UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: KEVIN JARED ROSENBERG, Debtor.	Bankr. Case No. 18-35379-cgm Adv. Pro. No. 18-09023-cgm
KEVIN JARED ROSENBERG. Plaintiff-Appellee, -against- EDUCATIONAL CREDIT MANAGEMENT CORPORATION, Defendant-Appellant.	Case No. 7:20-cv-00688-PMH On Appeal from Order Granting Summary Judgment in Favor of Plaintiff and Discharging Debtor's Student Loan Under 11 U.S.C. § 523(a)(8) entered on January 24, 2020, by the Honorable Cecelia G. Morris, Chief U.S.B.J.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY VETERANS EDUCATION SUCCESS IN SUPPORT OF PLAINTIFF-APPELLEE

Amicus Curiae Veterans Education Success respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Plaintiff-Appellee Kevin Jared Rosenberg. Plaintiff-Appellee has consented to the filing of the brief; Defendant-Appellant has declined consent.

STANDARD OF REVIEW

District courts have "broad discretion" to permit the filing of an *amicus* brief. *In re GLG Life Tech. Corp. Sec. Litig.*, 287 F.R.D. 262, 265 (S.D.N.Y. 2012); *Auto. Club of N.Y. Inc. v. Port Auth. of N.Y. & N.J.*, 2011 U.S. Dist. LEXIS 135391,

at *5 (S.D.N.Y. 2011); *United States v. Ahmed*, 788 F. Supp. 196, 198 n.1 (S.D.N.Y.), *aff'd* 980 F.2d 161 (2d Cir. 1992). Such briefs "should normally be allowed . . . when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the party are able to provide." *Lehman XS Trust, Series 2006-GP2 v. Greenpoint Mortg. Funding Inc.*, 2014 U.S. Dist. LEXIS 11179, at *6 (S.D.N.Y. 2014) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (citations omitted)).

Courts in this district have frequently permitted the filing of *amicus* briefs relevant to their consideration of issues presented by the cases before them. *See, e.g.*, *In re Lehman Bros. Holdings Inc. v. Intel Corp.*, No. 08-13555, 2015 WL 7194609, at *4 (S.D.N.Y. 2015); *C & A Carbone, Inc. v. Cty. of Rockland, N.Y.*, No. 08 Civ. 6459, 2014 WL 1202699, at *4 (S.D.N.Y. 2014); *United States v. Apple, Inc.*, No. 12 Civ. 2826, 2012 WL 3195653, at *2 (S.D.N.Y. 2012).

INTEREST OF *AMICUS CURIAE*

Veterans Education Success is a nonprofit organization whose mission is to advance higher education success for veterans, service members, and military families, and to protect the integrity and promise of the G.I. Bill and other federal education programs. It offers free legal services, advice, and college and career counseling to service members, veterans, their survivors, and families using federal education benefits. Veterans Education Success also provides policy expertise to

federal and state policymakers and conducts non-partisan research on issues of concern to student veterans, including student outcomes and debt levels. Veterans Education Success is authorized to file this amicus curiae brief by its governing documents. Since its founding in 2013, Veterans Education Success has participated as *amicus* in a number of cases, raising important concerns regarding educational opportunities for veterans, service members and their families.

As explained more fully in Veterans Education Success's proposed *amicus curiae* brief, veterans, including Plaintiff-Appellee Mr. Rosenberg, have a particular interest in the Court's resolution of the legal issues in this case. Access to higher education provides veterans with a path to successful post-service careers and is a key priority for our country, as evidenced by the passing of the original G.I. Bill and other laws expanding educational benefits for veterans.

Despite the availability of benefits, veterans often need to obtain student loans to cover the full costs of higher education. Veterans face unique challenges to paying off student loans. In this context, denying relief to veterans who have to borrow to finance their futures on the basis of a standard that is all but impossible to overcome will discourage veterans from pursuing higher education. This would undermine clear legislative directives aimed at supporting veterans' educational pursuits. Therefore, veterans have a particular interest in the proper legal standard for discharging student loans under 11 U.S.C. § 523(a)(8).

As a nonprofit organization with specialized experience representing, counseling, and supporting veterans and service members, Veterans Education Success has heard from thousands of veterans who have obtained student loans in pursuit of higher education. The proposed brief recounts additional background information shedding light on Congress's clear legislative goals in enabling veterans to pursue higher education, and how the Court's ruling on the proper legal standard for discharging student loans could impact these goals. The proposed brief also evaluates the standard for undue hardship in light of the legislative history behind the enactment of 11 U.S.C. § 523(a)(8).

For the reasons stated above, Veterans Education Success believes it can provide a unique perspective on how the resolution of the legal issues here will have lasting impact on the educational opportunities for veterans.

