UNDUE HARDSHIP IN STUDENT LOAN BANKRUPTCY: A CIRCUIT-BY-CIRCUIT ANALYSIS OF *BRUNNER*

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Abstract

The judicial landscape of student loan discharge under the *Brunner* test reflects both commonalities and significant divergences across circuits. While courts generally adhere to a shared framework for assessing undue hardship, they remain divided on key issues, including whether retirement savings qualify as necessary expenses, the extent to which religious tithing is protected under the Religious Liberty and Charitable Donation Protection Act (RLCDPA), and whether a debtor's refusal to enroll in an income-driven repayment (IDR) plan constitutes bad faith under *Brunner*'s third prong. Courts also disagree on whether IDR eligibility should be considered under the first or second prong of *Brunner*. Some reject IDR as a substitute for undue hardship, while others incorporate IDR payment amounts into financial hardship assessments, even when the debtor is not enrolled. Further complicating matters, evidentiary standards vary, with some courts requiring expert testimony to establish medical hardship, while others accept debtor testimony or medical records alone. These inconsistencies create unpredictable and inequitable outcomes, making it difficult for debtors and practitioners to navigate the system. Without Supreme Court guidance or legislative reform, these disparities will likely persist, underscoring the urgent need for greater uniformity in student loan discharge determinations.

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INTRODUCTION

The dischargeability of student loan debt in bankruptcy has long been a contentious legal issue. In *In re Rosenberg*,[1] Chief Judge Cecelia G. Morris rejected rigid judicial interpretations of *Brunner*,[2] stating, "[t]his Court will not participate in perpetuating these myths." She emphasized that the test's harsh outcomes stem from courts' application rather than the standard itself.[3] With student loan debt surpassing $1.7 trillion as of 2025, the question of relief through bankruptcy remains urgent.[4]

Initially, student loans were treated like other unsecured debts, but legislative changes—beginning with the 1978 Bankruptcy Reform Act[5]—introduced further restrictions. By 1987, the *Brunner* test emerged as the dominant standard for proving undue hardship.[6] However, its application has varied across jurisdictions, with some circuits applying it strictly, while others, including the Eighth Circuit and most courts within the First Circuit, opt for the Totality of the Circumstances test.[7]

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1. Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 458 (Bankr. S.D.N.Y 2020), *aff'd in part, rev'd in part*, Rosenberg v. Educ. Credit Mgmt. Corp., No. 20-CV-00688 (PMH), 2021 WL 4461341, at *14 (S.D.N.Y. Sep. 29, 2021) (finding that summary judgment was inappropriate where neither party established the absence of genuine issues of material fact).

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

3. In re *Rosenburg*, 610 B.R. at 459.

4. U.S. DEBT CLOCK, https://www.usdebtclock.org [https://perma.cc/T3GG-SBWQ] (last visited Jan. 31, 2025).

5. 11 U.S.C. § 523(a)(8).

6. *Brunner*, 831 F.2d at 396.

7. Brief of Amici Curiae the Nat'l Consumer Bankr. Rights Ctr. & Nat'l Ass'n of Consumer Bankr. Att'ys in Support of Petitioner at 2, McCoy v. United States, 141 S. Ct. 2794

Recent reforms under the Biden-Harris Administration aim to alleviate the burden of student loan discharge by introducing guidelines from the Department of Justice (DOJ) and Department of Education (DOE), promoting a more lenient and standardized approach.[8] This Article examines the evolving judicial interpretations of the *Brunner* test, highlighting the inconsistencies and their impact on borrowers seeking relief.

Part I explores the evolving history of section 523(a)(8), which excepts student loans from general discharge in bankruptcy. Part II examines how various circuit courts have applied the *Brunner* test, deliberately omitting the Eighth Circuit (which does not follow the *Brunner* framework) and the First Circuit (which does not have a uniform standard but generally applies the Totality of the Circumstances test). The analysis begins with the Second Circuit, which has provided significant jurisprudence on this issue. Part III investigates the divergent approaches of the Circuit Courts regarding key issues that have led to inconsistency in applying the *Brunner* test. This part analyzes how different interpretations of "undue hardship" and other factors have resulted in conflicting decisions, raising concerns about uniformity and predictability in bankruptcy outcomes for student loan borrowers. This Article concludes with a call for reforms to reduce inconsistency and promote fairness in student loan discharge proceedings.

I. HISTORY OF 11 U.S.C. § 523(A)(8)

Concerns over the dischargeability of student loans in bankruptcy emerged in the early 1970s, fueled by reports of borrowers quickly discharging educational debts soon after graduation and prompting fears of abuse of the bankruptcy system.[9] In response, Congress formed the

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(2021) ("However, the circuits are divided on how to determine whether undue hardship exists. The Eighth Circuit uses the totality of the circumstances test, as do courts in the First Circuit.").

8. *Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers*, U.S. DEP'T OF JUST. (Nov. 17, 2022), https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy [https://perma.cc/JA6T-MG56]; *Student Loan Guidance*, U.S. DEP'T OF JUST. (May 1, 2025), https://www.justice.gov/ust/student-loan-guidance [https://perma.cc/2MB7-HX7Q].

9. Before the 1970s, student loans were treated like other types of debt in bankruptcy, as the federal student loan industry was still in its infancy. The government entered the student loan market in 1958 with the National Defense Education Act, marking its first major role in higher education financing beyond veterans' benefits. That year, schools requested double the funding allocated by the government, and demand for federal student loans has continued to grow ever since. Sallie Mae, the largest student loan lender, was not established until 1972, and borrowers were not required to make payments while in school. This historical context may explain why some in Congress believed concerns about bankruptcy filings were exaggerated. *See In re* Johnson, 218 B.R. 449, 451 (B.A.P. 8th Cir. 1998); JOSH MITCHELL, THE DEBT TRAP: HOW STUDENT LOANS BECAME A NATIONAL CATASTROPHE 40 (2021); Heidi Rivera, *The Complete*

Commission on the Bankruptcy Laws of the United States in 1970 to study potential reforms.[10] The Commission's 1973 report recommended restricting student loan dischargeability within the first five years of repayment unless the borrower could demonstrate undue hardship.[11]

Congress implemented this recommendation in the 1976 Education Amendments, which prohibited the discharge of government-backed student loans within the first five years of repayment unless undue hardship was demonstrated.[12] The Bankruptcy Reform Act of 1978 reaffirmed this restriction under 11 U.S.C. § 523(a)(8).[13] However, due to a legislative oversight, there was an eleven-month gap (November 1978 to August 1979) during which student loans could technically be discharged in bankruptcy.[14] Congress corrected this oversight in 1979, ensuring the continuous nondischargeability of educational loans.[15]

Over decades, Congress enacted several amendments further limiting the circumstances under which student loans could be discharged. In the 1984 amendment, Congress broadened section 523(a)(8) by removing references to "higher education," thereby extending nondischargeability to encompass a wider range of educational loans.[16] Then, in the 1990 Crime Control Act,[17] Congress extended the repayment period, the time before a student loan could be discharged without proving undue hardship, from five to seven years.[18] This amendment also expanded section 523(a)(8) to include educational benefits, scholarships, and stipends, making it harder to discharge various forms of educational assistance.[19]

History of Student Loans, BANKRATE, https://www.bankrate.com/loans/student-loans/history-of-student-loans/ (last visited Feb. 4, 2025).

10. *In re* Johnson, 218 B.R. at 451 (quoting H.R. DOC. NO. 93-137, at pt. 1, 11 (1973)); Frank R. Kennedy, *The Report of the Bankruptcy Commission: The First Five Chapters of the Proposed New Bankruptcy Act*, 49 IND. L.J. 422, 430 (1974).

11. Kennedy, *supra* note 10, at 430.

12. Kennedy, *supra* note 10, at 452.

13. The Senate bill mirrored the Commission's recommendation, restricting student loan discharge within the first five years of repayment, while the House bill argued that student loans be treated like other debts. The House was skeptical of claims that borrowers were filing for bankruptcy shortly after graduation, but ultimately, Congress adopted the Senate version. *See* Pub. L. No. 95-598, 92 Stat. 2591 (1978); *In re* Johnson, 218 B.R. at 452.

14. *In re* Johnson, 218 B.R. at 453.

15. *Id.*

16. Pub. L. No. 98-353, § 454(a)(2), 98 Stat. 333, 375–76 (1984); *In re* Johnson, 218 B.R. at 454.

17. Pub. L. No. 101-647, § 3621(2), 104 Stat. 4789, 4964

18. Pub. L. No. 101-647, § 3621(2), 104 Stat. 4789, 4964 (1990); *In re* Johnson, 218 B.R. at 454; Scott Pashman, *Discharge of Student Loan Debt Under 11 U.S.C. § 523(a)(8): Reassessing "Undue Hardship" After the Elimination of the Seven-Year Exception*, 44 N.Y. L. SCH. L. REV. 605, 605 (2000).

19. Pub. L. No. 101-647, § 3621(1), 104 Stat. 4964 (1990); *In re* Johnson, 218 B.R. at 454.

In 1997, the National Bankruptcy Review Commission proposed eliminating section 523(a)(8), contending that the nondischargeability of student loans unfairly penalized diligent borrowers.[20] The Commission's report highlighted the fact that many borrowers experienced long-term financial hardship due to student loan debt.[21] Despite this, Congress rejected this recommendation and, in 1998, amended the law by removing the seven-year rule, thus making student loans indefinitely nondischargeable unless the borrower could demonstrate undue hardship.[22] This change marked a fundamental policy shift, reinforcing the notion that student loan repayment obligations persist throughout a borrower's lifetime, except in extraordinary circumstances.

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005[23] represented the most significant expansion of student loan nondischargeability.[24] Before BAPCPA, section 523(a)(8) primarily covered government-guaranteed and nonprofit-backed loans.[25] The amendment expanded nondischargeability to private student loans, provided they met the definition of qualified education loans.[26] This change significantly reduced the ability of borrowers to discharge privately issued educational debt in bankruptcy.[27] Specifically, 11 U.S.C. § 523(a)(8) eliminates certain educational debts from discharge unless the debtor demonstrates undue hardship.[28] The statute applies to: "(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as

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20. *In re* Johnson, 218 B.R. at 454.

21. *Id.*

22. Pub. L. No. 105-244, § 971, 112 Stat. 1837 (1998).

23. Pub. L. No. 109-8, § 220, 119 Stat. 23.

24. The 2005 expansion coincided with the full privatization of Sallie Mae, the largest student loan provider in the U.S. Before 2004, Sallie Mae operated as a government-sponsored enterprise (GSE), with its loans federally insured or guaranteed. After privatization, the company began issuing private student loans without government backing. During this period, lender practices faced increased scrutiny, particularly regarding their relationships with educational institutions. This heightened oversight led to New York Attorney General Andrew Cuomo's 2007 investigation into Sallie Mae, which uncovered unethical financial arrangements with colleges and universities, resulting in a $2 million settlement. *See Largest Student Loan Provider to Pay $2 Million in Settlement*, COLUMBUS DISPATCH (Apr. 11, 2007, at 17:49 ET), https://www.dispatch.com/story/news/2007/04/11/largest-student-loan-provider-to/23690017007/ [https://perma.cc/A892-3Z8W].

25. *See* 11 U.S.C. § 523(a)(8) (2000) (excepting from discharge educational loans made, insured, or guaranteed by a governmental or nonprofit institution).

26. *See* 26 U.S.C. § 221(d)(1) (2018).

27. *See* 11 U.S.C. § 523(a)(8) (2000).

28. *Id.*

defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual."[29]

Since the addition in 2005 of BAPCPA, Congress has not enacted any further modifications to section 523(a)(8) to ease student loan dischargeability, leaving student loans among the most difficult debts to discharge in bankruptcy. Nevertheless, several significant developments have occurred. First, there were multiple bills that were introduced in Congress seeking to restore some form of student dischargeability, including the Fresh Start Through Bankruptcy Act of 2021,[30] which proposed allowing federal student loans to be discharged after ten years.[31] However, none of these bills have passed.[32] Second, in November 2022, President Joe Biden, with the collaboration of the DOJ and DOE, introduced new guidelines aiming to streamline the process for debtors seeking relief from federal student loans in the bankruptcy.[33]

As Congress tightened student loan discharge, bankruptcy courts have followed suit. The next part delves into the origins of the *Brunner* test, its application, and how courts have interpreted its three-pronged standard.

II. THE EMERGENCE OF THE *BRUNNER* TEST: OVERLAP IN COURT INTERPRETATIONS AND APPLICATIONS

The Bankruptcy Code does not define the phrase "undue hardship" under 11 U.S.C. § 523(a)(8), leaving its interpretation to the courts.[34] Over time, this ambiguity has led to the emergence of two primary judicial tests: the *Brunner* test and the Totality of the Circumstances test. The *Brunner* test, first established in the Second Circuit, has been adopted by most circuits.[35] In contrast, the Eighth Circuit has rejected *Brunner*.[36] While the First Circuit has not formally endorsed a specific standard, most courts within the circuit apply the Totality of Circumstances Test.[37]

29. *Id.*

30. S. 2598, 117th Cong. (2021).

31. *Id*.

32. *Id.*

33. *Justice Department and Department of Education Announce Successful First Year of New Student Loan Bankruptcy Guidance*, U.S. DEP'T OF JUST. (Nov. 16, 2023), https://www.justice.gov/archives/opa/pr/justice-department-and-department-education-announce-successful-first-year-new-student-loan [https://perma.cc/KZ5S-EWJK].

34. Ryan Freeman, *Student-Loan Discharge: An Empirical Study of the Undue Hardship Provision of § 523(a)(8) Under Appellate Review*, 30 EMORY BANKR. DEV. J. 148, 150 (2013).

35. John P. Hunt, *Student Loan Purpose and the Brunner Test*, 15 HARV. L. & POL'Y REV. 237, 238 (2020).

36. *See In re* Long, 322 F.3d 549, 553–55 (8th Cir. 2003) (reaffirming the "totality of the circumstances" approach to student loan discharges).

37. *See In re* Kainu, No. 08-10020-JMD, Adv. No. 08-1005-JMD, 2009 WL 1033756, at *3–5 (Bankr. D.N.H. Apr. 14, 2009); *In re* Moses, No. 02-12491-MWV, Adv. No. 02-1156-MWV, at 4–5 (Bankr. D.N.H. Dec. 29, 2009); Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) ("Having considered the various tests used

Under *Brunner*, a debtor must prove three elements: (1) "that the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans;" (2) "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans;" and (3) "that the debtor has made good faith efforts to repay the loans."[38]

Unlike *Brunner*, the Totality of the Circumstances test does not impose a rigid "good faith" requirement. Instead, it allows courts to consider the debtor's financial situation more holistically by evaluating: (1) past, present, and reasonably reliable future financial resources; (2) reasonably necessary living expenses; and (3) any other relevant facts or circumstances.[39] This approach provides greater flexibility than *Brunner*, as it does not require debtors to demonstrate an exhaustive history of repayment efforts, though courts may still consider good faith as a relevant factor.[40]

Although *Brunner* has been widely adopted, courts interpret and apply its three-pronged test inconsistently, resulting in variations in how undue hardship is assessed. The Second Circuit, which originated the *Brunner* test, has continued to refine its application, influencing how other circuits analyze student loan discharge cases. Examining how *Brunner* has evolved within the Second Circuit provides insight into the test's original intent and the legal standards that other circuits have adopted or modified.

A. *Second Circuit's Interpretation of the* Brunner *Test*

The Second Circuit established the *Brunner* test in *Brunner v. New York State Higher Education Services Corp.*,[41] setting a precedent that most courts nationwide have followed when evaluating student loan discharge under 11 U.S.C. § 523(a)(8). The case involved Marie Brunner, a recent master's degree graduate with no disabilities or dependents, who sought to discharge her federal student loans less than a year after completing her degree and just one month after her first payment was due.[42] The court denied her request, reasoning that she had not demonstrated prolonged financial hardship and had failed to pursue

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to determine undue hardship, the plain text of § 523(a)(8), and further recognizing that the majority of courts in the First Circuit adopt the totality of the circumstances test, the Panel declines to adopt the Brunner test."); *see also* Smith v. Dep't of Educ. (In re *Smith*), 582 B.R. 556 (Bankr. D. Mass. 2018).

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

39. *In re* Long, 322 F.3d at 554.

