundreds of thousands of dollars in student loan debt that are the unfortunate reality for so many Americans today. And the hardships imposed by such borrowers' inability to access affordable credit and engage in the local economy not only are felt concretely, but also have long-term and persistent effects on borrowers and their families. These hardships are particularly significant for borrowers struggling to manage their debts and who have consequently sought relief in bankruptcy. The *Brunner* test should not be blind to these realities.

## III. INCOME-BASED REPAYMENT PLANS DO NOT NECESSARILY MITIGATE THE BURDEN OF NONDISCHARGE FOR STUDENT LOAN BORROWERS AND THEIR MERE AVAILABILITY SHOULD NOT PRECLUDE DISCHARGE UNDER 11 U.S.C. § 523(A)(8).

The mere availability of income-based repayment plans[3] should not preclude discharge of student loans in bankruptcy under 11 U.S.C. § 523(a)(8). The benefits of these programs often do not meet the needs of a bankruptcy-eligible borrower. Consumer Fin. Prot. Bureau, *Data Point: Borrower Experiences on Income-Driven Repayment* 45 (Nov. 2019) (internet) (concluding that although income-based repayment plan enrollment "helps many borrowers manage their student loans and other debt, there is a sizable population who appear to continue to struggle despite [repayment plan] availability"). And documented errors and fraud in the administration of these plans increase the risk of hardship for borrowers who are already in extreme financial circumstances.

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[3] The federal government provides eligible federal loan borrowers a variety of repayment plans that set monthly payments equal to a percentage of earned income and discharge any remaining loan balance after twenty or twenty-five years depending on the program. *See* Fed. Student Aid, U.S. Dep't of Educ., *Income-Driven Repayment (IDR) Plan Request* (internet) (describing various federal student loan repayment plans). Although the details of each plan differ, for the purpose of this brief, these programs are collectively referred to as "income-based repayment plans."

### A. Income-based repayment plans differ substantially from discharge and, for struggling borrowers in need of bankruptcy discharge, are unlikely to mitigate, and may exacerbate, hardship caused by nondischarge.

Income-based repayment plans do not offer the same "fresh start" as a discharge in bankruptcy, despite their potential for short-term reduced payments and promise of eventual relief for borrowers in other circumstances. *Compare* 15 U.S.C. § 1681c(a)(1) (credit reports may not contain information related to a bankruptcy after ten years), *with* 34 C.F.R. § 685.221(f) (the "income-based repayment" plan provides for loan discharge after either 20 or 25 years, depending on the date of origination). Such plans thus cannot fully substitute for the benefits that bankruptcy discharge provides to eligible borrowers.

A borrower on an income-based repayment plan can experience negative amortization: because reduced payments may not cover the entire monthly payment, and may not even cover the monthly interest charged, the loan balance increases instead of decreasing, even with no missed payments. Consumer Fin. Prot. Bureau, *What Is Negative Amortization?* (Sept. 25, 2017) (internet). The practical effect of negative amortization is that, even though monthly payments are reduced, overall debt increases. The growth of these outstanding debts only magnifies the barriers that student loan debt imposes on borrowers' access to affordable forms of other credit. *See supra* § II.

Additionally, unlike discharges of loans in bankruptcy, which are not taxable events, 26 U.S.C. § 108(a)(1)(A), discharges of loans at the conclusion of the term of an income-based repayment plan generally are taxable. Were a borrower to recertify her repayment plan annually and make payments for the twenty or twenty-five years necessary to obtain ultimate discharge, taxation on the discharge of her outstanding debt—which will have ballooned due to negative amortization—will impose an additional burden that a bankruptcy debtor would not face. 26 U.S.C. § 61(a)(12) (gross income includes income from discharge of indebtedness).

Finally, there is no indication that Congress intended for income-based repayment plans to serve as alternatives to bankruptcy discharge. The undue hardship standard predates the first of these plans by more than a decade, and as Congress has introduced new and additional plans over the years, it has not amended the Bankruptcy Code to replace the undue hardship standard with an even stricter standard that would invariably channel borrowers to income-based repayment plans rather than bankruptcy discharge. Moreover, once a borrower makes the good-faith decision to file for bankruptcy, the time for repayment alternatives has generally passed. These relief mechanisms are thus complementary, not mutually exclusive.