TIMELINESS OF PROPOSED FILING

Amicus's proposed filing is timely. Pursuant to Fed. R. Bankr. P. Rule 8017, *amicus curiae* must file its brief "no later than 7 days after the principal brief of the party being supported is filed." Fed. R. Bankr. P. § 8017(a)6). Plaintiff-Appellee's brief was filed on June 22, 2020. *Amicus*'s proposed brief is submitted on June 29, 2020. Thus *amicus*'s proposed filing is timely.

CONCLUSION

Because *amicus*'s proposed filing is timely and *amicus*'s perspective will be useful to the Court, leave to file should be granted.

Dated: June 29, 2020

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

By

/s/ *Lauren A. Moskowitz*

Paul H. Zumbro
Lauren A. Moskowitz

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
pzumbro@cravath.com
lmoskowitz@cravath.com

Attorneys for Amicus Curiae

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: KEVIN JARED ROSENBERG, Debtor.	Bankr. Case No. 18-35379-cgm Adv. Pro. No. 18-09023-cgm
KEVIN JARED ROSENBERG. Plaintiff-Appellee, -against- EDUCATIONAL CREDIT MANAGEMENT CORPORATION, Defendant-Appellant.	Case No. 7:20-cv-00688-PMH On Appeal from Order Granting Summary Judgment in Favor of Plaintiff and Discharging Debtor's Student Loan Under 11 U.S.C. § 523(a)(8) entered on January 24, 2020, by the Honorable Cecelia G. Morris, Chief U.S.B.J.

BRIEF OF *AMICUS CURIAE* VETERANS EDUCATION SUCCESS IN SUPPORT OF PLAINTIFF-APPELLEE KEVIN JARED ROSENBERG

Paul H. Zumbro
Lauren A. Moskowitz
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

BACKGROUND 1

A. Higher Education Provides Veterans with a Path to Successful Post-Service Careers. 1

B. Providing Veterans with Access to Higher Education Has Been and Remains a National Imperative. 3

C. Veterans Often Need to Supplement Benefits with Additional Funds to Finance Their Education. 4

D. Veterans Face Unique Challenges To Paying Off Student Loans. 6

ARGUMENT 7

I. CONGRESS DID NOT INTEND 11 U.S.C. § 523(a)(8) TO PROHIBIT STUDENT DEBTS FROM BEING DISCHARGED IN BANKRUPTCY. 7

II. THE BANKRUPTCY COURT CORRECTLY APPLIED THE STANDARD FOR UNDUE HARDSHIP UNDER 11 U.S.C. § 523(a)(8). 9

III. CONTINUED MISAPPLICATION OF THE UNDUE BURDEN TEST WOULD UNDERMINE CLEAR LEGISLATIVE GOALS OF ENABLING VETERANS TO PURSUE HIGHER EDUCATION. 14

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987) .8, 10, 11, 12

In re Brunner, 46 B.R. 752 (S.D.N.Y. 1985), *aff'd sub nom.* Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987) 9, 12

In re Cotto, 425 B.R. 72 (Bankr. E.D.N.Y. 2010) 9

In re Gleason, 2017 WL 4508844 (Bankr. N.D.N.Y. Oct. 6, 2017) 9

In re Holzer, 33 B.R. 627 (Bankr. S.D.N.Y. 1983)....................12

In re Rosenberg, 610 B.R. 454 (Bankr. S.D.N.Y. 2020) 10, 11, 13, 14

Jean-Baptiste v. Educ. Credit Mgmt. Corp. (In re Jean-Baptiste), 584 B.R. 574 (Bankr. E.D.N.Y. 2018) 14

Kevin Jared Rosenberg v. Educ. Credit Mgmt. Corp., No. 7:20-cv-00688 (S.D.N.Y. 2019) 10, 11, 13

Marrama v. Citizens Bank, 549 U.S. 365 (2007)....................7

Tingling v. United States Dept. of Educ., 611 B.R. 710 (Bankr. E.D.N.Y. 2020) 14

STATUTES & RULES

11 U.S.C. § 35(a) (1976) (repealed 1978) 7

11 U.S.C. § 523(a)(8).................... passim

11 U.S.C. § 707(b)(3) 9

Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944) 3

Supplemental Appropriations Act of 2008, Pub. L. 110-252, H.R. 2642....................4

OTHER AUTHORITIES

Bureau of Labor Statistics, *Employment Situation*, https://www.bls.gov/news.release/pdf/vet.pdf 2

Center for Analysis on Postsecondary Education and Employment, *For-Proft Colleges by the Numbers*, https://capseecenter.org/research/by-the-numbers/for-profit-college-infographic/ (last visited June 29, 2020)....................5

Demographics: Profile of the Military Community, *available at* https://download.militaryonesource.mil/12038/MOS/Reports/2015-Demographics-Report.pdf 7

Franklin Delano Roosevelt, Former President of the United States, *Message to Congress* (Oct. 27, 1943) *available at* http://www.fdrlibrary.marist.edu/_resources/images/msf/msfb0114 (last viewed June 29, 2020) 15