40. *See In re* Bronsdon, 435 B.R. at 800 (reaffirming that the "good faith" requirement in *Brunner* lacks textual support).

41. *Brunner*, 831 F.2d at 396–97.

42. *Id*.

alternative repayment options, such as requesting a deferral, which indicated a lack of good faith.[43] Over time, courts have interpreted *Brunner* more restrictively, making student loan discharges increasingly difficult to obtain.

While *Brunner* involved a debtor who was young, healthy, and without dependents, modern courts have denied discharge to debtors facing far more severe circumstances, including those near retirement age and those with chronic illnesses, disabilities, or substantial caregiving responsibilities.[44] By doing so, the Second Circuit has made student loan discharges exceptionally rare.

The first prong in *Brunner* examines whether the debtor can maintain a minimal standard of living while repaying student loans. Courts in the Second Circuit apply a restrictive interpretation, closely scrutinizing non-essential expenses and frequently referencing federal poverty guidelines as a benchmark.[45] Courts distinguish between essential and discretionary expenses, often requiring debtors to demonstrate a frugal lifestyle.[46]

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43. *Id.*

44. *See In re* Houshmand, 320 B.R. 917, 921 (2004).

45. *See, e.g.*, Tingling v. Dep't of Educ., 611 B.R. 710, 725–26 (E.D.N.Y. 2020) (finding that the first prong was not met where the debtor's gross income was four times the poverty line); *In re* N.M. v. Educ. Credit Mgmt. Corp., 325 B.R. 507, 509–10 (Bankr. W.D.N.Y. 2005) (finding that the first prong was not met where the debtor's income was more than two-and-a-half times the poverty line); *In re* Longo, 654 B.R. 1, 13 (Bankr. D. Conn. 2023); *In re* Kelly, 351 B.R. 45, 53 (Bankr. E.D.N.Y. 2006); *In re* Retzlaff, No. 99-15649, Adv. Pro. No. 03-90135, 2013 WL 3155469, at *10–11 (Bankr. N.D.N.Y. June 24, 2004) (citing *In re* Elmore, 230 B.R. 22, 26 (Bankr. D. Conn. 1999)).

46. *See, e.g.*, McKenzie v. Educ. Credit Mgmt. Corp. (*In re* McKenzie), No. 09-11174, Adv. No. 10-1018, 2012 WL 1098607, at *6 (Bankr. D. Vt. Mar. 30, 2012) (finding that monthly expenses of $577 for a fax line, cable and internet, clothing, gasoline, recreation, and pet care were unreasonable); *see also In re* Pobiner, 309 B.R. 405, 417 (Bankr. E.D.N.Y. 2004) (denying discharge where the debtor's wife contributes $462 to her 401(k) while seeking to discharge a $72,000 student loan); *In re* Markison, No. 05-12616, Adv. No. 06-1007, at 5–6 (Bankr. D. Vt. June 5, 2007) (holding that undue hardship was not met where the debtor allocated 84% of her net monthly income to travel expenses to visit her children); *In re* Pincus, 280 B.R. 303, 318 (Bankr. S.D.N.Y. 2002) (holding that the debtor failed to prove an inability to sustain a minimal standard of living, as excessive discretionary spending—such as gym memberships, dining out, and newspaper subscriptions—indicated financial mismanagement); *In re* N.M., 325 B.R. at 509 (finding that $700 rent was unnecessary because the debtor chose a location that increased transportation costs; pet care expenses and non-traditional healthcare, while reasonable, were not deemed necessary for maintaining a minimal standard of living). *But see In re* Clavell, 611 B.R. 504, 521 (Bankr. S.D.N.Y. 2020) (requiring a debtor to forego 401(k) contributions for future living expenses would itself be an undue hardship, even if it would not immediately deprive the debtor of food or shelter); *In re* Reed, Case No. 04-10570, Adv. Proc. No. 04-1025, at 4–6 (Bankr. D. Vt. June 13, 2005) (finding that monthly expenses of $120 per month to the debtor's daughter, who was a sophomore in college at the time, were reasonable); *In re* Congdon, 365 B.R. 433, 436–37 (Bankr. D. Vt. 2007) (finding that a debtor's decision to move to a one-bedroom apartment, increasing monthly expenses by $80, was reasonable given family support for other expenses).

While most non-essential expenses are rejected, the Second Circuit is divided on tithing, with some courts permitting it and others not.[47] Additionally, courts consider household income holistically, often including spousal or cohabitant earnings when determining whether a debtor meets the minimal standard of living requirement.[48]

The second prong requires the debtor to prove that financial hardship will persist for a significant portion of the repayment period. Courts assess: (1) the length of the repayment period (original loan term vs. federal repayment programs such as Income-Driven Repayment (IDR) plans or Income-Contingent Repayment Plans (ICRPs)); and (2) the debtor's future financial prospects, requiring more than mere speculation or optimism.[49] A key contentious issue is whether courts should assume the IDR plans or the current loan agreement when making the determination.[50]

Additionally, courts require concrete evidence of a long-term inability to repay the loans, such as chronic illness, disability, caregiving responsibilities, or substantial limitations on earning potential.[51] Medical and psychological conditions must be well-documented, often requiring

47. *See In re* Lynch, 299 B.R. 62, 75 (Bankr. S.D.N.Y. 2003) (Donations are not necessary expenses). *But see In re* Lebovits, 223 B.R. 265, 272 (Bankr. E.D.N.Y. 1998) (Allowed $700 in monthly tuition for parochial school given the debtor's orthodox religious obligations and allowed $60 monthly tithing as it fell within RLCDPA limits).

48. *See In re* Retzlaff, Adv. No. 03-90135, at 10–11 (holding that non-borrower income should be included when evaluating undue hardship where both spouses filed jointly); In re *Elmore*, 230 B.R. at 27–28 (same); *In re* Hlady, 616 B.R. 257, 271 (Bankr. E.D.N.Y. 2020) (explaining that courts focus on a debtor's household income and expenses to determine what constitutes necessary living expenses, including food, shelter, transportation, and medical treatment); *In re* Pobiner, 309 B.R. at 416 (holding that the income of the plaintiff's non-debtor spouse should be considered when evaluating whether repaying student loans would result in undue hardship); *In re* Davis, 373 B.R. 241, 247–49 (W.D.N.Y. 2007).

49. *See, e.g.*, *In re* Santamassino, 373 B.R. 807, 812 (Bankr. D. Vt. 2007) (holding that the debtor's responsibility for caring for a mother with Parkinson's disease met the second prong); *In re* Bolen, No. 94-10640, Adv. No. 00-1060, at 9–10 (Bankr. D. Vt. Oct. 8, 2003) (finding that an unfavorable job market rendered it improbable that the debtor's employment prospects would improve sufficiently).

50. *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020) (finding that hardship was likely to persist where the current loan had been accelerated, making the full balance immediately due).

51. *See* Tingling v. Dep't of Educ., 611 B.R. 710, 726 (E.D.N.Y. 2020); Porrazzo v. Educ. Credit Mgmt. Corp. *(In re* Porrazzo), 307 B.R. 345, 348 (Bankr. D. Conn. 2004) (holding that disability or illness is relevant only if it "restrict[s] the debtor's ability to obtain and sustain a level of income sufficient to repay a student loan"); *In re* Bacote, Case No. 02-11553 (AJG), Adv. No. 05-03209, 2006 WL 3732993, at 9 (Bankr. S.D.N.Y. Dec. 15, 2006) ("In *Brunner* and related cases, only the fact that the debtor was disabled, elderly, had dependents or had evidence that indicated a total foreclosure of job prospects in her area of training, would be sufficient to meet the burden of this prong."); *In re* Traversa, 444 F. App'x 472 (2d Cir. 2011) (denying discharge despite five years of financial struggles, emphasizing that the debtor's past work ability and inconsistent testimony undermined his claim of undue hardship).

expert testimony.[52] However, in cases where debtors are self-represented, courts have occasionally taken judicial notice of certain medical conditions.[53] While courts do not require absolute hopelessness, they scrutinize any potential for financial improvement.[54] Courts also consider exempt assets, particularly when those assets could contribute to future financial stability.[55] Courts may also consider pre-existing conditions or assets that may affect repayment but do not automatically disqualify a debtor from discharge.[56] Courts distinguish between unavoidable financial hardship and voluntary lifestyle choices that may have contributed to the debtor's financial situation.[57]

Finally, the third prong, requiring a showing of good faith efforts to repay, has been interpreted rigorously by courts in the Second Circuit. Courts evaluate multiple factors, including the debtor's payment history, efforts to maximize income, attempts to minimize expenses, and

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52. *See In re* Norasteh, 311 B.R. 671, 678 (Bankr. S.D.N.Y. 2004) (holding that the lack of medical documentation was insufficient to justify discharge); *In re* Traversa, No. 3:10-CV-876, 2010 WL 4683920, at *6 (D. Conn. Nov. 5, 2010) (same); *In re* N.M., 325 B.R. 507, 511 (Bankr. W.D.N.Y. 2005) (denying discharge where a debtor's doctor testified that stress from repayment might exacerbate her condition but failed to establish that repayment would prevent her from maintaining a minimal standard of living or cause severe mental deterioration); *In re* Mosley, 330 B.R. 832, 843 (Bankr. N.D. Ga. 2005); *In re* Jackson, No. 05-15085, Adv. No. 06-01433, 2007 WL 2295585, at *2 (Bankr. S.D.N.Y. Aug. 9, 2007) (denying discharge for a debtor who suffers from bipolar disorder which had disrupted his employment but haven't provided an expert testimony); *In re* Benjumen, 408 B.R. 9, 21 (Bankr. E.D.N.Y. 2009) (denying discharge where the debtor lacked medical corroboration of her condition and admitted that her condition did not cause her to loss job or miss interviews); *In re* Kelsey, 287 B.R. 132, 143–44 (Bankr. D. Vt. 2001) (noting that undue hardship claims based on psychological conditions must be believed by the judge, like all other things, though the defense can argue they lie). *Cf. In re* King, 368 B.R. 358, 370–71 (Bankr. D. Vt. 2007) (granting discharge where the debtor's psychiatrist provided extensive evidence that his conditions were debilitating, long-term, and unlikely to improve); *In re* Porrazzo, 307 B.R. at 350–51 (granting discharge where expert testimony established that the debtor's Asperger's Syndrome and generalized anxiety disorder significantly impaired his interpersonal and job-related abilities).

53. Doherty v. United Student Aid Funds, Inc. (*In re* Doherty), 219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998) (relying on the debtor's testimony and judicial notice of facts regarding bipolar disorder to discharge the debtor's student loans).

54. *See In re* Sorber, 358 B.R. 68, 74 (Bankr. N.D.N.Y. 2006) (finding the debtor's inability to repay student loans was unlikely to persist); *In re* DeRose, 316 B.R. 606, 609 (Bankr. W.D.N.Y. 2004) (finding the debtor's age irrelevant to future financial prospects).

55. Armesto v. N.Y. State Higher Educ. Servs. Corp., 298 B.R. 45, 48 (Bankr. W.D.N.Y. 2003) (considering exempt assets as relevant to the debtor's ability to repay).

56. *See* Educ. Credit Mgmt. Corp. v. Curiston, 351 B.R. 22, 28–31 (D. Conn. 2006) (noting that while the Second Circuit has not ruled on pre-existing conditions, some courts include them in the undue hardship analysis).

57. *In re* Stern, 288 B.R. 36, 42–43 (Bankr. N.D.N.Y. 2002) (denying discharge where the debtor's decision to not pursue a legal career precluded an undue hardship finding); *In re* Melton, 187 B.R. 98, 102 (Bankr. W.D.N.Y. 1995) (holding that voluntary financial decisions, such as supporting a girlfriend and her children or choosing low-income employment, do not qualify as undue hardship).

willingness to explore alternative repayment options.[58] A long history of non-payment or nominal payments may raise concerns about the debtor's commitment to repayment.[59] In assessing good faith, courts scrutinize whether the debtor has made reasonable efforts to improve their financial situation, such as actively seeking higher-paying jobs or additional income streams.[60] Similarly, courts analyze spending patterns to determine whether the debtor has attempted to minimize unnecessary expenses.[61] Courts place significant weight on whether the debtor has explored available repayment options, such as loan consolidation, deferments, or IDR plans.[62] However, failure to enroll in an IDR plan is not automatically considered bad faith, especially if the debtor can show that participation would not meaningfully alleviate their financial hardship.[63] Courts have also excluded tax implications from the undue hardship analysis, holding that potential tax consequences from loan forgiveness are irrelevant to the determination.[64] The timing of the debtor's bankruptcy filing is another critical consideration.[65] Finally, a

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58. *See In re* Longo, 654 B.R. 1, 19–20 (Bankr. D. Conn. 2023); Tingling v. Dep't of Educ., 611 B.R. 710, 727–28 (E.D.N.Y. 2020).

59. Bacote v. Educ. Credit Mgmt. Corp., No. 02–11553, Adv. No. 05-03209, 2006 WL 3732993, at *20–22 (Bankr. S.D.N.Y. Dec. 15, 2006) (holding that a debtor who made no voluntary payments in twenty years, aside from an involuntary tax refund offset, lacked good faith); *see also* Grubin v. Sallie Mae Servicing Corp., 476 B.R. 699, 713 (Bankr. E.D.N.Y. 2012).

60. *See In re* Longo, 654 B.R. at 19–20 (holding that the debtor's failure to seek higher-paying job opportunities weakened the good faith claim); *In re* Rhodes, 418 B.R. 27, 35 (Bankr. D. Conn. 2009) (finding that the debtor's decision not to pursue full-time employment despite available opportunities did not establish good faith).

61. *In re* Lozada, 604 B.R. 427, 430 (S.D.N.Y. 2019) (holding that excessive religious and charitable donation—over $100,000 in five years—were unreasonable and failed to satisfy the undue hardship standard under § 523(a)(8) per *Brunner*); *In re* Waters, No. 05-12019, Adv. No. 06-1013, at *9 (Bankr. D. Vt. Feb. 2, 2007) (finding that the debtor's misuse of lump-sum payments, which could have been used for student loans, indicated bad faith).

62. *In re* French, No. 04-40365, Adv. No. 04-03060, 2006 WL 2583646, at *7 (Bankr. S.D.N.Y. Aug. 31, 2006) (holding that a debtor's failure to explore alternative repayment options does not automatically indicate bad faith).

63. *Id.*; *see also In re* King, 368 B.R. 358, 373–74 (Bankr. D. Vt. 2007) (finding that the debtor's consistent job search and expense reduction, despite significant psychological challenges, demonstrated good faith, and that failure to enroll in an Income-Contingent Repayment Plan (ICRP) did not negate the debtor's good faith).

64. *In re* Lozada, 604 B.R. at 437; Tingling v. U.S. Dep't of Educ., 611 B.R. 710, 727–28 (E.D.N.Y. 2020).

65. *See* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396–97 (2d Cir. 1987); *In re* Lavoie, 292 B.R. 504, 507 (Bankr. W.D.N.Y. 2003) (holding that a debtor seeking discharge before loans become due does not establish good faith); *In re* Pincus, 280 B.R. 303, 317 (Bankr. S.D.N.Y. 2002) (explaining that the good faith prong safeguards against premature discharge before a debtor has had the opportunity to pursue a successful career); *In re* Gesinde, No. 18-10320, at *13–14 (Bankr. S.D.N.Y. Oct. 10, 2019) (denying discharge where the debtor sought relief four months before the first payment was due).

high ratio of student loan debt to total bankruptcy debt may indicate bad faith, though this is not dispositive.[66]

The Second Circuit is among the strictest in applying the *Brunner* test; next, we turn to a discussion of the Third Circuit, which applies the *Brunner* test strictly and the standard is high and difficult to satisfy.

B. *Third Circuit's Interpretation of the* Brunner *Test*

The Third Circuit follows a similarly strict approach to the Second Circuit.[67] Courts in the Third Circuit do not require absolute poverty, but discretionary expenses are closely examined.[68] Courts also consider health conditions, employment barriers, and other mitigating factors that may impact the debtor's ability to repay.[69] Like the Second Circuit, courts in the Third Circuit follow the majority approach by considering both the debtor's and their spouse's earnings when assessing the first prong.[70] Courts within the Third Circuit may evaluate retirement contributions on the facts of the case when determining whether expenses are reasonably necessary; some court decisions treat voluntary retirement contributions as funds that could be redirected to repayment.[71] However, many courts

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66. *See In re* Kelly, 351 B.R. 45, 55–56 (Bankr. E.D.N.Y. 2006) (finding the debtor did not meet the third prong where her student loan debt accounted for over 70% of total debt).