### B. Income-based repayment plans have suffered from administrative complexity as well as servicer errors and fraud, undermining their usefulness to borrowers in extreme need.

For many borrowers, there may also be practical impediments to accessing income-based repayment plans, even when they are technically available. Absent additional and concrete information about the borrower's expected future circumstances, the mere availability of income-based repayment should not foreclose a student loan borrower's access to bankruptcy discharge to provide a "fresh start."

One such practical impediment is the administrative complexity of many income-based repayment plans. Despite its simple premise, income-based repayment is not straightforward. Once enrolled, borrowers must recertify their eligibility annually to maintain their reduced payments and to progress toward debt forgiveness. Borrowers who fail to recertify correctly will be returned to the standard repayment plan, regardless of whether they can afford it. And servicers themselves sometimes mishandle the recertification process, ranging from misinformation to delays to lost benefits. *See* Consumer Fin. Prot. Bureau, *Annual Report of the CFPB Student Loan Ombudsman* 11-17 (Oct. 2015) (internet); Consumer Fin. Prot. Bureau, *Midyear Update On Student Loan Complaints: Income-Driven Repayment Plan Application Issues* 12-14 (Aug. 2016) (internet). These complaints are borne out by the data. U.S. Dep't of Educ., Sample Data on IDR Recertification Rates for ED-

Held Loans (internet) (based on November 2014 surveys, 56.71 percent of borrowers did not recertify on time, 31.17 percent of whom went into hardship-related forbearance or deferment). In practical terms, enrolling and staying enrolled in these plans is itself a barrier to financial stability for bankruptcy-eligible borrowers, particularly when compared to the immediate "fresh start" offered by discharge.

Even worse, income-based repayment plans have been the subject of outright fraud and abuse by servicers. The State has actively sought to eliminate these problems. For example, NYDFS and the New York Attorney General's Office recently entered into a consent order with a major student loan servicer for illegally directing borrowers into costly forbearances instead of more beneficial income-based repayment plans. *See* Press Release, N.Y. Dep't of Fin. Servs., *DFS Superintendent Vullo and A.G. James Announce $9 Million Settlement with Conduent Education Services, LLC for Engaging in Illegal Practices While Servicing Loans*, (Jan. 4, 2019) (internet); *see also* Press Release, N.Y. Att'y Gen, *AG James Sues Student Loan Servicer for Mismanaging Loan Forgiveness Program* (Oct. 3, 2019) (internet) (discussing lawsuit against student loan servicer for, *inter alia*, its administration of income-based repayment plans, including failing to process applications in a timely manner).

Courts have not taken into account these practical problems with income-based repayment plans in holding that the mere availability of these plans weighs against student loan borrowers under the *Brunner* test. *See* ECMC Br. 35 (collecting cases). This Court should not perpetuate that error. When a borrower avails herself of the bankruptcy process to have her student loans discharged, courts must account for both the substantive differences between bankruptcy's "fresh start" and income-based repayment plans' prolonged alternative, as well as the practical problems with income-based repayment plans described above.

## IV. FILING BANKRUPTCY IS AN IMPORTANT AND REASONED DECISION FOR BORROWERS SEEKING A "FRESH START."

Appellant ECMC suggests that accounting for the present-day reality of student loans in applying the *Brunner* test will allow borrowers to abuse bankruptcy and evade their responsibility to repay their debt. *See* ECMC Br. 12 (discussing concerns that students might "borrow recklessly and excessively from taxpayers, default on that loan, and then simply walk away"). But a debtor's decision to seek discharge is generally a difficult and considered one, not one of opportunity, and is taken as a last resort. Bankruptcy's ability to provide a "fresh start" for such debtors is the very reason for this procedure's existence—not a reason to withhold that benefit. U.S. Bankr. Ct. S.D.N.Y., *Understanding Bankruptcy* (internet) (describing "fresh start" as a primary purpose of bankruptcy).

In a review of court data and interviews about whether, when, and how consumers file for bankruptcy relief, Professor Pamela Foohey discusses the drawnout decision-making consumers undertake that results in "an 'internal reckoning' about the severity of their financial situation," and dispels misconceptions about filings as "bankruptcies of convenience." Pamela Foohey, *Access to Consumer Bankruptcy*, 34 Emory Bankr. Developments J. 341, 348-49 (2018) (internet). Consumers do not jump to file bankruptcy at the first sign of hardship. Nor do consumers opportunistically file to evade repayment. Rather, "most people turn to bankruptcy for help after experiencing shocks to income or expenses, with job loss, divorce, and medical expenses underlying the vast majority of filings." Pamela Foohey, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B. C. L. Rev. 2297, 2309 (2019).