G.I. Bill Comparison Tool, U.S. Dept. of Veterans Affairs, https://www.va.gov/GIBILL/docs/job_aids/ComparisonToolData.xlsx 5

H.R. Rep. No. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5963 ....8, 12

Hon. Robert C. Scott (VA), "The Introduction of the Post-9/11 Veterans Education Assistance Act of 2007," *Congressional Record* 153:95 (June 13, 2007)................................3

Jennifer Steinhauer, *Veterans Are Working, but Not in Jobs That Match Their Advanced Training*, N.Y. Times, Mar. 16, 2020 2

LinkedIn, *Veteran Opportunity Report* (Nov. 5, 2019) at 20, *available at* https://socialimpact. linkedin.com/content/dam/me/linkedinforgood/en-us/resources/veterans/LinkedIn-Veteran-Opportunity-Report.pdf 2, 3

Mariano Ariel Corcilli, *The History of Veterans Benefits: From the Time of the Colonies to World War Two*, U. Miami Nat'l Sec. & Armed Conflict L. Rev. 47 (2015).......................3

National Center for Education Statistics, *Status and Trends in the Education of Racial and Ethnic Groups*, https://nces.ed.gov/programs/raceindicators/indicator_red.asp................5

Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 *U. Cin. L. Rev.* 405, 405 (2005)..7, 8

Student Borrower Protection Ctr., *Educational Redlining* (Feb. 2020), https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf 7

Syracuse University, *Missing Perspectives: Service members' Transition from Service to Civilian Life* (November 2015), *available at* https://surface.syr.edu/cgi/viewcontent.cgi?article=1006&context=ivmf 2, 6

U.S. Dept. of Veteran Affairs, https://www.mentalhealth.va.gov/student-veteran/studentvetslearn-about-student-veterans.asp..6

VA College Toolkit, U.S. Dept. of Veterans Affairs, https://www.mentalhealth.va.gov/studentveteran/studentvets.asp 6

Veterans Education Success, *Schools Receiving the Most Post-9/11 GI Bill Tuition and Fee Payments Since 2009* (Mar. 2018), *available at* https://vetsedsuccess.org/schools-receiving-the-most-post-9-11-gi-bill-tuition-and-fee-payments-since-2009 6

Walter Ochinko and Kathy Payea, Veterans Education Success, *Annual and Cumulative Student Loan Debt Among Veterans Using and Not Using G.I. Bill Benefits* (October 2019), *available at* https://vetsedsuccess.org/annual-and-cumulative-student-loan-debt-among-veterans-using-and-not-using-gi-bill-benefits/ 4

Walter Ochinko and Kathy Payea, Veterans Education Success, *Postsecondary Non-Completion Among Veterans: Contributing Factors and Implications* (November 2018), *available at* https://vetsedsuccess.org/postsecondary-non-completion-among-veterans-contributing-factors-and-implications/..5

Walter Ochinko and Kathy Payea, Veterans Education Success, *Veteran Student Loan Debt Before and After the Post-9/11 G.I. Bill* (May 2018), *available at* https://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/5afadabd1ae6cfbdcfafab09/1526389438244/NPSAS+Vet+Student+Debt+Report.2018.FINAL.pdf.........................5

STATEMENT OF INTEREST[1]

Veterans Education Success (hereinafter "**Veterans Education Success**") is a nonprofit organization whose mission is to advance higher education success for veterans, service members and military families, and to protect the integrity and promise of the G.I. Bill and other federal education programs. It offers free legal services, advice and college and career counseling to service members, veterans, their survivors and families using federal education benefits. Veterans Education Success also provides policy expertise to federal and state policymakers and conducts non-partisan research on issues of concern to student veterans, including student outcomes and debt levels. Veterans Education Success is authorized to file this *amicus curiae* brief by its governing documents.

BACKGROUND

A. Higher Education Provides Veterans with a Path to Successful Post-Service Careers.

The United States military is a critical component of our national security. Our nation's ability to sustain an all-volunteer military force hinges on the perception and reality that military service provides a gateway to a strong post-service career. Thus, the success of veterans after service is vital to the success of

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than the *amicus curiae*, their members or their counsel, contributed money that was intended to fund preparing or submitting the brief.

our military and ultimately to our national security. Empowering our veterans by providing them with access to higher education not only fulfills our societal duty to take care of the men and women who volunteer to defend our country but also helps to strengthen the nation's labor force and economy.[2]

Higher education plays a crucial role in veterans' reintegration into civilian life and career success.[3] Higher education is important to veterans' post-service employment because generally, veterans may face difficulties in translating and applying their military experience and skills to civilian jobs[4] and employers may be unfamiliar with the skills learned during military service.[5] Relatedly, veterans are often funneled into specific jobs where their skills and experiences are most easily translated, such as in the defense and transportation industries.[6] This dynamic is discouraging, particularly in light of data suggesting that 55% of veterans want to pursue a different career than the one they held in the military.[7]

---

[2] As of Feb. 2020, veterans made up 7.4% of the adult population and 5.7% of the civilian labor force. *See* Bureau of Labor Statistics "Employment Situation"; FRED Fed. Res. Bank of St. Louis.