67. *See In re* Faish, 72 F.3d 298, 306 (3d Cir. 1995) (adopting *Brunner* Test).

68. *Id.* (holding that the debtor's decision to save for a new vehicle instead of repaying her loans did not satisfy the first prong of the *Brunner* test); *In re* Derby, 199 B.R. 328, 330 (Bankr. W.D. Pa. 1996) (finding that the debtor's reliance on welfare benefits and inability to repay loans without falling below the minimal standard of living satisfied the first prong of the *Brunner* test); *see also* Hoyle v. Pa. Higher Educ. Assistance Agency, 199 B.R. 518, 523 (Bankr. E.D. Pa. 1996); *In re* Alston, 297 B.R. 410, 415 (Bankr. E.D. Pa. 2003) (explaining that maintaining a minimal standard of living does not equate to poverty but falls somewhere between poverty and mere financial difficulty); *In re* Miller, 409 B.R. 299, 318–20 (Bankr. E.D. Pa. 2009) (finding no undue hardship where the debtor's excessive housing costs were unreasonable for a single dependent household); *In re Miller*, 409 B.R. at 318–19; *In re* Johnson, 400 B.R. 167, 174 (Bankr. M.D. Pa. 2009) (holding that a two-bedroom townhouse and $160 in haircare expenses were unnecessary); *In re* Bridgeforth, No. 5:14-04499-MJC, at *10 (Bankr. M.D. Pa. Jan. 26, 2022) (finding that excessive spending on housing and discretionary expenses weakened the debtor's claim of undue hardship); Doernte v. Educ. Credit Mgmt. Corp. (*In re* Doernte), No. 10-24280-JAD, at 17 (Bankr. W.D. Pa. May. 25, 2017) (holding that pet care, modest recreation, and reasonable internet costs were necessary expenses).

69. *In re* Wolfson, No. 19-11618 (LSS) (Bankr. D. Del. Jan. 14, 2022) (recognizing that a debtor with epilepsy made consistent job-search efforts despite medical limitations); *In re* Zopfi, No. 1:18-bk-2556-HWV, at *10–12 (Bankr. M.D. Pa. Nov. 25, 2020) (the debtor's failure to challenge the high spousal and child support order showed a lack of "belt-tightening").

70. *In re* Miller, 409 B.R. 299, 313 (Bankr. E.D. Pa. 2009).

71. *In re* Allen, 329 B.R. 544, 551 (Bankr. W.D. Pa. 2005) (finding that a deduction of $111.67 for retirement is not only reasonable, but also allowable, for a debtor who has had no existing retirement savings and is sixty-years-old). *Cf. In re* Doernte, No. 10-24280-JAD, at *19–22 (finding 403(b) contributions were not necessary for a minimal standard of living for a debtor who is forty-eight-years-old, has ample disposable income, expected raises, and has a significant asset, including retirement savings and home equity).

decline to treat tithing as a necessary expense in the section 523(a)(8) undue hardship analysis.[72]

Moreover, a debtor's eligibility for a zero income-driven repayment plan is a factor courts may consider, but it is not necessarily dispositive where the debtor's budget otherwise shows inability to maintain a minimal standard of living.[73]

The second prong imposes an exceptionally high burden of proof for demonstrating long-term hardship.[74] The Third Circuit requires definitive evidence that the debtor's earning potential is unlikely to improve in the foreseeable future.[75] Courts frequently require medical documentation proving a permanent condition and often deny discharge if there remains any possibility, even speculative, that the debtor could obtain future employment.[76] Factors such as chronic illness, caregiving responsibilities, and limited retraining opportunities are weighed in favor of discharge.[77] Like the Second Circuit courts, courts have rejected age alone as a sufficient factor for undue hardship.[78] The Third Circuit has

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72. *In re* Allen, 329 B.R. at 552. (finding $130 a month for tithing must be redirected toward student loan payments).

73. *See In re* Reagan, 587 B.R. 296, 303 (Bankr. W.D. Pa. 2018) (finding that the court's focus should be on whether a debtor can maintain a minimal standard of living while making student loan payments, ruling that the debtor need not prove that the loan payments themselves caused the financial hardship, just that the total obligations left her unable to maintain that standard); Roundtree-Crawley v. Educ. Credit Mgmt. Corp. (*In re* Crawley), 460 B.R. 421, 438 (Bankr. E.D. Pa. 2011) (emphasizing that bankruptcy courts, not the Department of Education, should determine student loan discharge ability and that the debtor's inability to maintain a minimal standard of living, even under a $0.00 payment plan, made eligibility for the Income Contingent Repayment Plan (ICRP) irrelevant under the first prong of the *Brunner* test); *In re* Tinsley, No. 17-28611-ABA, at *1, 6 (Bankr. D.N.J. Dec. 26, 2018) (holding that eligibility for a $0.00 per month repayment plan does not determine the outcome of the first prong of the *Brunner* test).

74. *See* Bailey v. Navient Sols., LLC (*In re* Bailey), No. 19-15531-ABA, at *7, 8 (Bankr. D.N.J. June 30, 2021).

75. *In re* Fabrizio, 369 B.R. 238, 248 (Bankr. W.D. Pa. 2007); *In re* Brightful, 267 F.3d 324, 328 (3d Cir. 2001) (debtor must demonstrate total "incapacity" to pay her debts) (citations omitted).

76. *See, e.g.*, Devos v. Price, 583 B.R. 850, 857 (E.D. Pa. 2018) (declining to assume a debtor's financial difficulties would persist without substantiated evidence); *In re* Greco, 251 B.R. 670, 677 (Bankr. E.D. Pa. 2000) (finding that the debtor failed to demonstrate diligent efforts to secure stable employment); *see also In re* Wolfson, No. 19-11618 (LSS), at *7 (Bankr. D. Del. Jan. 14, 2022).

77. *In re* Derby, 199 B.R. 328, 330 (Bankr. W.D. Pa. 1996) (holding that the debtor's significant financial hardship and her husband's mental health condition warranted discharge, despite the absence of a prognosis); *In re* Young, 225 B.R. 312, 315–16 (Bankr. E.D. Pa. 1998) (granting discharge to a 50-year-old debtor unable to secure employment in her field for over a year, citing limited job opportunities).

78. *In re* Jones, 392 B.R. 116, 129–30 (Bankr. E.D. Pa. 2008) (denying discharge for a debtor who took out the loan at age 40 after obtaining his law degree and pursuing a new area of

rejected a per se rule requiring expert testimony for emotional or psychiatric conditions, instead allowing bankruptcy judges to evaluate debtor testimony and overall credibility when assessing hardship.[79] Courts also take into account external financial support, including assistance from family members, charities, or other sources that may impact the debtor's financial situation.[80]

Similar to the Second Circuit, the Third Circuit regards self-imposed hardship as a factor that weighs negatively against the debtor[81]Additionally, courts often consider past financial patterns as a strong predictor of future hardship.[82] Similar to the approach taken by courts in the Second Circuit, courts in the Third Circuit consider two key questions under the second prong: "(1) How long is the applicable repayment period? (2) What is a 'significant portion' of that repayment period (sufficient to warrant discharge of the debtor's student loan)?"[83] Specifically, the repayment period is determined by either the debtor's current loan agreement or the repayment plan under an available income-contingent repayment program.[84]

Under the third prong, courts assess good faith efforts, often applying a presumption in favor of creditors. Courts consider multiple factors, including whether the debtor has attempted to maximize income, minimize expenses, make payments, or enroll in available repayment programs.[85] Much like the Second Circuit, failure to enroll in an IDR plan

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study); *cf. In re* Young, 225 B.R. at 313 (granting discharge for a 50-year-old debtor who had been unemployed for a year and a half prior to trial).

79. *Brightful*, 267 F.3d at 329–30; *In re* Crawley, 460 B.R. 421, 442–43 (Bankr. E.D. Pa. 2011) (finding the debtor's inability to work full time credible based on personal testimony, medical records, and a history of health-related absences, which were likely to persist and cause financial hardship).

80. *In re* Clarke, No. 99-16597, Adv. No. 99-0813, at *6 (Bankr. E.D. Pa. Dec. 10, 1999) (holding that the debtor's reliance on family financial assistance, which maintained a middle-class standard of living, weighed against granting discharge).

81. See *In re* Zierden-Landmesser, 249 B.R. 65, 70 (M.D. Pa. 2000) (holding that a healthy debtor with twenty-five remaining working years had not sufficiently explored relocation options, and her financial struggles were partially due to voluntary choices); c*f. In re* Carter, 295 B.R. 555, 561 (Bankr. W.D. Pa. 2003) (finding that a 23-year-old single mother, living below the poverty line with no college degree and limited job prospects, met the second prong of *Brunner* due to her inability to improve her financial situation); *see also In re* Fischer, 23 B.R. 432, 433 (Bankr. W.D. Ky. 1982) (emphasizing that voluntary hardships do not justify student loan forgiveness).

82. In re *Crawley*, 460 B.R. at 439 (citing *In re* Berry, 266 B.R. 359, 364–65 (Bankr. N.D. Ohio 2000)).

83. Devos v. Price, 583 B.R. 850, 855 (E.D. Pa. 2018) (citation omitted).

84. *Id.*

85. *See* Pelliccia v. Dep't of Educ., 67 F. App'x 88, 91 (3d Cir. 2003); Murphy v. Dep't of Educ. (*In re* Murphy), 535 B.R. 97, 105 (Bankr. W.D. Pa. 2015); Jones v. Educ. Credit Mgmt. Corp. (*In re* Jones), 495 B.R. 674, 691 (Bankr. E.D. Pa. 2013); Davis v. Nat'l Collegiate Tr. (*In re* Davis), 526 B.R. 136, 141 (Bankr. W.D. Pa. 2015) (finding that although the debtor maintained

typically weighs against the debtor.[86] Importantly, courts have held that debtors may still demonstrate good faith even in the absence of loan payments, provided they were not in a financial position to make payments.[87] Like the Second Circuit, courts in the Third Circuit consider the ratio of student loan debt to total bankruptcy debt. A high percentage of student loan debt may suggest that the debtor filed for bankruptcy primarily to discharge student loans, which can negatively impact the good faith analysis.[88]

Among all jurisdictions, the Third Circuit—alongside the Second Circuit—imposes one of the most stringent standards for student loan discharge. The following section explores the Fourth Circuit's approach to student loan discharge under *Brunner*.

C. *Fourth Circuit's Interpretation of the* Brunner *Test*

The Fourth Circuit applies the *Brunner* test to assess whether a debtor qualifies for student loan discharge under 11 U.S.C. § 523(a)(8).[89] Under the first prong, debtors must show that repaying student loans would prevent them from maintaining a minimal standard of living.[90] The

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modest expenses, her failure to maximize earning potential demonstrated a lack of good faith in repaying student loans).

86. *See* Sperazza v. Edu. Credit Mgmt. Corp. (*In re* Sperazza), 366 B.R. 397, 413–14 (Bankr. E.D. Pa. 2007); *In re* Murphy, 535 B.R. at 106–08 (holding that the debtor's decision not to participate in an Income-Based Repayment (IBR) plan, which could have reduced his monthly payment to $0, was based on unsupported, speculative evidence of future tax consequences, indicating bad faith); *cf. In re* Crawley, 460 B.R. at 445–46 (holding that the failure to participate in the Income-Contingent Repayment Plan (ICRP) must be evaluated based on the debtor's specific circumstances, and in this case, the decision was a reasonable response to financial hardship, medical issues, and the belief that the ICRP would be ineffective); *see also In re* Allen, 329 B.R. at 550–51 (finding no bad faith for debtor's failure to participate in ICRP). *But see* Coco v. New Jersey Higher Educ. Student Assistance Auth. (*In re* Coco), 335 F. App'x 224, 228–29 (3d Cir. 2009) (finding that the debtor's refusal to enter an ICRP plan was reasonable due to concerns about creating future tax liabilities).

87. *See In re* Wolfson, No. 19-11618 (LSS), at *11–12 (Bankr. D. Del. Jan. 14, 2022); *In re* Jones, 495 B.R. at 691 (stating that the debtor's failure to make voluntary payments was understandable, given that nothing in the record suggested that the debtor was ever financially able to do so while maintaining a minimal standard of living). *But see* Kuznicki v. Edu. Credit Mgmt. Corp. (*In re* Kuznicki), 483 B.R. 296, 302 (W.D. Pa. 2012) (holding that the debtor acted in bad faith by possessing the ability to make reasonable minimum payments but failing to do so).

88. *See In re* Murphy, 535 B.R. at 107 (finding the debtor's student loans comprised 85% of his total unsecured debt, suggesting the primary motivation for bankruptcy was to discharge these loans, which, while not decisive, weighed against good faith); *see also In re* Fabrizio, 369 B.R. 238, 247 (Bankr. W.D. Pa. 2007); DiFrancesco v. U.S. Dep't of Educ. (*In re* DiFrancesco), 607 B.R. 463, 469 (Bankr. M.D. Pa. 2019).

89. Ward v. U.S. Dep't of Educ., 588 F. App'x 282, 282 (4th Cir. 2014) (rejecting the argument that the *Brunner* test was inapplicable).

90. *See* Perkins v. Penn. Higher Educ. Assistance Agency (*In re* Perkins), 318 B.R. 300, 305 (Bankr. M.D.N.C. 2004); *see also* Murphy v. Sallie Mae (*In re* Murphy), 305 B.R. 780, 793 (Bankr. E.D. Va. 2004) ("[T]he bankruptcy court must determine what amount is minimally

Fourth Circuit does not require debtors to live in extreme poverty but expects them to reduce discretionary spending and adjust their lifestyle to meet essential needs, including housing, food, and transportation.[91] Like other circuits, the Fourth Circuit has no per se rule regarding retirement contributions. However, in *Perkins*, the court held that neither the $400 allocated for retirement expenses nor the $400 contributed to a 401(k) was necessary to maintain a minimal standard of living.[92] Similarly, the Fourth Circuit has not issued a definitive ruling on whether tithing qualifies as an allowable expense under the *Brunner* test.[93] Like the Second and Third Circuits, the Fourth Circuit considers family income, including that of a non-debtor spouse, when evaluating a debtor's financial situation.[94] A surplus of income generally precludes the finding of undue hardship.[95] Courts also scrutinize non-essential expenditures to determine whether the debtor is maintaining more than a minimal standard of living.[96] Additionally, a $0 monthly payment under an income-driven repayment plan generally weighs against the finding of undue hardship.[97]

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necessary to ensure that the debtor's needs for care, including food, shelter, clothing, and medical treatment, are met."); Kapinos v. Graduate Loan Ctr. (*In re* Kapinos), 253 B.R. 709, 714 (Bankr. W.D. Va. 2000) (considering the debtor's ability to increase income through overtime or additional employment).

91. *See* Gill v. Nelnet Loan Servs., Inc., 326 B.R. 611, 625 (Bankr. E.D. Va. 2005); *see also* Love v. U.S. (*In re* Love), 33 B.R. 753, 754–55 (Bankr. E.D. Va. 1983).

92. *In re* Perkins, 318 B.R. at 308.

93. *Id.* at 309.

94. *Gill*, 326 B.R. at 626; Virginia State Educ. Assistance Auth. v. Dillon, 189 B.R. 382, 385 (W.D. Va. 1995).

95. Burton v. Educ. Credit Mgmt. Corp., 339 B.R. 856, 871 (Bankr. E.D. Va. 2006).

96. Hock v. U.S. Dep't of Educ., 653 B.R. 802, 804 (W.D.N.C. 2023) (finding that luxury vehicle leases and annual household income of $80,085.36 supported repayment capacity); *see also* Halatek v. William D. Ford Fed. Direct Loan Program, 592 B.R. 86, 97–99 (Bankr. E.D.N.C. 2018) (finding expenditures on a new SUV and other luxuries, coupled with an income five times the federal poverty level, negated hardship claims); McDade v. Direct Subsidized Consol. Loan (*In re* McDade), No. 15-bk-52, at *6 (Bankr. N.D.W. Va. July 27, 2017) (finding that supporting an adult child and charitable contributions indicated a standard of living above the minimal level); Erbschloe v. U.S. Dep't of Educ. (*In re* Erbschloe), 502 B.R. 470, 478 (Bankr. W.D. Va. 2013) (allowing modest entertainment expenses but rejecting cable and satellite TV costs as excessive); Educ. Credit Mgmt. Corp. v. Buchanan, No. 1:01-CV-177 (N.D. W. Va. Mar. 29, 2002).