Student loan borrowers are no different. After a 2005 amendment to the Bankruptcy Code that applied the undue hardship standard to discharge of private student loans, researchers found that, like other debtors, student loan borrowers do not opportunistically seek discharge. *See* Rajeev Darolia & Dubravka Ritter, Fed. Reserve Bank of Phila., Working Paper No. 15-17/R, *Do Student Loan Borrowers Opportunistically Default? Evidence From Bankruptcy Reform* (Sept. 2015) (internet). Instead of finding a decrease in filings after 2005, when more loans were subject to the higher undue hardship standard, borrowers' bankruptcy filings and default behavior did not change relative to federal student loan borrowers and to those without loans. *Id.* at 29. This suggests that before the 2005 amendments made discharge of loans more difficult, borrowers were not opportunistically seeking to discharge their loans.[4] *See id.* at 3 ("[W]e continue to find little evidence that would support concerns about widespread opportunistic filing behavior among student loan debtors prior to the policy.").

Nor is filing bankruptcy simple. The 2005 amendment to the Bankruptcy Code "made it more difficult, expensive, and time-consuming for people to file bankruptcy." Foohey, *Access to Consumer Bankruptcy*, *supra*, at 342 (citing Angela Littwin, *Adapting to BAPCPA*, 90 Am. Bankr. L.J. 183, 183-87 (2016) (overviewing changes to the Bankruptcy Code that "appeared likely to impair the consumer bankruptcy system's ability to function"); Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 27 (2012)

[4] The same study found that, although there was not an increase in opportunistic bankruptcy filings by student loan debtors, there was an increase in lending to riskier borrowers, as measured by credit score, and that loans to these borrowers were larger. Darolia & Ritter, *supra*, at 2-3 ("post-policy loan amounts among the least creditworthy [private student loan] borrowers were more than 75% higher than pre-policy loan amounts."). Considering these findings—that higher risk borrowers have greater access to large loans while simultaneously having their ability to discharge those loans in bankruptcy restricted—the researchers proposed that "policymakers are faced with the challenge of weighing the benefits of expanded credit availability against the burden that the bankruptcy restrictions place on struggling non-opportunistic debtors." *Id.*; *see also* Alexi Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 Harv. L. & Pol'y R. 175, 178 (2017) (finding that the 2005 amendment reduced students' ability to discharge their loans in bankruptcy but did not provide a countervailing benefit of lowering the cost of those loans to students).

("[O]ne of [the amendment's] stated goals [was] the reduction of consumer bankruptcy filings.")).

To be sure, some debtors will improperly seek the protection of bankruptcy in a way that may be abusive. But the plight of student debtors has worsened in recent years, and that decline has been assisted by the "certainty of hopelessness" standard that courts have added to the *Brunner* test. The bankruptcy court in this case has appropriately adapted that test to the current circumstances of student debtors. Although Congress required student loan borrowers to demonstrate undue hardship to obtain discharge in a way that other debtors do not have to, there is no indication that Congress intended to make student loan debt nearly impossible to discharge through bankruptcy, thus saddling those already in an extremely precarious situation—those seeking relief in bankruptcy—with onerous financial obligations that impede their ability to develop wealth and provide for their families for the rest of their lives. Bankruptcy has always been an important tool for those suffering from the hardships of debt, and maintaining access to its "fresh start" for student loan borrowers experiencing undue hardship is critical for the economic opportunity of struggling consumers across New York.

## CONCLUSION

For the foregoing reasons, *amicus curiae* NYDFS supports the bankruptcy court's careful analysis and application of the *Brunner* test in this proceeding.

Dated: New York, New York
July 3, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8015(h) of the Federal Rules of Bankruptcy Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief and excluding the parts of the document exempted by Rule 8015(g), this document contains 5,072 words and complies with the typeface requirements of Rule 8015(a)(5)-(6) and (a)(7)(B) and the length limits of Rule 8017(a)(5).

*/s/ Oren L. Zeve*