[3] Corri Zoli et al., Institute for Veterans and Military Families, Surface at Syracuse University, *Missing Perspectives: Service members' Transition from Service to Civilian Life* (November 2015), at 31, *available at* https://surface.syr.edu/cgi/viewcontent.cgi?article=1006&context=ivmf (the "**IVMF Study**") (finding that 92% of veterans sampled either "agreed" or "strongly agreed" that education played a role in their post-service transition into civilian life and that 86% of veterans indicated "career/job opportunities" as the top motivation for pursuing education).

[4] Jennifer Steinhauer, *Veterans Are Working, but Not in Jobs That Match Their Advanced Training*, N.Y. Times, Mar. 16, 2020, https://www.nytimes.com/2020/03/07/us/politics/veterans-jobs-employment.html ("[Veterans] are often hampered by the difficulty of converting skills gained in wars to private-sector jobs").

[5] See IVMF Study, at 25-26.

[6] LinkedIn, *Veteran Opportunity Report* (Nov. 5, 2019) at 20, *available at* https://socialimpact.linkedin.com/content/dam/me/linkedinforgood/en-us/resources/veterans/LinkedIn-Veteran-Opportunity-Report.pdf.

[7] *Id.* at 18.

Higher education provides veterans with a platform to apply, transform and optimize their military experience in a civilian atmosphere, all while gaining the knowledge and training to succeed in a career of their choice.

B. Providing Veterans with Access to Higher Education Has Been and Remains a National Imperative.

One of the primary ways in which our country honors the service and sacrifice of our veterans is by providing service members opportunities to increase their civilian economic success and quality of life through education. In 1944, Congress passed the G.I. Bill of Rights (the "**1944 G.I. Bill**")[8] which provided numerous benefits for veterans returning to civilian life, but it was the educational provision which "ultimately had the greatest effect on veterans and the most lasting effect on the nation."[9]

Since the 1944 G.I. Bill ended in 1956, Congress has passed several other G.I. Bills to support education for veterans returning home from service.[10] Notably, in the summer of 2008, Congress approved the Post-9/11 G.I. Bill, an expansion of benefits beyond the then-current G.I. Bill program.[11] The new Post-9/11 G.I. Bill was designed to ensure that the current generation of veterans could

[8] Servicemen's Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944).

[9] Mariano Ariel Corcilli, *The History of Veterans Benefits: From the Time of the Colonies to World War Two*, 5 U. *Miami Nat'l Sec. & Armed Conflict L. Rev.* 47, 53 n.51 (2015).

[10] *See* Hon. Robert C. Scott (VA), "The Introduction of the Post-9/11 Veterans Education Assistance Act of 2007," *Congressional Record* 153:95 (June 13, 2007), p. E1287.

[11] Title V of the Supplemental Appropriations Act of 2008, Pub. L. 110-252, H.R. 2642.

secure civilian economic success through higher education: it increased federal tuition support for veterans[12] and added provisions for non-tuition expenses.

Through its efforts over the last 70 years to enhance veterans' educational benefits, Congress has made it abundantly clear that veterans' access to higher education is a key priority for our country.

C. Veterans Often Need to Supplement Benefits with Additional Funds to Finance Their Education.

Despite the generosity of the Post-9/11 G.I. Bill and other educational benefits,[13] they sometimes fall short of covering the full cost of higher education. Consequently, many veterans incur student loans to finance their education.[14]

Veterans Education Success's research reports have identified several factors that contribute to veterans taking on student loans despite the availability of benefits.[15] *First*, approximately 25% of veterans do not qualify for full G.I. Bill benefits because they served less than 36 months of active duty after September 10,

[12] 100% of in-state tuition at public schools; up to $24,477 (adj. for inflation) at private schools.

[13] Other educational benefits include in-state public tuition waivers, state veterans' scholarships and scholarships provided by post-secondary institutions.

[14] The proportion of veterans who graduated with student loan debt in 2015-16 varied by degree type—57% of veterans who earned bachelor's degrees had student loan debt compared to 49% of their peers who earned associate's degrees. *See* Walter Ochinko and Kathy Payea, Veterans Education Success, *Annual and Cumulative Student Loan Debt Among Veterans Using and Not Using G.I. Bill Benefits* (October 2019), at 1, 3, *available at* https://vetsedsuccess.org/annual-and-cumulative-student-loan-debt-among-veterans-using-and-not-using-gi-bill-benefits/ ("**G.I. Bill Usage Factsheet**").

[15] *Id.*at 1-2.