97. Greene v. U.S. Dep't of Educ., No. 4:13-cv-79, at *7–10 (E.D. Va. Oct. 2, 2013) (holding that a $0 payment under an income-contingent plan did not affect the debtor's ability to meet a minimal standard of living); *In re* Straub, 435 B.R. 312, 316 (Bankr. D.S.C. 2010) (finding the plaintiff failed to satisfy the first *Brunner* prong, noting she qualified for a monthly payment of $0 under the income-driven repayment plan); Bell v. Dep't of Educ. (*In re* Bell), 633 B.R. 164 (Bankr. W.D. Va.) (same). *But see* Nightingale v. N.C. State Educ. Assistance Auth. (*In re* Nightingale), 529 B.R. 641, 650 (Bankr. M.D.N.C. 2015) (finding section 523(a)(8) should not be rendered meaningless by offering the debtor a repayment plan with zero-dollar monthly payments as the interest will continue to grow with none-payment).

To satisfy the second prong, debtors must show that their financial hardship is likely to persist for a significant portion of the repayment period. Courts assess factors such as age, health, employment prospects, and external barriers to financial stability.[98] One court identified the following three key considerations under this prong: (1) the debtor's current financial condition; (2) the likelihood that these conditions will persist; and (3) whether the hardship will continue for a substantial part of the remaining loan term.[99] Claims of undue hardship are frequently rejected when debtors fail to seek reasonable employment opportunities.[100] Courts also evaluate the debtor's assets when determining whether financial hardship is likely to persist.[101] In cases involving medical conditions, courts typically require substantial

98. *In re* Raynor, No. 19-01656-5, at *9 (Bankr. E.D.N.C. Nov. 20, 2024) (finding that the 76-year-old debtor, who was caring for an ill spouse, could not repay the loans); *Hock*, 653 B.R. at 807 (determining that Hock's income from Social Security and her husband's disability benefits would continue regardless of her ability to work and that her financial future was not hopeless, as a doctor had refused to certify her as permanently disabled); Randall v. Navient Sols. (*In re* Randall), 628 B.R. 772, 782–83 (Bankr. D. Md. 2021) (granting discharge, finding it unreasonable to expect the debtor to work more than eighty hours per week); *In re* Nightingale, 543 B.R. at 546–50 (finding that Alice Nightingale's severe and worsening medical conditions, supported by her testimony, physician letters, and a disability determination, were unlikely to improve, satisfying the second prong for proving long-term hardship); Kelly v. U.S. Dep't of Educ. (*In re* Kelly), 548 B.R. 99, 102–07 (Bankr. E.D.N.C. 2016) (denying discharge, as the debtor failed to show diligent job searches or exceptional circumstances).

99. *In re* Bell, 633 B.R. at 164, 176, 181 ("[T]he inquiry is not whether participation in a repayment program for twenty years for an ultimate forgiveness would be an undue hardship; the inquiry according to the *Brunner* test is whether repayment of the loan over the repayment period would be an undue hardship.").

100. *See In re* Erbschloe, 502 B.R. at 478–80 (finding that despite a medical condition limiting physical labor, the debtor's transition to administrative work demonstrated employability and negated a finding of hopelessness); *see also* Ward v. Dep't of Educ. (*In re* Ward), No. H-12-00001-8-MP, 2013 WL 4136093, at *5–6 (Bankr. E.D.N.C. Aug. 9, 2013) (holding that a debtor's spotty employment history and approaching age fifty did not meet the second prong, as there was no evidence of significant medical issues or diligent efforts to secure stable employment, failing to prove hopelessness); Najafian v. Educ. Credit Mgmt. Corp. (*In re* Najafian), No. 12-cv-01408, 2013 WL 1399340, at *4 (E.D. Va. Apr. 5, 2013) (concluding that the debtor's refusal to seek work outside her specialized field undermined her claim and that despite nearing retirement, her education and skills indicated future income potential); Matthess v. U.S. Dep't of Educ. (*In re* Matthess), No. 98–12955C–7G, Adv. No. 99–2029, 2000 WL 33673763, at *3 (Bankr. M.D.N.C. Feb. 4, 2000) (rejecting an undue hardship claim partly due to a lack of effort in seeking higher-paying employment).

101. *See* Marcotte v. Brazos Higher Educ. Serv. (*In re* Marcotte), 455 B.R. 460, 471–72 (Bankr. D.S.C. 2011) (considering whether Marcotte's 401(k) should be liquidated to repay student loans but holding that Marcotte's $11,200 balance, was not required to be liquidated due to factors including age, low income, and future stability needs, showing that retirement contributions may be permissible if they align with the debtor's present and future needs).

evidence, which may include expert testimony, to establish a long-term prognosis.[102]

Under the third prong, a debtor must actively demonstrate good faith to repay the loans. Courts evaluate the debtor's attempts to maximize income, efforts to obtain employment, and attempts to minimize expenses.[103] Additionally, courts consider whether the debtor explored alternative repayment options before seeking a discharge, such as income-driven repayment plans.[104] In most circuits, failure to pursue

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102. *See* Todd v. Access Group Inc. (*In re* Todd), 473 B.R. 676, 689–92 (Bankr. D. Md. 2012) (finding that Todd's conditions of autism, PTSD, and osteoporosis created a "certainty of hopelessness," supported by expert testimony); *see also* Aylsworth v. U.S. Dep't of Educ. (*In re* Aylsworth), No. 04-1409, Adv. No. 04-67, 2007 WL 2496520, at *2 (Bankr. N.D. W. Va. Aug. 30, 2007) (finding a debtor's medical issues did not preclude all employment, and surgery could potentially cure the condition); Braun v. Mae (*In re* Braun), No. 1.10–BK–11169–GM, Adv. No. 11–01529, 2012 WL 5199163, at *7 (Bankr. E.D. Va. Oct. 19, 2012) (rejecting PTSD and ADHD claims due to the lack of supporting medical evidence); Robinson v. Educ. Credit Mgmt. (*In re* Robinson), 416 B.R. 275, 280 (Bankr. E.D. Va. 2009) (finding no certainty of hopelessness without medical documents or expert testimony on her condition); Triplett v. ACS/PNC Educ. Loan Ctr. (*In re* Triplett), 357 B.R. 739, 743–44 (Bankr. E.D. Va. 2006) (requiring medical evidence to support an undue hardship claim); Burton v. Educ. Credit Mgmt. (*In re* Burton), 339 B.R. 856, 874–75, 878 (Bankr. E.D. Va. 2006) (acknowledging *Doherty*, where the debtor's testimony and judicial notice of bipolar disorder were enough for discharge, but agreed with the majority view that some corroborating evidence is necessary in these cases); Thompson v. New Mexico Student Loan Guarantee Corp. (*In re* Thompson), 329 B.R. 145, 188–89, 191 (Bankr. E.D. Va 2005) (emphasizing that corroborative medical evidence is crucial for pro se debtors seeking student loan discharge due to undue hardship); *In re* Nightingale, 548 B.R. at 531, 534 (reopening the case for a debtor to provide medical evidence, acknowledging her challenges in obtaining it due to financial constraints).

103. *See* Mosko v. Magers (*In re* Mosko), 515 F.3d 319, 323–25 (4th Cir. 2008) (finding that the debtor's decision to not work during the summer to care for family did not constitute undue hardship and expenses such as internet, satellite TV, and cigarettes were deemed unnecessary, and the failure to reduce these costs undermined the debtor's good faith); *see also* Raynor v. Educ. Credit Mgmt. (*In re* Raynor), 666 B.R. 540, 546–47 (Bankr. E.D.N.C. 2024); Kelly v. U.S. Dep't of Educ. (*In re* Kelly), 548 B.R. 99, 107–08 (Bankr. E.D.N.C. 2016) (ruling that the debtor's voluntary decision to leave stable employment for lower-paying jobs undermined her good faith efforts); Shank v. Educ. Credit Mgmt. (*In re* Shank), No. 05–73943–FJS, No. 07-7087, 2008 WL 3166492, at *8–9 (Bankr. E.D. Va. Aug. 5, 2008) (finding that the debtor's failure to pursue less strenuous work in her trained field and reduce high expenses, including luxury items like cable TV and long-distance plans, contradicted her claim of undue hardship).

104. *See* Educ. Credit Mgmt. v. Frushour (*In re* Frushour), 433 F.3d 393, 402 (4th Cir. 2006) (viewing seeking loan consolidation as a key indicator of good faith repayment); *see also* Lagueux v. U.S. Dep't of Educ. (*In re* Lagueux), 604 B.R. 249, 251 (Bankr. D.S.C. 2019) (noting that while consolidation is not mandatory, it heavily influences the good faith evaluation); Liposky v. U.S. Dep't of Educ. (*In re* Liposky), No. 09–03076–DOT, Adv. No. 09–03076–DOT, 2010 WL 1333103, at *6 (Bankr. E.D. Va. Mar. 30, 2010) (finding that consistent payments and seeking an income sensitive plan supported a finding of good faith); *cf.* Straub v. Sallie Mae Educ. Credit Mgmt. (*In re* Straub), 435 B.R. 312, 317 (Bankr. D.S.C. 2010) (finding that a complete lack of repayment efforts reflected bad faith). *But see In re* Todd, 473 B.R. at 694–95 (finding no bad faith where the debtor refused to pursue a repayment plan, attributing both her mistrust of such programs and her financial inability to pay to the effects of her autisms).

administrative remedies does not automatically bar a debtor from seeking discharge.[105] Payment history and prior financial decisions also play a role in this analysis.[106] Like the Second and Third Circuits, courts within this Circuit consider factors like the time elapsed since the loan became due and the proportion of total debt represented by the student loan.[107] Finally, courts assess whether the debtor's financial hardship stems from circumstances beyond their control, reinforcing the stringent nature of the *Brunner* test.[108]

While the Fourth Circuit applies the *Brunner* test more leniently, the Fifth Circuit has interpreted *Brunner* more stringently. The following section explores the Fifth Circuit's strict approach to student loan discharge under *Brunner*.

D. *Fifth Circuit's Interpretation of the* Brunner *Test*

The Fifth Circuit applies the *Brunner* test to assess whether a debtor qualifies for student loan discharge.[109] Under the first prong, courts determine the debtor's minimal standard of living by evaluating monthly income and expenses to identify those that are "reasonable and necessary."[110] Courts apply common sense and consider federal poverty

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105. *See In re* Lagueux, 604 B.R. at 251–52; *see also In re* Todd, 473 B.R. at 694–95.

106. Bell v. Dep't of Educ. (*In re* Bell), 633 B.R. 164, 183 (Bankr. W.D. Va. 2021) (finding that the financial inability, not the absence of payments, determines good faith); Hooker v. Educ. Credit Mgmt. Corp., 368 B.R. 502, 505 (W.D. Va. 2007) (expressing uncertainty about whether lack of payments was due to bad faith or worsening health from HIV diagnosis, remanding for further fact-finding regarding medical condition); *In re* McNemar, 352 B.R. 621, 624 (Bankr. N.D. W. Va. 2006) (denying discharge based on a lack of good faith, as debtor ceased payments in 1995 due to a dispute with the lender, not hardship, and failed to resume payments for over ten years); *In re* Mosko, 515 F.3d at 326–27 (court found that while Moskos made some payments and sought forbearances, failure to make payments during times of surplus income and continued discretionary spending undermined their good faith); Murphy v. Sallie Mae (*In re* Murphy), 305 B.R. 780, 801–02 (Bankr. E.D. Va. 2004) (court found lack of good faith, as Murphy failed to make payments and relied solely on forbearances, despite a family income over $80,000); Educ. Credit Mgmt. Corp. v. Mosko, No. B-04-52834C-7W, Adv. No. A-04-6077W, 2006 WL 2668437, at *5–6 (M.D.N.C. Sep. 15, 2006) (upholding bankruptcy court's finding of good faith due to Moskos' efforts, but emphasizing that failure to fully eliminate unnecessary expenses did not negate good faith).

107. *In re* Wilson, No. 01-30624, Adv. No. 01-3128, 2002 Bankr. LEXIS 1743, at 7 (Bankr. E.D. Va. Mar. 25, 2003).

108. *In re* McNemar, 352 B.R. 621, 624 (Bankr. N.D. W. Va. 2006) (emphasizing that a debtor's financial difficulties must result from factors beyond their control, noting that voluntarily ceasing payments when capable of doing so contradicts good faith); *see also In re* Kelly, 548 B.R. at 107 (noting that a debtor's voluntary decision to leave her job and her failure to maximize income or minimize expenses demonstrated a lack of good faith).

109. *See In re* Gerhardt, 348 F.3d 89, 91 (5th Cir. 2003).

110. See *In re* Speer, 272 B.R. 186, 194 (Bankr. W.D. Tex. 2001) (disallowing a debtor's $140 monthly retirement contribution, finding it inconsistent with the undue hardship standard); Educ. Credit Mgmt. Corp. v. Young, 376 B.R. 795, 799 (E.D. Tex. 2007) (finding $220 monthly

guidelines.[111] Courts also factor in household size and family circumstances.[112] Like most circuits, courts in the Fifth Circuit consider the income of both spouses when evaluating a debtor's financial situation.[113] Although the issue remains unsettled, some courts in the Fifth Circuit have allowed tithing as an expense.[114] Like the Fourth Circuit and some courts in the Second Circuit, courts in the Fifth Circuit generally disallow 401(k) contributions or retirement savings as allowable expenses under *Brunner*.[115] Courts in the Fifth Circuit require debtors to prioritize student loan repayment over private school tuition for a child unless compelling circumstances justify the expense.[116]

Under the second prong, the debtor must demonstrate additional circumstances that create a total incapacity to repay student loans, both

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401(k) contribution was inappropriate, as retirement savings are not essential during bankruptcy and should be redirected to repaying loans).

111. *In re* Eady, No. 20-40208, at 10 (Bankr. E.D. Tex. July 26, 2021) (allowing reasonable expenses (e.g., cable, internet) but rejecting unnecessary savings and security costs, emphasizing the need for financial sacrifice); *In re* Mullin, No. 19-12579-JDW, Adv. No. 20-01064-JDW, 2021 WL 3824647 (Bankr. N.D. Miss. Aug. 26, 2021) (noting that a debtor's income exceeded federal poverty levels, failing to prove undue hardship); Justice v. Educ. Credit Mgmt. Corp. (*In re* Justice), No. 14-13684-JDW, Adv, No. 15-01083-JDW, 2016 Bankr. LEXIS 4100, at *10–11 (Bankr. N.D. Miss. Nov. 28, 2016) (denying discharge due to excessive car payments); *In re* Newchurch, No. 05-11747, Adv. No. 06-1009, 2006 Bankr. LEXIS 3060, at *5 (Bankr. M.D. La. Nov. 2, 2006) (finding a $500 life insurance annuity unnecessary); *In re* Knox, No. 05-0695 IEE, Adv. No. 06-0060, 2007 Bankr. LEXIS 3873, at *9 (Bankr. S.D. Miss. Nov. 6, 2007) (criticizing $99 for phone and internet plans).

112. *In re* Pratt, 375 B.R. 753, 761 (Bankr. S.D. Tex. 2007) (acknowledging that large family size and high daycare costs hindered additional employment, justifying a large vehicle purchase); *In re* Cartwright, No. 01-20547-RLJ-7, Adv. No. 01-2020, 2002 Bankr. LEXIS 1971 (Bankr. N.D. Tex. Mar. 27, 2002) (finding that a debtor's $500 tithing was excessive and advising that religious contributions be reduced to allow more for loan repayment); *In re* Barron, 264 B.R. 833, 841 (Bankr. E.D. Tex. 2001) (ruling that discretionary expenses, such as a two-bedroom apartment and cable, could be redirected toward student loans without harming the debtor's living standards).