2001.[16] *Second*, veterans may take longer to earn their degrees,[17] thereby exhausting the 36 months[18] of available benefits under the Post-9/11 G.I. Bill before graduation.[19] One reason why veterans may take longer to obtain a degree is due to a higher frequency of "stop outs" (*e.g.*, when a veteran, like Mr. Rosenberg, stops midway through his education to return to active duty).[20] *Third*, many veterans transfer schools and when they do, some credits may not be accepted by a new institution. This forces veterans to retake the same classes and finance these courses with additional debts. *Fourth*, some veterans may find the extra-tuition benefits, like the housing stipend, to be insufficient, particularly for veterans with dependents.[21] *Fifth*, nearly half of veteran-students attend private and for-profit colleges, which cost two-to-three times more in average tuition and fees as compared to public colleges.[22]

---

[16] Walter Ochinko and Kathy Payea, Veterans Education Success, *Veteran Student Loan Debt Before and After the Post-9/11 G.I. Bill* (May 2018) at 10, *available at* https://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/5afadabd1ae6cfbdcfafab09/1526389438244/NPSAS+Vet+Student+Debt+Report.2018.FINAL.pdf ("**NPSAS Analysis**").

[17] Veterans may take more than six years to earn a bachelor's degree (*see* G.I. Bill Usage Factsheet, at 2), whereas 41% of all students earn bachelor's degrees in four years (*see* https://nces.ed.gov/programs/raceindicators/indicator_red.asp.).

[18] Thirty-six months are the equivalent of four years of school (*i.e.*, four nine-month semesters).

[19] *Id.* at 2.

[20] Walter Ochinko and Kathy Payea, Veterans Education Success, *Postsecondary Non-Completion Among Veterans: Contributing Factors and Implications* (November 2018), at 12, *available at* https://vetsedsuccess.org/postsecondary-non-completion-among-veterans-contributing-factors-and-implications/.

[21] NPSAS Analysis, at 10.

[22] G.I. Bill Comparison Tool, U.S. Dept. of Veterans Affairs, https://www.benefits.va.gov/GIBILL/docs/job_aids/ComparisonToolData.xlsx ("School Type" tab showing that as of June 1, 2020, 22% and 27% of G.I. Bill students are enrolled in for-profit and private schools, respectively); *see also* https://capseecenter.org/research/by-the-numbers/for-profit-college-

Based on these considerations, it is no wonder that veterans cite "lack of financial resources" as the top barrier that hinders them from pursuing their educational goals despite the availability of federal educational benefits.[23]

D. Veterans Face Unique Challenges To Paying Off Student Loans.

Veterans face unique challenges in paying off their student loans. *First*, a majority (62%) of veteran-students are the first in their families to attend college[24] and may not have the parental support to help understand the implications of student loan debt, or to help pay for college. *Second*, veterans are disproportionately targeted by, and disproportionately enroll in, certain for-profit colleges.[25] Veterans who graduate with degrees from certain for-profit colleges may face difficulties finding employment because the schools lack the programmatic accreditation needed for them to be licensed in their field of study.[26] *Third*, veterans are more likely to face redlining and other racial discrimination by financial institutions whose lending practices subject borrowers who attend community colleges, Historically Black Colleges and Universities and Hispanic-Serving Institutions to harsher borrowing

infographic/ (showing average tuition and fees for full-time undergraduates of $8.2K, $16K and $27.3K at public, for-profit and private colleges, respectively).

[23] IVMF Study, at 5.

[24] U.S. Dept. of Veteran Affairs, https://www.mentalhealth.va.gov/student-veteran/learn-about-student-veterans.asp.

[25] *See* Veterans Education Success, *Schools Receiving the Most Post-9/11 GI Bill Tuition and Fee Payments Since 2009* (Mar. 2018), *available at* https://vetsedsuccess.org/schools-receiving-the-most-post-9-11-gi-bill-tuition-and-fee-payments-since-2009 (Eight of the ten schools receiving the most Post-9/11 tuition and fee payments from fiscal years 2009 through 2017 were for-profit schools).

[26] *Id.*

terms and higher interest payments.[27] The effect of such discriminatory practices is profound on veterans with more than one-third of our Armed Forces identifying themselves as part of a racial or ethnic minority.[28]

It is against this backdrop that we now discuss the significance of this Court's ruling on our nation's veterans and their post-service educational endeavors.

ARGUMENT

I. CONGRESS DID NOT INTEND 11 U.S.C. § 523(a)(8) TO PROHIBIT STUDENT DEBTS FROM BEING DISCHARGED IN BANKRUPTCY.

It is well established that "the principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'"[29] To that end, the discharge of debts in bankruptcy embodies the policy that "relief should be granted to an individual who has ceased to be economically productive by virtue of burdensome debt obligations".[30]

---

[27] *See* Student Borrower Protection Ctr., *Educational Redlining* (Feb. 2020) at 13, 18, https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf.

[28] U.S. Dept. of Defense, 2015 Demographics: Profile of the Military Community, *available at* https://download.militaryonesource.mil/12038/MOS/Reports/2015-Demographics-Report.pdf.

[29] *Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (citations omitted).

[30] Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 *U. Cin. L. Rev.* 405, 405 (2005) ("**R. Pardi and M. Lacey Law Review Article**").

Prior to 1976, a debtor could readily obtain a discharge of educational debts in bankruptcy.[31] Under the Bankruptcy Reform Act of 1978, Congress amended the bankruptcy laws to allow for the discharge of student loans only on a conditional basis.[32] Specifically, under 11 U.S.C. § 523(a)(8), educational loans cannot be discharged unless the debtor can establish that repayment of all or a portion of the debt would impose "undue hardship". In response to perceived abuses of the bankruptcy laws,[33] Congress sought to address "debtors with large amounts of educational loans, few other debts, and well-paying jobs, [ ] fil[ing] [for] bankruptcy shortly after leaving school and before any loans became due".[34]

Thus, it is true that Section 528(a)(8) of the Bankruptcy Code exhibits a "clear congressional intent . . . to make the discharge of student loans more difficult than that of other nonexcepted debt."[35] However, Section 523(a)(8) was not intended to operate as an absolute bar against the discharge of student loan debts. An "honest but unfortunate debtor" who meets the requirements for undue hardship under

---

[31] *See* 11 U.S.C. § 35(a) (1976) (repealed 1978).

[32] H.R. Rep. No. 95-595, at 133, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094.

[33] R. Pardi and M. Lacey Law Review Article, at 420 (explaining that the Bankruptcy Act Commission "reacted viscerally to anecdotal evidence of recent graduates who had obtained discharges of their student loans without any attempted repayment" despite "evidence presented [ ] that *less than one percent* of federally insured student loans were discharged in bankruptcy").

[34] H.R. Rep. No. 95-595, at 133, 159 (providing examples of "illegitimate", abusive discharges of student loans, including (1) a debtor seeking to discharge his student loans *two months* after graduation and (2) a debtor who refused to answer any correspondence from the loan agency in the two years preceding the discharge of his student loans).

[35] *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

Section 523(a)(8) is entitled to a complete financial fresh start—including with respect to student loan debt—as envisioned by the bankruptcy laws.

II. THE BANKRUPTCY COURT CORRECTLY APPLIED THE STANDARD FOR UNDUE HARDSHIP UNDER 11 U.S.C. § 523(a)(8).

In this circuit, to establish "undue hardship" for purposes of discharging student loans under 11 U.S.C. § 523(a)(8), a debtor must show that (1) he cannot, based on current income and expenses, maintain a "minimal" standard of living for himself if forced to repay the loans, (2) his state of affairs is likely to persist for a significant portion of the repayment period, and (3) he has made good faith efforts to repay the loans.[36]

Under the first prong of the *Brunner* test, a court is required to evaluate the debtor's ability to make monthly loan payments based on the debtor's "*current* income and expenses".[37] The Bankruptcy Court utilized the "means" test to determine whether Mr. Rosenberg's loan obligations would prevent him from maintaining a "minimal" standard of living.[38] Since Mr. Rosenberg generates negative monthly income, the Bankruptcy Court properly found that he satisfied the first prong of the *Brunner* test.[39]

---

[36] *Id.*

[37] *Id.* at 754 (emphasis added).

[38] The "means test" under Section 707(b)(3) of the Bankruptcy Code was codified "to create a more objective standard for establishing a presumption of abuse and to reduce judicial discretion in the process." *In re Cotto*, 425 B.R. 72, 77 (Bankr. E.D.N.Y. 2010) (internal citations omitted).

[39] *See In re Gleason*, 2017 WL 4508844, at *4 (Bankr. N.D.N.Y. Oct. 6, 2017) (finding that debtor satisfied the first prong given his current income and expenses generated a monthly deficit).

Defendant-Appellant Educational Credit Management Corporation ("**ECMC**") did not then and currently does not contest this factual finding.[40] Instead, ECMC argues that the Bankruptcy Court erred in using "the entire $221,395.49 balance of the loan [as] his 'payment' for purposes of the first *Brunner* prong".[41] Because the entire balance of Mr. Rosenberg's student loans was "currently due and owing", it was proper for the Bankruptcy Court to apply the test against the full loan balance.[42] The reality is that Mr. Rosenberg currently cannot even pay a single dollar of his student loans without falling below a "minimal" standard of living based on his negative monthly income.[43]

Under the second prong, a court must consider whether "additional circumstances" exist that will impact the debtor's ability to pay for a "significant portion of the repayment period".[44] The Bankruptcy Court correctly concluded that the circumstances affecting Mr. Rosenberg's inability to pay would "certainly exist for the remainder of the repayment period" because the repayment period had already ended as of the date of his bankruptcy petition.[45]

---

[40] *In re Rosenberg*, 610 B.R. 454, 460 (Bankr. S.D.N.Y. 2020); *see also* Appellant Educational Credit Management Corporation's Brief, *Kevin Jared Rosenberg v. Educ. Credit Mgmt. Corp.*, No. 7:20-cv-00688 (S.D.N.Y. 2019) ("**ECMC Brief**").