113. *See In re* Wynn, 378 B.R. 140, 148 (Bankr. S.D. Miss. 2007).

114. *In re* Pratt, 375 B.R. at 760 (finding the validity of tithing as an expense for undue hardship uncertain but upholding the bankruptcy court's decision allowing tithing under the RLCDPA, which caps tithing contributions in Chapter 13 at 15% of gross income); *In re* McLeroy, 250 B.R. 872, 881 (N.D. Tex. 2000) (finding tithing does not automatically qualify as a reasonable expense).

115. *In re* Eady, No. 20-40208, Adv. No. 20-04028, 2021 WL 3148951, at *4 (determining that 401(k) contributions are not necessary expenses during bankruptcy proceedings, as the plaintiff's financial situation required prioritizing student loan repayment over saving for retirement); *see also In re* Speer, 272 B.R. at 194 (ruling that student loan repayment must take precedence over retirement savings, deeming the debtor's 401(k) contribution of $140 per month unreasonable under the undue hardship standard); *Young*, 376 B.R. at 799–800.

116. *See* Epperson v. Educ. Credit Mgmt. Corp. (*In re* Epperson), No. 17-42001, Adv. No. 18-4015, 2021 WL 810873, at *5 (Bankr. E.D. Tex. Feb. 24, 2021); *In re* Russ, 365 B.R. 640, 645 (Bankr. N.D. Tex. 2007).

in the present and for the foreseeable future.[117] This prong imposes an exceptionally high burden of proof, requiring debtors to present evidence of external factors—such as chronic illness or disability—that significantly limit their earning potential and are beyond their control.[118] This includes persistent illness or disability.[119] Expert testimony is not required.[120] Courts also consider the debtor's age, level of education, earning potential, and caregiving responsibilities when evaluating long-term hardship.[121]

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117. Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 451 (5th Cir. 2019).

118. *See* Manley v. Trellis Co. (*In re* Manley), No.19-33976, Adv. No. 19-03577, 2020 WL 739633, at *1 (Bankr. S.D. Tex. Feb. 13, 2020); O'Donohoe v. Panhandle-Plains Higher Educ. Auth. (*In re* O'Donohoe), No.12-33870, Adv. No. 12–03281, 2013 WL 2905275, at *5 (Bankr. S.D. Tex. June 13, 2013) (requiring a proof of additional circumstances affecting future earning potential); *In re* Pratt, 375 B.R. at 762 (reversing a discharge order, citing the Pratts' voluntary decisions and improving financial situation); In re *Newchurch*, No. 05-11747, Adv. No. 06-1009, 2006 Bankr. LEXIS 3060, at *3 (Bankr. M.D. La. Nov. 2, 2006) (denying discharge for a debtor who failed to pursue alternative work outside his field); *see also In re* Farrish, 272 B.R. 456, 462–63 (Bankr. S.D. Miss. 2001) (same).

119. *In re* McMullin, 316 B.R. 70, 78 (Bankr. E.D. La. 2004) (granting discharge due to the debtor's persistent health issues, including bipolar disorder and morbid obesity); *In re* Demmons, No. 14-11638, Adv. No. 15-1024, 2016 WL 5874831, at *5–6 (Bankr. E.D. La. Oct. 7, 2016) (finding that Demmons' permanent spinal damage and inability to secure higher-paying work due to his disability met the second prong of the *Brunner* test); *cf. In re* Hollowell, No. 23-11082-cgb, Adv. No. 23-01040-cgb, 2024 WL 4562569, at *3 (Bankr. W.D. Tex. Oct. 23, 2024) (denying discharge despite Ms. Hollowell's mental health challenges, citing her successful entrepreneurial efforts and academic achievements); O'Donohoe v. Panhandle-Plains Higher Educ. Auth. (*In re* O'Donohoe), Case No. 12-33870, Adv. No. 12–03281, 2013 WL 2905275, at *5 (Bankr. S.D. Tex. June 13, 2013) (granting discharge, finding that the debtor's severe mental and physical conditions, combined with unemployment, constituted undue hardship). *But see In re* White, No. 07-41509, Adversary No. 07–4157. 2008 WL 5272508, at *6 (Bankr. E.D. Tex. Dec. 17, 2008) (finding that a debtor with autoimmune hepatitis and a stroke failed to prove an inability to work); *In re* Ostrom, 283 F. App'x 283, 286 (5th Cir. 2008) (finding no long-term inability to repay loans for a debtor with sleep issues and a master's degree).

120. *In re* O'Donohoe, Case No. 12-33870, Adv. No. 12–03281, 2013 WL 2905275, at 5 (finding that the debtor met the second prong of the *Brunner* test, and although no medical testimony was produced, the court observed the debtor's difficulties in completing thoughts and minimal social skills, leading it to conclude that he could not maintain stable employment).

121. McCoy v. United States, No. 3:18-CV-21 (S.D. Tex. Mar. 7, 2019) (finding that McCoy's doctorate and professional roles contradicted her claims of persistent incapacity, emphasizing the need for evidence of ongoing inability to earn); *In re* Manley, No. 19-33976, Adv. No. 19-03577, 2020 WL 739633, at *1 (Bankr. S.D. Tex. Feb. 13, 2020) (ruling that a 44-year-old debtor with more than twenty years of potential employment ahead could not meet the second *Brunner* prong); Trejo v. Navient, No. 17-42439-MXM-7, Adversary No. 17-4052, 2020 WL 1884444, at *8 (Bankr. N.D. Tex. Apr. 15, 2020) (finding that Trejo, a single mother caring for two children with severe medical conditions, met the second *Brunner* prong, as her caregiving duties prevented her from working). *But see* Educ. Credit Corp v. Welch, No. 04-0768, at 4 (W.D. La. Jan. 4, 2006) (ruling that Welch, a capable individual with a strong work ethic, would likely improve her situation once her child began school, enabling better employment opportunities); *In re* Gerhardt, 348 F.3d 89, 92–93 (5th Cir. 2003) (finding that a debtor could not claim undue

In assessing good faith under the *Brunner* test, courts examine whether the debtor has made reasonable efforts to maximize income and minimize expenses.[122] Courts also evaluate whether the debtor has made payments on the loans and explored alternative repayment options before seeking discharge.[123] Finally, courts assess whether the debtor's financial hardship results from circumstances beyond their control, reinforcing the strict standard applied by the Fifth Circuit in *Brunner* cases.[124]

While the Fifth Circuit applies a rigid standard under the *Brunner* test, courts in the Sixth Circuit have taken a more nuanced approach. The Sixth Circuit still adheres to *Brunner* but incorporates additional considerations, such as the *Flores* factors in assessing good faith. The following section examines the Sixth Circuit's interpretation of the *Brunner* test and its approach to assessing undue hardship.

E. *Sixth Circuit's Interpretation of the* Brunner *Test*

The Sixth Circuit applies the three-prong *Brunner* test to evaluate whether a debtor qualifies for student loan discharge under 11 U.S.C. § 523(a)(8).[125] The first prong of the *Brunner* test requires the debtor to demonstrate that they cannot maintain a minimal standard of living if

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hardship simply by limiting employment to a low-paying field, as Gerhardt failed to show circumstances beyond his control hindering repayment).

122. *In re* McMullin, 316 B.R. at 79 (demonstrating good faith by maintaining employment despite physical or mental limitations or minimizing discretionary expenses); *cf. In re* Griffith, Case No. 17-31905-hdh7, Adv. No. 17-03051-hdh, 2021 WL 2762809, at *6 (Bankr. N.D. Tex. June 30, 2021) (finding that high discretionary expenses or unnecessary financial commitments, such as leasing additional residences or buying luxury vehicles, indicate a lack of effort to minimize expenses).

123. *Trejo*, 2020 WL 1884444, at *9–10 (noting that making loan payments when possible and engaging in deferral, forbearance, or income-contingent repayment plans (ICRPs) can demonstrate good faith); *In re* Pratt, 375 B.R. at 763 (finding that the debtor's participation in ICRPs was seen as indicative of good faith); *In re* O'Donohoe, 2013 WL 2905275, at *6 (emphasizing that good faith involves substantial efforts to repay loans despite hardship, noting that while ICRP participation is relevant, it is not mandatory for establishing good faith); *cf. In re* Gnahoua, Case No. 14-50222-RLJ-7, Adversary No. 14–05020, 2016 WL 1238831, at *3 (Bankr. N.D. Tex. Mar. 28, 2016) (emphasizing that failure to engage in ICRPs, renegotiate terms, or make any payments typically leads to a finding of bad faith); In re *Newchurch*, 2006 Bankr. LEXIS 3060, at *10 (finding bad faith when the debtor failed to make payments or explore ICRPs).

124. *In re* Coveney, 192 B.R. 140, 144 (Bankr. W.D. Tex. 1996) (considering the debtor's personal choices, such as relocating to areas with limited job opportunities or providing financial support to non-dependents, in light of the debtor's obligation to repay loans); *see also In re* Farrish, 272 B.R. 456, 462–63 (Bankr. S.D. Miss. 2001); *In re* Russ, 365 B.R. 640, 645 (Bankr. N.D. Tex. 2007) (weighing personal choices against the legal duty to repay debts); *In re* Stebbins-Hopf, 176 B.R. 784, 788 (Bankr. W.D. Tex. 1994) (acknowledging that personal or moral obligations, such as caregiving, could justify financial hardship but do not override the legal requirement to repay loans).

125. *See* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005).

forced to repay their student loans. A minimal standard of living encompasses essential needs, including housing, utilities, food, clothing, transportation, health insurance, and limited recreational activities.[126] Courts have found that certain expenses undermine a debtor's claim of maintaining a minimal standard of living. These include contributions to a 401(k) or IRA, excessive holiday and birthday spending, and frequent trips, such as multiple trips to Florida or Disney.[127] Although debtors are not expected to live in poverty, they may need to cut back on luxuries and non-essential expenses.[128] Courts have recognized that participation in income-driven repayment (IDR) plans is a relevant fact, but it does not render § 523(a)(8) meaningless.[129]

The second prong of the *Brunner* test requires debtors to demonstrate that their financial situation is likely to persist for a significant portion of the student loan repayment period.[130] Medical conditions and related disabilities are common factors that courts examine when determining whether a debtor meets the second prong.[131] Debtors who cannot provide

126. *See* Campton v. U.S. Dep't of Educ. (*In re* Campton), 405 B.R. 887, 891 (Bankr. N.D. Ohio 2009); Wallace v. Educ. Credit Mgmt. Corp. (*In re* Wallace), 443 B.R. 781, 787–88 (Bankr. S.D. Ohio 2010).

127. *See* Hull v. U.S. Dep't of Educ. (*In re* Hull), Case No. 18-32076, 11 (Bankr. W.D. Ky. Apr. 23, 2021).

128. Hastings v. U.S. Dep't of Educ. (*In re* Hastings), 643 B.R. 470, 476 (Bankr. S.D. Ohio 2022); Marlow v. U.S. Dep't of Educ. (*In re* Marlow), No. 3:13-24, 2013 WL 3515726, at *6–9 (E.D. Tenn. July 11, 2013); *see also* Sexton v. Pheaa (*In re* Sexton), 520 B.R. 578, 583–87 (Bankr. W.D. Ky. 2014) (deeming debtor's $508 monthly tuition for two children, $600 phone bill, and $800 for house cleaning, lawn care, and childcare as excessive because no special needs were shown); *In re* Pietras, No. 10-3169, 2011 WL 4352381, at *8–16 (Bankr. N.D. Ohio Sep. 16, 2011) (deeming a debtors' $200 timeshare, $225 cell phone plan, and $150 VIP cable as excessive and non-essential).

129. *See In re* Barrett, 487 F.3d 353, 364 (6th Cir. 2007) ("Had Congress intended participation in the ICRP—implemented in 1994—to effectively repeal discharge under § 523(a)(8), it could have done so."); Hutsell v. Navient (*In re* Hutsell), 620 B.R. 604, 611–16 (Bankr. N.D. Ohio 2020) (ECMC conceded that the Plaintiff might qualify for a $0.00 repayment plan, supporting that the debtor cannot maintain a minimal standard of living under the original contract); Greene v. U.S. Dep't of Educ. (*In re* Greene), 484 B.R. 98, 110 (Bankr. E.D. Va. 2012); Marshall v. Student Loan Corp. (*In re* Marshall), 430 B.R. 809, 814–15 (Bankr. S.D. Ohio 2010).

130. *In re* Goodman, 449 B.R. 287, 293–97 (Bankr. N.D. Ohio 2011) (holding that the debtor's family obligations, although financially challenging, were expected to improve over time as children emancipated).

131. Pierson v. Navient (*In re* Pierson), No. 17-31687, Adv. No. 17-3096, 2018 Bankr. LEXIS 3106, at *12–13 (Bankr. N.D. Ohio Oct. 4, 2018) (noting a debtor's age, learning disabilities, and bipolar disorder caused chronic financial hardship with an income below $17,000, and health limitations made improvement unlikely); *see also In re* Hutsell, 620 B.R. at 611–16 (noting a debtor's chronic conditions, including Crohn's disease and thyroid cancer, limited her ability to earn a stable income); *In re* Pietras, 2011 WL 4352381, at *8–16 (finding that while the debtors' chronic medical conditions were severe, their steady income from government benefits and unnecessary expenses, like $600 for home improvements and $150 for charitable contributions, undermined their claim of inability to repay the loans, leading to a conclusion that

sufficient medical evidence or demonstrate significant employment barriers are generally less likely to satisfy the second prong.[132] Like all other circuits, age alone does not justify discharge of student loan debt.[133] Additionally, courts deny discharge when financial hardship results from the debtor's voluntary choices rather than external circumstances beyond their control.[134]

When evaluating good faith, courts in the Sixth Circuit frequently apply the six *Flores* factors, which include "(1) was the debtor's failure to repay a student loan obligation truly because of factors beyond her reasonable control; (2) has the debtor realistically used all available resources to repay the debt; (3) is the debtor using her best efforts to maximize her earning potential; (4) how long after the loan first became due did the debtor seek to discharge the debt; (5) what is the percentage of student loan debt in relation to the debtor's total indebtedness; and (6) has the debtor obtained any tangible benefit from the student loan obligations."[135] Courts have found that failing to contact loan servicers, making little to no meaningful repayment, or neglecting to pursue Income-Driven Repayment (IDR) plans may indicate a lack of good

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the second prong was not satisfied); Trudel v. U.S. Dep't of Educ. (*In re* Trudel), 514 B.R. 219, 226–30 (B.A.P. 6th Cir. 2014) (highlighting the need for medical evidence to show a debilitating condition sufficient to preclude employment, which the debtor failed to prove). *But see* Conner v. U.S. Dep't of Educ. (*In re* Conner), 526 B.R. 218, 225–30 (Bankr. E.D. Mich. 2015) (finding that manageable medical conditions and voluntary retirement did not meet the second prong).

132. Doremus v. U.S. Dep't of Educ. (*In re* Doremus), No. 13-30423, Adv. No. 13-3016, 2014 WL 1168906, at *4–7 (Bankr. N.D. Ohio Mar. 21, 2014) (noting a debtor's failure to provide adequate medical evidence and demonstrate efforts to improve his situation undermined his claim of permanent financial hardship); *In re* Oldham, No. 08-60633, Adv. No. 09-2077, 2011 Bankr. LEXIS 2960 (Bankr. S.D. Ohio Aug. 15, 2011) (noting the plaintiff failed to provide supporting medical evidence and did not demonstrate that her condition would endure for the duration of the loan repayment period).

133. *See In re* Conner, 526 B.R. at 225–30.

134. Sexton v. Pheaa (*In re* Sexton), 520 B.R. 578, 585–86 (Bankr. W.D. Ky. 2014) (rejecting the debtor's claim of unemployability due to reputation and limited legal practice, as the court found no evidence that his income limitations were permanent or that he had made sufficient efforts to expand his employment opportunities); Chenault v. Great Lakes Higher Educ. Corp. (*In re* Chenault), 586 B.R. 414, 419–21 (B.A.P. 6th Cir. 2018) (dismissing a debtor's claim of hardship due to parole status, noting that personal conduct leading to legal status issues does not meet the second prong's standard); Marlow v. U.S. Dep't of Educ. (*In re* Marlow), No. 3:13-24, 2013 WL 3515726, at *3 (E.D. Tenn. July 11, 2013) (noting a debtor's lack of a law license was self-inflicted, and no evidence was presented to show that his financial difficulties were likely to persist); Kennedy v. Access Group Loan Servicing (*In re* Kennedy), No. 10–31030, Adv. No. 10-3048, 2011 WL 87242, at *7–8 (Bankr. E.D. Tenn. Jan. 11, 2011) (stating that the financial difficulties were primarily due to personal choices, such as living in a small town and running a limited-hour law office); Hart v. ECMC (*In re* Hart), 438 B.R. 406, 411–12 (E.D. Mich. 2010).

135. Fields v. Sallie Mae Servs. Corp. (*In re* Fields), 286 F. App'x 246, 249–50 (6th Cir. 2007) (quoting Flores v. U.S. Dep't of Educ. (*In re* Flores), 282 B.R. 847, 856 (Bankr. N.D. Ohio 2002)).

faith.[136] In assessing good faith, courts also consider the debtor's overall financial situation, including whether student loan debt represents a significant portion of their total debts.[137]

F. *Seventh Circuit's Interpretation of the* Brunner *Test*

The Seventh Circuit follows the *Brunner* test in assessing whether a debtor qualifies for student loan discharge based on undue hardship.[138] Under the first prong of the *Brunner* test, the court examines whether the debtor has made reasonable efforts to maximize income and minimize expenses.[139] Like courts in other circuits, the Seventh Circuit considers all sources of income, including that of a non-debtor spouse or other household contributors.[140] Courts in the Seventh Circuit are divided on whether to consider income-contingent repayment plans (ICRP) or other income-driven repayment (IDR) plans under the first prong of *Brunner*.[141] While courts consider a debtor's eligibility for income-driven

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136. *See* Hastings v. U.S. Dep't of Educ. (*In re* Hastings), 643 B.R. 470, 479–80 (Bankr. S.D. Ohio 2022); *Hull*, 2021 WL 1602880, at *7; *In re Doremus*, 2014 WL 1168906, at *5; *Pietras*, 2011 WL 4352381, at *8; Aaron v. U.S. Dep't of Educ. (*In re* Aaron), No. 13–62693, Adv. No. 14–6009, 2016 WL 3483208, at *5 (Bankr. N.D. Ohio June 20, 2016); Warner v. Bank of Am. (*In re* Warner), 514 B.R. 532, 535–38 (Bankr. W.D. Mich. 2014) (holding the good faith requirement was not met where the debtor failed to apply tax refunds to student loan debt and only made minimal payments); Goodman v. U.S. Dep't of Educ. (*In re* Goodman), 449 B.R. 287, 296–97; *Oldham*, 2011 Bankr. LEXIS 2960, at *9–10; *cf.* Roberts v. U.S. Dep't of Educ. (*In re* Roberts), 442 B.R. 116, 119–21 (Bankr. N.D. Ohio 2010) (holding that failure to make payments is not per se evidence of bad faith, but Plaintiff's lack of documentation of her inability to make payments or participation in repayment programs led the court to conclude that debtor failed to demonstrate good faith); *In re* Barrett, 487 F.3d 353, 363–64 (6th Cir. 2007) (holding that despite not making payments or using an income-driven repayment plan, the debtor's low income due to health issues); *cf. In re* Hutsell, 620 B.R. at 615–16 (holding that the debtor's thyroid cancer and divorce and her consistent efforts to work were seen as demonstrating good faith).

137. *In re* David Ernest Nixon & Elisabeth Ann Nixon, 453 B.R. 311, 333–36 (Bankr. S.D. Ohio 2011).

138. *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993); Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 777 (7th Cir. 2002).

139. *See* Tuttle v. Educ. Credit Mgmt. Corp. (*In re* Tuttle), 600 B.R. 783, 796 (Bankr. E.D. Wis. 2019) (adjusting unnecessary household expenses like entertainment and groceries to assess if the debtor's budget met the minimal standard of living); Davis v. Conduent (*In re* Davis), 608 B.R. 693, 704–05 (Bankr. N.D. Ill. 2019) (finding a lack of reasonable effort where debtor, despite advanced degrees, failed to seek higher-paying employment, showing insufficient effort to improve income); Promisco v. Dep't of Educ. (*In re* Promisco), 625 B.R. 715, 726 (Bankr. N.D. Ill. 2021); *cf.* Bukovics v. Navient (*In re* Bukovics), 612 B.R. 174, 186–89 (Bankr. N.D. Ill. 2020) (ruling that reasonable efforts were made when debtor highlighted efforts to find work, including applying for over 200 jobs, while reducing expenses and relying on loans and government assistance due to extreme financial strain).

140. *In re* Tuttle, 600 B.R. at 796.

141. *In re* Eliason, 653 B.R. 646, 653 (Bankr. W.D. Wis. 2023) (finding a debtor's rent and utility costs were higher than average due to landlords refusing to rent to individuals with eviction and unemployment histories, forcing them into more expensive housing); *cf. In re* Bukovics, 587

repayment (IDR) plans, they do not automatically disqualify debtors from undue hardship relief. Instead, IDR participation is assessed alongside other financial factors.[142] While debtors are not required to live in poverty, they must demonstrate a frugal lifestyle.[143] Discharge is typically denied when debtors fail to show significant efforts to improve their financial situation, including maximizing income and minimizing expenses.[144] The Seventh Circuit is more accommodating than some other circuits when it comes to religious and charitable contributions. Courts have permitted reasonable tithing and donations as long as they do not significantly impact a debtor's ability to meet basic living expenses.[145]

In applying the second prong, the *Brunner* test requires the debtor to demonstrate that their financial difficulties are likely to persist for a significant portion of the repayment period.[146] To satisfy the second

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B.R. 695, 706 (Bankr. N.D. Ill. 2018) (maintaining a vehicle for an adult child was deemed unnecessary, as the debtor did not prove this expense was essential).

142. *See In re* Promisco, 625 B.R. at 727–28, 732 (finding that the debtor could enroll in an Income-Based Repayment (IBR) plan with a low monthly payment, but the plan wouldn't reduce the principal or interest, causing the debt to likely increase over time); *see also In re* Murray, 563 B.R. 52, 59–60 (Bankr. D. Kan. 2016) (rejecting the argument that simply enrolling in an IBR plan demonstrates a debtor's ability to repay loans while maintaining a minimal standard of living); Carter v. Sallie Mae (*In re* Carter), 517 B.R. 875 (Bankr. N.D. Ill. 2014); Fecek v. Sallie Mae (*In re* Fecek), No. 12-13062-JMC-7, Adv. No. 13–50089. 2014 WL 1329414, at *7 (Bankr. S.D. Ind. Mar. 31, 2014).

143. *In re* Clark, 341 B.R. 249 (Bankr. N.D. Ill. 2006); *In re* Hopson, 588 B.R. 509, 514–15 (Bankr. N.D. III. 2018) (stating even if IBR payments are $0, debtors must show they cannot further reduce expenses, such as by moving to a more affordable apartment).

144. *In re* Chance, 600 B.R. 51, 62 (Bankr. S.D. Ind. 2019) (finding a debtors' discretionary expenses, like dining out, suggested they could repay loans without falling below a minimal standard of living); Shirzadi v. Dep't of Educ. (*In re* Shirzadi), 269 B.R. 664, 668, 673 (Bankr. S.D. Ind. 2001) (finding a debtor's regular purchases and contributions to retirement and education funds indicated they could reduce spending and improve finances, leading the court to order $500 monthly payments); *cf.* Butler v. Educ. Credit Mgmt. Corp. (*In re* Butler), No. 14-71585, at *7–11 (Bankr. C.D. Ill. Jan. 27, 2016) (finding a debtor's discretionary expenses, such as tobacco and pet care, to be reasonable and rejected the creditor's claim).

145. *In re* Larson, No. 08-B-09196, at 791–93 (Bankr. N.D. III. 2010) (considering a debtor's religious tithing, which was under 15% of gross income, as a reasonable expense and deeming the debtor's 401(k) contributions reasonable given the debtor's age and the employer's matching policy, limited savings, and overall frugal budget); Educ. Credit Mgmt. Corp. v. Durrani (*In re* Durrani), No. 97 B 16918, Adv. No. 02 A. 1859, 2004 Bankr. LEXIS 920, at *1 (Bankr. N.D. Ill. June 30, 2004) (charitable contributions were protected under the Religious Liberty and Charitable Donation Protection Act, allowing up to 15% of gross income for qualified donations); *cf. In re* Echelbarger, 600 B.R. 39, 44 (Bankr. S.D. Ind. 2019) (holding that the debtor had not sufficiently minimized her expenses, pointing to various expenditures, including the cost of her son's private/parochial school education, and retainment as evidence that the debtor had not made adequate efforts to reduce her expenses).

146. *In re* Robinson, No. 00-82044, Adv. No. 02-8018 (Bankr. C.D. Ill. Oct. 22, 2002) (concluding that where a debtor's loan repayment term had fully elapsed by the time of the bankruptcy filing, the second prong of the *Brunner* test was satisfied without needing to predict

prong, debtors must show more than a temporary inability to pay. They must provide evidence of exceptional circumstances—such as chronic illness, permanent disability, or significant employment barriers—that will persist for a substantial portion of the repayment period.[147] Courts consider factors such as long-term medical or employment limitations and require credible evidence that these conditions will prevent the debtor from maintaining a minimal standard of living while repaying the loan.[148] Courts assess medical and disability evidence carefully but generally require documentation proving the condition's long-term impact on earning capacity.[149] Age alone is not considered sufficient for undue hardship.[150] Also, while expert testimony is not required, well-

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the duration of financial hardship, as the debtor's inability to repay had already persisted throughout the entire loan term); *see also In re* Butler, No. 14-71585, at 12 (considering a debtor's future financial prospects under the terms of their loan agreements where the debtor had consolidated her loan and has over 20 years remaining on her repayment plan).

147. *In re* Bukovics, 612 B.R. 174, 190 (Bankr. N.D. Ill. 2000) (determining that a debtor did not demonstrate lasting circumstances that would prevent future employment despite debtor's contention that unemployment caused by company bankruptcy and limited job opportunities impeded loan repayment); Tuttle v. Educ. Credit Mgmt. Corp. (*In re* Tuttle), 600 B.R. 783, 801–04 (Bankr. E.D. Wis. 2019) (rejecting a debtor's arguments that age and lack of supervisory experience were barriers to employment, finding insufficient evidence); *In re Clark*, 341 B.R. at 254 (ruling health issues such as fibromyalgia, while contributing to financial difficulties, did not automatically meet the "exceptional circumstances" standard unless they significantly hindered the debtor's ability to work); Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 779 (7th Cir. 2002) (reversing a loan discharge, finding that financial difficulties due to age, substance abuse, and a felony conviction did not meet the "exceptional circumstances" requirement under the *Brunner* test); *In re* Promisco, 625 B.R. at 730 (holding that voluntary support to a non-dependent mother does not meet the second prong of the *Brunner* test).

148. *In re* Hoskins, 292 B.R. 883, 886–89 (Bankr. C.D. Ill. 2003) (holding a debtor's epilepsy, requiring ongoing treatment and causing an inability to work, was an exceptional circumstance under the *Brunner* test).

149. *In re* Vang, 324 B.R. 76, at 84–85 (Bankr. W.D. Wis. Apr. 15, 2005) (finding that the debtor, a 31-year-old with mild mental retardation and language barriers, met the *Brunner* test for undue hardship due to limited employability despite educational assistance, supported by expert testimony); *cf. In re* Williams, No. 15bk38704, 2018 WL 1229719, at *5 (Bankr. N.D. Ill. Mar. 8, 2018) (finding no evidence that learning disabilities hindered employment, given the debtor's advanced degrees and work history); *In re* Henry, Case No. 14-70113, 2016 WL 3681201, at *5–6 (Bankr. C.D. Ill. July 5, 2016) (crediting debtor's diagnoses of depression, anxiety, and ADHD but rejecting a finding of hopelessness where the record showed discretionary spending and feasible steps to improve her financial circumstances); Carter v. Sallie Mae (*In re* Carter), 517 B.R. 870, 878 (Bankr. N.D. Ill. 2014) (finding that a 52-year-old debtor's age, health issues, and communication difficulties were not permanent barriers to work, especially since she did not diligently seek employment).

150. *In re* Chance, 600 B.R. 50, 59 (Bankr. S.D. Ind. 2019) (finding that the plaintiffs' ages (56 and 57) and financial outlook did not meet the "certainty of hopelessness" standard); Owens v. Dep't of Educ. (*In re* Owens), 525 B.R. 719, 722 (Bankr. C.D. Ill. 2015) (determining that a 33-year-old debtor with a bachelor's and master's degree failed to demonstrate a long-term inability to find work); *In re* Vargas, No. 08-82824, Adv. No. 08-8135, 2010 WL 5395142, at *5–7 (C.D. Ill. Dec. 22, 2010) (finding a 57-year-old debtor's reluctance to seek alternative

documented medical records and testimony often strengthen a debtor's case.[151] Furthermore, although courts acknowledge the tax implications of forgiven loan balances after completing a repayment plan, these consequences are often deemed speculative and insufficient to establish undue hardship.[152] Courts also evaluate the debtor's limited career experience, employment opportunities, and whether external circumstances justify their inability to work.[153] Courts often consider whether debtors have pursued realistic employment opportunities and whether external circumstances justify their inability to work.[154] Importantly, there is no bright-line rule that denies undue hardship for individuals with criminal convictions.[155] Additionally, courts may consider cognitive and language barriers, educational background, job market conditions, and the field of employment when evaluating a debtor's earning potential.[156]

The third prong of the *Brunner* test requires the debtor to demonstrate good faith efforts to repay their student loans.[157] Courts assess whether defaults on the loans were the result of willful or negligent behavior or

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employment to maximize income didn't meet the undue hardship standard); *In re* Nelsen, 404 B.R. 892, 896 (Bankr. E.D. Wis. 2009) (noting that a debtor's age (57) and inability to secure a teaching job were insufficient to meet the *Brunner* test, because income-driven repayment options could address repayment challenges).

151. *In re Hoskins*, the court found that the debtor's chronic epilepsy, which hindered his ability to work, qualified as undue hardship for student loan discharge. 292 B.R. at 886–89. Though no expert witnesses were submitted, the court accepted the debtor's medical records, which confirmed the severity and permanence of his condition, alongside his continued receipt of Social Security disability benefits. *Id.* This evidence supported the conclusion that the debtor could not gain employment to repay his loans. *Id.*

152. *E.g.*, *In re* Hopson, 588 B.R. 509, 515 (Bankr. N.D. Ill. 2018).

153. In Fecek v. Sallie Mae (*In re* Fecek), the debtor's financial hardship was deemed likely to persist due to her limited career experience, high interest rates (7.75%–9.75%), and private loans without federal repayment options, satisfying the second prong of the *Brunner* test. No. 12-13062-JMC-7, Adv. No. 13–50089. 2014 WL 1329414, at *6 (Bankr. S.D. Ind. Mar. 31, 2014)

154. Educ. Credit Mgmt. Corp. v. Krieger, 482 B.R. 238, 241–48 (C.D. Ill. 2012) (finding the debtor's unemployment was due to personal preference, as she had not pursued jobs outside her degree field); *cf. In re* Larson, 426 B.R. 782, 795 (Bankr. N.D. Ill. 2010) (acknowledging that the debtor's vision loss and health issues met the second prong of the *Brunner* test).

155. Koll v. U.S. Dep't of Educ. (*In re* Koll), No. 01-82174, Adv. No. 01-8068, 2002 WL 32001509, at *1, *5 (Bankr. C.D. Ill. May 3, 2002).

156. *See In re* Himes, No. 00-80532, Adv. No. 00-8072, Adv. No. 00-8073, 2001 WL 34076414, at *1, *4–5 (Bankr. C.D. Ill. Aug. 29, 2001) (finding the debtor's advanced degrees and work experience indicated potential for future employment); *In re* O'Hearn, 339 F.3d 559, 562–66 (7th Cir. 2003) (finding the debtor had secured the best-paying job in his field but had not explored higher-paying opportunities); *In re* Salinas, 240 B.R. 305, 314–16 (Bankr. W.D. Wis.), *rev'd*, 262 B.R. 457 (W.D. Wis. 1999), *rev'd*, No. 01-C-234-S, 2001 WL 829951 (W.D. Wis. June 13, 2001) (considering the debtor's failure to complete optometry school and leverage his education as a factor in meeting the second prong of the *Brunner* test).

157. Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773, 779 (7th Cir. 2002).

due to factors beyond the debtor's control.[158] A debtor is not required to have made a specific number or percentage of payments to prove good faith, particularly if they lacked the financial capacity to make payments.[159] Rather, good faith is evaluated based on the debtor's overall financial circumstances.[160] Courts evaluate tangible efforts to repay, including enrolling in IDR plans and applying for deferments.[161] Courts also assess whether the debtor has made reasonable efforts to minimize expenses and maximize income, considering their overall financial conduct and ability to repay.[162] Conversely, courts are less likely to find good faith when debtors fail to take meaningful steps to repay their loans or reduce expenses.[163]

The next section examines how the Ninth Circuit interprets *Brunner*. While the Ninth Circuit follows *Brunner*, it applies it more flexibly than stricter circuits such as the Second, Third, and Fifth.

G. *Ninth Circuit's Interpretation of the* Brunner *Test*

The Ninth Circuit applies the *Brunner* test to assess whether a debtor qualifies for student loan discharge under the undue hardship standard.[164] To satisfy the first prong, a debtor must demonstrate more than "tight finances," but they are not required to prove "utter hopelessness."[165]

158. *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993).

159. *In re* Vang, 324 B.R. 76, 85 (Bankr. W.D. Wis. 2005).

160. *In re* Clark, 341 B.R. 238, 255–56 (Bankr. N.D. Ill. 2006).

161. *See In re* Eliason, 653 B.R. 646, 657–60 (Bankr. W.D. Wis. 2023), *aff'd sub nom.*, Bank of N.D. v. Eliason, 754 F. Supp. 3d 823 (W.D. Wis. 2024) (finding good faith when the debtor sought deferments and forbearance despite making zero-dollar payments under the income-based plans); *In re* Fecek, No. 12-13062-JMC-7, Adv. No. 13-50089, 2014 WL 1329414, at *1, *7 (Bankr. S.D. Ind. Mar. 31, 2014) (finding good faith when the debtor attempted to negotiate repayment plans despite making limited payments).

162. In *In re* Echelbarger, the court found a lack of good faith due to luxury spending, funding private education, and contributing to retirement savings while claiming hardship. 600 B.R. 39, 50 (Bankr. S.D. Ind. 2019). Similarly, in *In re* Seifert, the debtor was found lacking good faith after making no payments while securing deferrals and purchasing a BMW. 375 B.R. 816, 821–22 (Bankr. C.D. Ill. 2007). *See also In re* Myhre, 503 B.R. 698, 704–05 (Bankr. W.D. Wis. 2013) (finding no bad faith where the debtor's use of inheritance for home improvements); *In re* Henry, No. 14-70113, 2016 WL 3681201, at *6 (Bankr. C.D. Ill. July 5, 2016) (finding no good faith where the debtor voluntarily maintained nonessential expenses and failed to pursue higher-paying jobs).

163. *In re* Promisco, 625 B.R. 715, 732 (Bankr. N.D. Ill. 2021) (finding the debtor's failure to make payments despite enrolling in an income-based repayment plan, along with criminal conduct hindering employment, were self-imposed hardships); *In re* Vargas, No. 08-82824, Adv. No. 08-8135, 2010 WL 5395142, at *6 (C.D. Ill. Dec. 22, 2010) (finding a failure of good faith due to the debtor's lack of effort to seek payment plans or avoid default); *In re* Tuttle, 600 B.R. 783, 804–06 (Bankr. E.D. Wis. 2019) (finding the debtor's minimal job search and extensive deferments insufficient to meet the good faith standard).

164. *See In re* Pena, 155 F.3d 1108, 1114 (9th Cir. 1998).

165. *See In re* Nascimento, 241 B.R. 440, 445 (B.A.P. 9th Cir. 1999).

Courts in the Ninth Circuit recognize that debtors are not required to live in poverty, but they are not entitled to maintain a "middle-class standard of living" either.[166] Modest expenses and limited recreation may still fall within a minimal standard of living.[167] Courts evaluate retirement contributions on a case-by-case basis to determine whether they are reasonably necessary under the first prong of *Brunner*.[168] In making the determination, courts consider non-exhaustive factors including "the debtor's age, income, overall budget, expected date of retirement, existing retirement savings, and the amount of contributions; the likelihood that stopping contributions will jeopardize the debtor's fresh start by forcing the debtor to make up lost contributions after emerging from bankruptcy; and the needs of the debtor's dependents."[169] Charitable donations, however, are not considered necessary expenses.[170]

Unlike other circuits, the Ninth Circuit has held that a debtor is not required to maximize income to satisfy this prong. Instead, the Ninth Circuit focus on whether the debtor's current income and expenses allow for a minimal standard of living.[171] Courts have broad discretion in

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166. Educ. Credit Mgmt. Corp. v. Beattie (*In re* Beattie), 490 B.R. 581, 586 (W.D. Wash. 2012) (quoting *In re* Howe, 319 B.R. 886, 889 (B.A.P. 9th Cir. 2005)); Mendenhall v. Navient Corp. (*In re* Mendenhall), 621 B.R. 472, 485–88 (Bankr. D. Idaho 2020) (finding some expenses, like retirement contributions and life insurance premiums, reasonable, while deeming others, like charitable contributions, unnecessary); Nitcher v. Educ. Credit Mgmt. Corp., 606 B.R. 67, 74–76 (Bankr. D. Or. 2019) (upholding high transportation and life insurance costs as reasonable); McDowell v. Educ. Credit Mgmt. Corp. (*In re* McDowell), 549 B.R. 744, 766–68 (Bankr. D. Idaho 2016) (justifying necessary living expenses due to dietary restrictions and dependents, and finding the debtor's income insufficient, satisfying the first *Brunner* prong).

167. *In re* Ivory, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001); *In re* Coplin, No. 13-46108, 2017 WL 6061580, at *14 (Bankr. W.D. Wash. Dec. 6, 2017).

168. *In re* Craig, 579 F.3d 1040, 1046–47 (9th Cir. 2009) (rejecting a per se rule retirement contributions are never necessary). In *In re* Mendenhall, the debtor contributed approximately 7% of his income to a Roth 401(k) account. 621 B.R. at 485–88. The court deemed this contribution reasonable, emphasizing that courts have typically accepted modest retirement savings, particularly when they are not deemed excessive. *Id. See also In re* Carlson-Callow, No. 05-04260-JDP, 2008 WL 2357012, at *3 (Bankr. D. Idaho June 6, 2008). *Cf. In re* Weldon, No. 03-49320, 2008 WL 4527654 (Bankr. W.D. Wash. Oct. 1, 2008) (finding that a 401k contribution was not necessary in light of debtor's circumstances).

169. *In re* Craig, 579 F.3d at 1046–47.

170. *Id. See also In re* Ritchie, 254 B.R. 913, 917–24 (Bankr. D. Idaho 2000) (stating that tithing is not exempt from disposable income calculations under § 523(a)(8), as the relevant bankruptcy provisions were not amended to allow such exclusions); *In re* Fulbright, 319 B.R. 650, 660–61 (Bankr. D. Mont. 2005) (finding that 10% of disposable income allocated for tithing is "significantly above a de minimis amount"). *But see* McCafferty v. U.S. Dep't of Educ. (*In re* McCafferty), No. 14-04545-FPC7, Adv. No. 15–80015–FPC, 2015 WL 6445185 (Bankr. E.D. Wash. Oct. 23, 2015) (noting that $300 in charitable donations is reasonable, citing the debtor's deep religious commitment).

171. *See* Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 882 (9th Cir. 2006); *In re* McDowell, 549 B.R. at 766.

determining what constitutes reasonable living expenses.[172] When assessing a debtor's ability to maintain a minimal standard of living, courts typically review both household income and expenses.[173] The Ninth Circuit has ruled that debtors are not required to enroll in an Income-Based Repayment (IBR) or Income-Driven Repayment (IDR) plan to satisfy the first prong of *Brunner*.[174] The Ninth Circuit held that while potential income may be relevant for later prongs of the *Brunner* test, it should not be considered under the first prong.[175] Courts closely scrutinize whether certain expenses are necessary for maintaining a minimal standard of living.[176] In one notable case, the court ruled that an incarcerated individual could not meet the first prong of the *Brunner* test because the state provided their basic living expenses, including meals, shelter, clothing, and medical care.[177] Additionally, the court found that the inability to generate a positive net-income showed that the plaintiffs could not maintain a minimal standard of living while repaying their loans.[178] Courts evaluate a debtor's expenses using Chapter 13

172. *See* Educ. Credit Mgmt. Corp. v. Jorgensen (*In re* Jorgensen), 479 B.R. 79, 87 (B.A.P. 9th Cir. 2012) (citing *In re* Pena, 155 F.3d 1108, 1112 (9th Cir. 1998)).

173. *In re* Coplin, No. 13-46108, 2017 WL 6061580, at *14 (Bankr. W.D. Wash. Dec. 6, 2017).

174. *Id*. at 9; *In re* Ng-A-Qui, No. AP 13-01591-MLB, 2015 WL 5923363, at *3–6 (B.A.P. 9th Cir. Oct. 9, 2015). *But see In re* Beattie, 490 B.R. at 586–88 (rejecting Beattie's argument for using the original $477 per month loan payment under the first prong, agreeing instead with the use of the IBR payment); Educ. Credit Mgmt. Corp. v. Kelly, No. C11-1263RSL, 2012 WL 1378725, at *2 (W.D. Wash. Apr. 20, 2012) (rejecting hypothetical scenario since debtor had not applied for or been accepted into the PSLF program at the time of trial). In *In re* Kelly, the court focused on whether debtor could afford her current monthly loan repayment without it reducing her standard of living below an acceptable minimum. 2012 WL 1378725, at *2.

175. *In re* Mason, 464 F.3d at 882.

176. *In re* Beattie, 490 B.R. at 586–88 (excluding unjustified expenses, like an excessive grocery bill, and focusing on necessary costs); *In re* Shells, 530 B.R. 758, 764–65 (B.A.P. 9th Cir. 2015) (finding discretionary expenses, like entertainment and vacations, unnecessary for a minimal standard of living); *In re* Berryhill, No. CV 10-8006-VBF, 2011 WL 3861598, at *3 (C.D. Cal. Aug. 31, 2011) (deeming expenses for a gym membership, cell phone, internet, and cable unnecessary).

177. *See In re* Hahaj, No. 05-41615-JDP, 2009 WL 5386132, at *4 (Bankr. D. Idaho Dec. 9, 2009).

178. *In re* Scott, 417 B.R. 623, 631 (Bankr. W.D. Wash. 2009) (finding that potential cost-saving measures, such as selling a vehicle or canceling satellite TV, would not make loan repayment feasible, and the plaintiffs had made reasonable efforts to minimize expenses); *cf.* Educ. Credit Mgmt. Corp. v. Degroot, 339 B.R. 201, 209–10 (D. Or. 2006) (holding that despite Ms. Degroot's efforts to minimize expenses, her failure to maximize income, such as by taking a roommate or seeking additional work, rendered her unable to meet the first prong of the *Brunner* test).

bankruptcy guidelines as a reference point.[179] Courts also consider post-discharge events as a basis for discharging student loans.[180]

The second prong of the *Brunner* test requires the debtor to demonstrate that their financial difficulties are likely to persist for a significant portion of the loan repayment period.[181] In *Nys*,[182] the Ninth Circuit adopted a twelve-factor test to evaluate whether a debtor's financial hardship is likely to persist.[183] These factors include age, education, employment history, medical conditions, dependents, and job market conditions.[184] Also, the court examines whether the financial hardship is in the debtor's control.[185] The Ninth Circuit rejected the notion that pre-existing conditions cannot be considered under the second prong.[186] Courts are more likely to discharge student loan debt when debtors provide substantial medical evidence showing that chronic illness, disability, or age-related employment limitations make long-term financial recovery highly unlikely.[187] However, minor or manageable

179. Greenwood v. Educ. Credit Mgmt. Corp. (*In re* Greenwood), 349 B.R. 795, 801–02 (Bankr. D. Ariz. 2006) (finding that despite exceeding guidelines in some categories, such as electricity and prescriptions, the Greenwoods' costs were modest and uncontrollable, and expenses like cable and internet were allowed as necessary in rural areas); *In re* Bossardet, 336 B.R. 451, 454–55 (Bankr. D. Ariz. 2005) (prioritizing local Chapter 13 guidelines over federal poverty standards, the court concluded that the debtor's expenses were reasonable and that repaying loans would prevent maintaining a minimal standard of living).

180. *See In re* Zygarewicz, 423 B.R. 909, 912–13 (Bankr. E.D. Cal. 2010).

181. Mathis v. Dep't of Educ. (*In re* Mathis), No. 2:19-BK-13660-ER, Adv. No. 2:20-ap-01619-ER, 2021 WL 6137895, at *7–9 (Bankr. C.D. Cal. Dec. 29, 2021) (finding the debtor's financial difficulties were unlikely to persist, noting her proactive steps to increase earning potential); *In re* Carlson-Callow, No. 05-04260-JDP, 2008 WL 2357012, at *11 (Bankr. D. Idaho June 6, 2008) (ruling the debtor's hardship would continue, given her limited earning potential and reliance on Social Security after retirement); *In re* Bossardet, 336 B.R. at 455–56 (concluding the debtor's financial situation was unlikely to improve due to her capped earnings as a teacher, age, and lack of funds for further education).

182. Educ. Credit Mgmt. Corp. v. Nys, 446 F.3d 938 (9th Cir. 2006).

183. *See id*. at 947 (citing Nys v. Educ. Credit Mgmt. Corp., 308 B.R. 436, 446–47 (B.A.P. 9th Cir. 2004)).

184. *Id.*; *see In re* Crawley, 460 B.R. at 438–39 n.20; Koeut v. U.S. Dep't of Educ. (*In re* Koeut), 622 B.R. 72, 81–82 (Bankr. S.D. Cal. 2020).

185. *In re* Burgess, No. 05-51380, 2006 WL 4811262, at *3 (Bankr. W.D. Wash. Oct. 18, 2006) (denying discharge where the debtor refused to reinstate his podiatrist license, which could have increased his income); *In re* Williams, No. 02-02394, 2004 WL 2475568, at *4 (Bankr. D. Haw. Oct. 28, 2004) (denying discharge where the debtor had no significant barriers to full-time employment and her decision not to pursue one was self-imposed).

186. *In re* Mason, 464 F.3d at 883–84; *Nys*, 446 F.3d at 946 (clarifying the second prong does not exclude pre-existing conditions but examines whether these conditions significantly impair the debtor's ability to repay loans); *In re* Mason, 315 B.R. 554, 560–62 (B.A.P. 9th Cir. 2004) (emphasizing that the second prong focuses on the debtor's current and future financial realities, rejecting arguments that conditions must worsen post-loan.).

187. Smith v. Dep't of Educ. (*In re* Smith), 608 B.R. 236, 242–43 (Bankr. D. Or. 2019) (finding a debtor with AFIB, depression, and limited retraining opportunities met the second

health conditions without significant employment impact generally do not satisfy the second prong.[188] Likewise, a debtor's educational background and career history play a crucial role in determining whether financial hardship will persist.[189] Courts are skeptical of claims from debtors with higher education and past stable employment unless they can show that their credentials are obsolete, their field is inaccessible, or they face insurmountable barriers to re-entering the workforce.[190] Noneconomic responsibilities, such as caregiving for dependents or family obligations, can serve as legitimate barriers to financial recovery under the *Brunner* test. Courts tend to favor debtors who can demonstrate that their caregiving responsibilities are long-term and severely restrict their earning capacity.[191] Courts require objective, well-documented evidence that a debtor's financial hardship will persist and reject claims based on speculation about future struggles. Debtors who fail to present

prong despite the lack of expert testimony); *In re* Mitchell, No. 09-44678, 2014 WL 5325852, at *6 (Bankr. W.D. Wash. Oct. 20, 2014) (finding bipolar disorder and severe anxiety made financial recovery unlikely); Hamilton v. U.S. Dep't of Educ. (*In re* Hamilton), 361 B.R. 532, 554–57 (Bankr. D. Mont. 2007) (finding extensive medical evidence and age precluded meaningful loan repayment); *In re* Mason, 464 F.3d at 880–81 (finding a learning disability prevented effective use of law degree, limiting career opportunities); Educ. Credit Mgmt. Corp. v. Jorgensen (*In re* Jorgensen), 479 B.R. 79, 88 (B.A.P. 9th Cir. 2012) (finding persistent hardship due to ongoing health problems and employment instability satisfied the second prong).