[41] ECMC Brief, at 21.

[42] *In re Rosenberg*, at 460.

[43] *See id.* at 461-62 ("As the Petitioner has a negative income each month, he has no money available to repay his Student Loan and maintain a 'minimal' standard of living.").

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

[45] *In re Rosenberg*, at 461.

ECMC argues, *inter alia*, that the "bankruptcy court's analysis completely misses the core of the second prong" which requires that the debtor "show a total incapacity . . . in the future to pay her debts for reasons not within [her] control."[46] However, a debtor's obligation to establish external circumstances beyond the debtor's reasonable control is required under the third—not the second—*Brunner* prong.[47] On this basis, the Bankruptcy Court properly held that it was not required to "make a determination about whether the Petitioner's 'state of affairs' was created by 'choice'" under the second prong of the *Brunner* test.[48]

Under the third prong of the *Brunner* test, a court must determine whether "the debtor has made good faith efforts to repay the loans".[49] ECMC suggests that under this prong, a court should consider certain "critical good faith factors" including whether or not the petitioner (1) minimized his expenses, (2) maximized his income, (3) currently refuses income-based repayment options, and (4) has made only minimal payments."[50] However, the *Brunner* court did not utilize any of these so-called "critical good faith factors". Instead, the *Brunner* court found a lack of good faith based on the fact that Ms. Brunner "filed for discharge within a month of the date the first payment of her loans came due" and that she "ha[d] made

[46] ECMC Brief, at 25.
[47] *Brunner*, at 396.
[48] *In re Rosenberg*, at 461.
[49] *Brunner*, at 396.
[50] ECMC Brief, at 39-40.

virtually no attempt to repay, nor . . . requested a deferment of payment".[51] In other words, Ms. Brunner attempted to do what Congress enacted Section 523(a)(8) to prevent. But not all student loan borrowers are Ms. Brunner, and the test should not be applied to effectively default to bad faith as ECMC appears to suggest and other courts in application of the *Brunner* test appear to have done.[52]

The *Brunner* court had the "stated purpose for § 523(a)(8)" in mind when developing the third prong of its undue hardship analysis.[53] In this context, it is crucial to consider that Mr. Rosenberg's loan obligations were due and payable in full as of the date of his petition, which he filed more than *15 years* after graduating from law school. The Bankruptcy Court also found that Mr. Rosenberg "missed only 16 payments" during the relevant repayment period and that he "did not sit back for 20 years" but instead "actively called and requested forbearance on at least five separate occasions". These factors cut against a finding of the type of debtor whose abuse of the bankruptcy system prompted the enactment of Section 523(a)(8).[54]

The important point from the perspective of Veterans Education Success is that the Bankruptcy Court recognized that courts following *Brunner* have

---

[51] *In re Brunner*, at 758; *see also Brunner*, at 397 (court considering the length of time that had elapsed since debtor-borrower's graduation as an additional indicium of good faith).

[52] *See e.g.*, *In re Holzer*, 33 B.R. 627, 632 (Bankr. S.D.N.Y. 1983) (court holding that in order to meet the "good faith" test, a petitioner must establish "that the dominant purpose in filing the bankruptcy petition was not to discharge the student loans").

[53] *In re Brunner*, at 755.

[54] H.R. Rep. No. 95-595, *supra* note 32, at 158-59.

unduly narrowly interpreted the *Brunner* test, describing the application of the *Brunner* test as "punitive", and the facts of this case demonstrate that well. ECMC suggests that Mr. Rosenberg has failed to establish undue hardship because Mr. Rosenberg *may* be eligible for a repayment program which, after 25 years of repayment, will cancel any remaining balance on his student loans.[55] This effectively means that Mr. Rosenberg,[56] would need to repay his student loans until he is 70 years old, out of his earnings which are currently insufficient to support even a "minimal" standard of living.[57] Such a result would be unduly harsh for similarly-situated veterans who, as discussed above, face unique challenges to paying off student loans. That is not what Congress intended in enacting Section 523(a)(8).

The Bankruptcy Court got it right in recalibrating the *Brunner* test and its decision should be affirmed. Perhaps the most important aspects of the Bankruptcy Court's application of the *Brunner* test is with respect to the third prong's "good faith" requirement. *First*, the Bankruptcy Court properly excluded from its "good faith" analysis the debtor-borrower's reason for filing for bankruptcy (*i.e.*, to discharge his/her student loans).[58] Nothing in the *Brunner* court's opinion supports the contention that filing for bankruptcy to discharge one's student loan

---

[55] ECMC Brief, at 10 (emphasis added).

[56] Mr. Rosenberg is currently 45 years old. *See* ECMC Brief, at 5.

[57] *See supra* note 43.

[58] *In re Rosenberg*, at 461 (court stating that "[i]t is therefore inappropriate to consider [ ] Petitioner's reasons for filing bankruptcy").

debts constitutes "bad faith".[59] *Second*, consistent with the *Brunner* court's approach to the "good faith" analysis,[60] the Bankruptcy Court correctly focused on the debtor-borrower's past (*i.e.*, prepetition) behavior in repaying the loans, and not on what he or she may theoretically do in the future.[61]

The Bankruptcy Court's decision, correcting years of misapplication of the *Brunner* standard,[62] strikes the right balance by preserving the undue burden test as intended by Congress while allowing struggling borrowers to overcome the crippling burden of overwhelming debt. Affirming the Bankruptcy Court's interpretation of the *Brunner* standard will aid veterans who are in good faith trying to embark on the "fresh start" the Bankruptcy Code is supposed to provide to honest but unfortunate debtors.

III. CONTINUED MISAPPLICATION OF THE UNDUE BURDEN TEST WOULD UNDERMINE CLEAR LEGISLATIVE GOALS OF ENABLING VETERANS TO PURSUE HIGHER EDUCATION.

Our nation repeatedly and unequivocally has committed to supporting veterans in their civilian lives, in acknowledgment of the valuable and weighty

[59] *See In re Rosenberg*, at 459 (questioning the propriety of "call[ing] it 'bad faith'" when debtor files for bankruptcy with the primary purpose of discharging student loans).

[60] *See supra* note 52 (under the third prong of the test, the *Brunner* court focused solely on the debtor-borrower's pre-petition actions).

[61] *In re Rosenberg*, at 461.

[62] *See e.g.*, *Tingling v. United States Dept. of Educ.*, 611 B.R. 710, 726 (Bankr. E.D.N.Y. 2020) (second prong only satisfied under "such extreme circumstances as severe illness, disability, or an unusually large number of dependents"); *Jean-Baptiste v. Educ. Credit Mgmt. Corp. (In re Jean-Baptiste)*, 584 B.R. 574, 588 (Bankr. E.D.N.Y. 2018) (requiring proof of a "certainty of hopelessness" despite the plain and straightforward language of *Brunner*).

sacrifice they undertake in defending and serving the American people and in recognition of the upstream challenges veterans face transitioning from military life to civilian life. One of the primary ways in which the country has sought to honor our veterans and ease their reintegration into civilian life is by providing them with educational opportunities at low personal costs. Continuing to harshly misapply *Brunner* would discourage veterans from pursuing higher education. This would undermine clear legislative directives aimed at supporting veterans' educational pursuits. Denying relief to veterans who have to borrow to finance their futures on the basis of a standard that is all but impossible to overcome hamstrings the futures of our nation's veterans and weighs heavily against veterans' ability to "live useful and happy lives in freedom, justice, and decency", a goal envisaged by FDR when lobbying Congress to pass the original G.I. Bill back in 1943.[63] The Bankruptcy Court's balanced interpretation of *Brunner* would benefit thousands of veterans on whose behalf Veterans Education Success tirelessly works.

CONCLUSION

For all of the reasons set forth above, we urge the Court to affirm the Bankruptcy Court's interpretation of *Brunner* and to affirm the Bankruptcy Court's granting of summary judgment in favor of Mr. Rosenberg.

---

[63] Franklin Delano Roosevelt, Former President of the United States, *Message to Congress* (Oct. 27, 1943) *available at* http://www.fdrlibrary.marist.edu/_resources/images/msf/msfb0114 (last viewed June 29, 2020).

Dated: June 29, 2020

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

By

/s/ *Lauren A. Moskowitz*

Paul H. Zumbro
Lauren A. Moskowitz

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
pzumbro@cravath.com
lmoskowitz@cravath.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the page length requirement of Fed. R. Bankr. P. 8017(a)(5) because the Brief (1) is one-half the maximum length authorized for a party's principal brief (which is 30 pages pursuant to Fed. R. Bankr. P. 8015(a)(7)(A)), excluding the parts of the Brief exempted by Fed. R. Bankr. P. 8015(g); and (2) contains 4,915 words, which is less than one-half of the type-volume limitation for a party's principal brief (which is 13,000 words pursuant to Rule 8015(a)(7)(B)). The foregoing Brief also complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type style requirements of Fed. R. Bankr. P. 8015(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font, except for footnotes and electronic signatures.

Dated: June 29, 2020

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

By /s/ *Lauren A. Moskowitz*
Lauren A. Moskowitz

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
lmoskowitz@cravath.com