188. *In re* Lilly, 538 B.R. 45, 51 (B.A.P. 9th Cir. 2013) (finding that debtor's advanced degrees and work experience allowed for potential employment and financial improvement despite underemployment); *In re* Gouveia, No. 05-02143, at *12–13 (Bankr. D. Haw. Sep. 29, 2006) (finding that debtor's depression and knee problems deemed insufficient to meet the second prong).

189. *See* Love v. Dep't of Educ. (*In re* Love), 649 B.R. 556, 568–69 (Bankr. E.D. Cal. 2023) (finding that a low-value degree, twenty years of low-income work, and no income growth potential satisfied the second prong); Nitcher v. Educ. Credit Mgmt. Corp. (*In re* Nitcher), 606 B.R. 67, 76–78 (finding that a rigid legal career with minimal earning potential made financial hardship likely to persist).

190. Ng-A-Qui v. U.S. Dep't of Educ. (*In re* Ng-A-Qui), No. AP 13-01591-MLB, Adv. No. 13–01591–MLB, 2015 WL 5923363, at *5–7 (B.A.P. 9th Cir. Oct 9, 2015) (finding that debtor's outdated degree and voluntary job search limitations suggested financial improvement was possible); Barrett v. Dep't of Educ. (*In re* Barrett), 545 B.R. 625, 632 (Bankr. N.D. Cal. 2016) (noting that debtor's age and lack of resources were not enough, as experience suggested financial recovery was possible); Nichols v. Educ. Credit Mgmt. Corp. (*In re* Nichols), No. ADV 11-00784, 2013 WL 3497666, at *5 (B.A.P. 9th Cir. July 9, 2013) (finding that debtors had earned $72,000 annually and could return to similar income levels).

191. *In re* Coplin, No. 13-46108, 2017 WL 6061580, at *11 (Bankr. W.D. Wash. Dec. 6, 2017) (finding that debtor's caregiving responsibilities, age, and lack of assets made financial improvement unlikely); Jolie v. Dep't of Educ. (*In re* Jolie), No. 12-61188-7, Adv. No. 13–00009. 2014 WL 929703 at *8 (Bankr. D. Mont. Mar. 10, 2014) (limited job opportunities, poor credit, and increasing debt under an Income-Based Repayment plan made financial hardship likely to persist); *cf.* Carter v. U.S. Dep't of Educ. (*In re* Carter), No. 10–30555–tmb7, Adv. No. 10-03136-tmb, 2011 WL 6989901, at *1, *8 (B.A.P. 9th Cir. Nov. 8, 2011) (finding that debtor had achieved financial stability as a service station manager, showing hardship was unlikely to persist).

clear proof—such as medical records, employment history, or expert testimony—are unlikely to satisfy the second prong.[192]

The third prong of the *Brunner* test requires a debtor to demonstrate a good faith effort to repay their student loans. This inquiry focuses on whether the debtor has made efforts to obtain employment, maximize income, and minimize expenses.[193] In assessing good faith under the third prong, courts do not simply ask whether a debtor lacked good faith, but instead require affirmative evidence that the debtor made genuine efforts to repay their loans.[194] Courts consider factors such as attempts to obtain employment, minimize expenses, seek deferments, or explore repayment options.[195] While participation in an IBR plan is not required to demonstrate good faith, courts often consider the debtor's reasons for declining such programs.[196] In assessing good faith, courts acknowledge the tax consequences,[197] look at whether the undue hardship is beyond the debtor control,[198] and look at payment history and use of deferments

192. Afamasaga v. U.S. Dep't of Educ. (*In re* Afamasaga), No. 2:05-CV-2348-MCE, 2006 WL 1652560, at *4 (E.D. Cal. June 13, 2006) (reversing the bankruptcy court and finding debtor's speculative claims about future struggles unsupported by evidence); Educ. Credit Mgmt. Corp. v. Degroot, 339 B.R. 201, 210–14 (D. Or. 2006) (holding that debtor's claims of future hardship were speculative, as age and business ventures were not enough to meet the second prong).

193. *In re* Nitcher, 606 B.R. at 78–79 (finding that debtor demonstrated good faith by relocating, living frugally, and making substantial payments before defaulting due to overwhelming debt); *see also In re* Barrett, 545 B.R. at 633 (finding that debtor's efforts, including passing bar exams and relocating, showed good faith despite failure to enroll in income-driven repayment plans); *cf.* Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878, 885 (9th Cir. 2006) (overturning bankruptcy court's finding of good faith, as debtor did not pursue legal work or higher-paying employment).

194. Blackbird v. Educ. Credit Mgmt. Corp. (*In re* Blackbird), No. 06–43180, Adv. No. 07–04039, 2008 WL 8444793, at *7 (B.A.P. 9th Cir. July 11, 2008).

195. Pa. Higher Educ. Assistance Ag. v. Birrane (*In re* Birrane), 287 B.R. 490, 499 (9th Cir. BAP 2002); Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 917 (B.A.P. 9th Cir. 2013).

196. Koeut v. U.S. Dep't Educ. (*In re* Koeut), 622 B.R. at 84 (finding debtor's rejection of IBR plan due to concerns about future tax liability and credit harm reasonable and consistent with good faith). *Cf.* Munch v. Educ. Credit Mgmt. Corp., No. 9:16-BK-12162-PC, Adv. No. 9:17-ap-01008-PC, 2018 WL 4636173, at *6 (C.D. Cal. Sep. 25, 2018) (weighing debtor's refusal to participate in IBR plan with $0 payment against finding of good faith); *In re* Roth, 490 B.R. at 919–20 (upholding debtor's refusal to enroll in IBR due to low income and advanced age, finding overall efforts in good faith); *cf.* Educ. Credit. Mgmt. Corp. v. Kelly, No. C11-1263RSL, 2012 WL 1378725, at *3 (W.D. Wash. Apr. 20, 2012) (denying discharge where debtor failed to apply for Public Service Loan Forgiveness, showing lack of good faith).; *In re* Birrane, 287 B.R. at 500 (reversing bankruptcy court finding that debtor met good faith prong where she did not take any measures to negotiate a repayment schedule).

197. Williams v. Educ. Credit Mgmt. Corp. (*In re* Williams), 301 B.R. 62, 79 (Bankr. N.D. Cal. 2003).

198. *See In re* Ristow, Adv. No.10-01141-EWH, 2012 WL 1001594, at *6–7 (B.A.P. 9th Cir. Mar. 26, 2012) (finding debtor's refusal to accept lower-paying or part-time work and failure to pursue repayment options undermined good faith, concluding financial issues were self-

or forbearances to find good faith.[199] Finally, reasonable financial decisions that prioritize essential expenses, such as childcare or medical needs, do not automatically preclude a finding of good faith.[200]

While the Ninth Circuit applies to *Brunner* with greater flexibility, particularly regarding income maximization and IDR enrollment under the first prong, the Tenth Circuit remains rigid. The following section examines the Tenth Circuit's application of *Brunner* and its similarities to stricter jurisdictions.

H. *Tenth Circuit's Interpretation of the* Brunner *Test*

The Tenth Circuit has adopted the *Brunner* test to determine whether a debtor qualifies for student loan discharge under the undue hardship standard.[201] Under the first prong, courts assess whether the debtor can maintain a minimal standard of living while repaying student loans, though they are not required to live in poverty.[202] Courts in the Tenth Circuit consider a non-debtor spouse's income when evaluating a debtor's finances, but do not automatically factor in contributions from

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imposed); Hurley v. United States (*In re* Hurley), 601 B.R. 529, 535–36 (B.A.P. 9th Cir. 2019) (considering debtor's past criminal conduct and determining financial hardship was self-inflicted, outweighing earlier good faith efforts); *cf.* Smith v. Dep't of Educ. (*In re* Smith), 608 B.R. 236, 244–45 (Bankr. D. Or. 2019) (finding debtor's failure to undergo medical procedure did not negate good faith, as financial difficulties stemmed from legitimate challenges); Hamilton v. U.S. Dep't of Educ. (*In re* Hamilton), 361 B.R. 532, 552–59 (Bankr. D. Mont. 2007) (considering debtor's job search and voluntary payments as evidence of good faith, despite creditor's argument about income-contingent repayment plans).

199. *See* Love v. Dep't of Educ. (*In re* Love), 649 B.R. 556, 569 (Bankr. E.D. Cal. 2023) (finding debtor met good faith requirement by making payments during Chapter 7 case and post-bankruptcy contributions, despite unaffordable payments); *In re* Mendenhall v. Navient Corp. (*In re* Mendenhall), 621 B.R. 472, 490–94 (Bankr. D. Idaho 2020) (recognizing debtor's sporadic payments and forbearance requests as attempts to manage loans, despite hardship); *In re Bossardet*, 336 B.R. at 456–57 (debtor's payments and timely forbearance requests met good faith requirement, resulting in full discharge); *In re McDowell*, 549 B.R. at 771–74 (upholding debtor's good faith despite financial missteps, granting partial discharge); *cf. In re* Mathis, No. 2:19-BK-13660-ER, 2021 WL 6137895, at *9 (Bankr. C.D. Cal. Dec. 29, 2021) (finding no good faith where debtor made no payments and declined IBR plan, deeming it inequitable).

200. *In re* Coplin, No. 13-46108, 2017 WL 6061580, at *11–14 (Bankr. W.D. Wash. Dec. 6, 2017).

201. *See* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004).

202. Ester v. Pa. Higher Educ. Assistance Agency (*In re* Ester), 657 B.R. 655, 663 (Bankr. N.D. Okla. 2024); Watson v. Mae (*In re* Watson), No. 10-13963, Adv. No. 11–5138, 2012 WL 5360949, at *2 (Bankr. D. Kan. Oct. 30, 2012) (finding debtor failed the test as the debtor's incarceration eliminated living expenses and IBRP repayment was zero); Hough v. Dep't of Educ. (*In re* Hough), No. 05-72272, at *8 (Bankr. E.D. Okla. Sep. 15, 2006) (rejecting claim of minimal living, noting the debtor's large home and discretionary expenses contradicted the hardship claim); *cf.* Harrington v. Educ. Credit Mgmt. Corp. (*In re* Harrington), No. 02-24488-DLS, Adv. No. 03-6067, 2005 Bankr. LEXIS 349, at *12-16 (Bankr. D. Kan. Mar. 8, 2005) (ruling debtor could not maintain a minimal standard of living while repaying loans as the debtor is relying on inconsistent church assistance).

cohabitants, like a debtor's parent.[203] Courts define a minimal standard of living to include essential expenses such as housing, utilities, food, clothing, healthcare, and transportation.[204] Additionally, courts in the Tenth Circuit assess both the amount of debt and the debtor's ability to make reasonable payments without undue hardship, with debt that cannot realistically be repaid potentially qualifying as undue hardship.[205]

Courts in this circuit, like most others, refer to the federal poverty guidelines when making their determination.[206] The Tenth Circuit has ruled that retirement contributions cannot take priority over student loan payments.[207] While the Tenth Circuit has not extensively addressed tithing in student loan discharge cases, at least one court has recognized that modest religious or charitable contributions may be permissible under the undue hardship analysis, even though the Religious Liberty and Charitable Donation Protection Act (RLCDPA)[208] does not directly apply to section 523(a)(8).[209] Similarly, the court held that long-term income-based repayment plans with substantial tax consequences could deny debtors the fresh start envisioned by the Bankruptcy Code.[210]

The second prong of the *Brunner* test requires a determination of whether the debtor's current financial circumstances are likely to persist

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203. *In re* Quarles, No. 02-40709-7, 2004 WL 2191608, at *9 (Bankr. D. Kan. Apr. 22, 2004) (declining to include debtor's elderly mother's income, noting she could not provide long-term support, but agreeing non-debtor spouse's income should be considered in repayment analysis).

204. Schuckman v. Dep't of Educ. (*In re* Schuckman), No. 17-10834, at *14–15 (Bankr. D. Kan. May. 28, 2019) (finding a debtor's financial circumstances are reviewed holistically to assess whether they can meet these needs while repaying their loans); *In re* Zook, No. 05-00083, 2009 WL 512436, at *9 (Bankr. D.D.C. Feb. 27, 2009); *In re* McLaney, 375 B.R. 666, 674 (M.D. Ala. 2007). *See also* Murphy v. United States (*In re* Murphy), No. 15-11240-J7, 2018 WL 2670455, at *13 (Bankr. D.N.M. June 1, 2018) (finding expenses like paying for a disabled ex-spouse's cell phone and basic insurance for children are reasonable); *cf.* Loyle v. Dep't of Educ. (*In re* Loyle), No. 19-10065, 2022 WL 567724 (Bankr. D. Kan. Feb. 24, 2022) (deeming $458 in soccer fees unnecessary); *In re* Schuckman, No. 17-10834, at *16 (criticizing spending on fast food and discretionary items).

205. *In re* Ester, 657 B.R. at 663.

206. *In re* Regan, 590 B.R. 567, 574–76 (Bankr. D.N.M. 2018) (the debtor failed the first prong as her income, above 150% of the federal poverty guideline, was deemed sufficient for a minimal standard of living while making payments under an income-based repayment plan (IBRP)); *In re* Schuckman, No. 17-10834, at *15–16 (Bankr. D. Kan. May 28, 2019).

207. Woody v. U.S. Dep't of Just. (*In re* Woody), 494 F.3d 939, 952–53 (10th Cir. 2007) (holding that 401(k) contribution cannot take precedence over student loan payments). *But see* Johnson v. Sallie Mae, Inc. (*In re* Johnson), No. 11-23108, Adv. No. 11–6250, 2015 WL 795830, at *8 (Bankr. D. Kan. Feb. 19, 2015); *In re* Innes, 184 F.3d 1275 (10th Cir. 1999).

208. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105–183, 112 Stat. 517 (1998).

209. *See In re* Innes, 284 B.R. 496, 505 (D. Kan. 2002) (recognizing a minimal level of tithing).

210. Johnson v. Sallie Mae, Inc. (*In re* Johnson), 577 B.R. 895 (Bankr. D. Kan. 2017); *In re* Murray, 563 B.R. 52, 60 (Bankr. D. Kan. 2016).

for a significant portion of the repayment period. Courts require specific, credible evidence and reject speculative claims or unfounded optimism about future income.[211] Courts in the Tenth Circuit have employed various approaches to determine the repayment period and what qualifies as a significant portion of it.[212] Courts are more likely to grant discharge when the debtor can provide specific evidence of exceptional circumstances—such as chronic illness, disability, or dependents with significant medical or financial needs—that substantially limit their earning capacity for a significant portion of the repayment period.[213] Expert testimony is not required to prove exceptional circumstances.[214] Courts, however, reject speculative arguments, such as the possibility of job loss or future income improvement, unless it is based on specific evidence.[215] Like in the Ninth Circuit, the Tenth Circuit considers the debtor's age and their employment opportunities.[216]

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211. *In re* Ester, 657 B.R. at 665; *In re* Polleys, 356 F.3d at 1311.

212. *In re* Ester, 657 B.R. at 665–67 (noting debtor's inability to repay student loan likely to persist for a decade, considering wage garnishment under Oklahoma law); Murphy v. United States (*In re* Murphy), No. 15-11240-J7, Adv. No. 15–1051–j, 2018 WL 2670455, at *8 (Bankr. D.N.M. June 1, 2018) (using the 25 years period under an IBR plan, concluding the debtor's financial situation would unlikely improve, as she would be in her 80s when the loan was paid off). *See also In re* Watson, No. 10-13963, 2012 WL 5360949, at *1 (Bankr. D. Kan. Oct. 30, 2012) (using IBR duration).

213. Johnson v. Sallie Mae, Inc. (*In re* Johnson), 577 B.R. 895, 904 (Bankr. D. Kan. 2017); *In re* Polleys, 356 F.3d at 1310–12; *In re* Murphy, No. 15-11240-J7, 2018 WL 2670455, at *6 (Bankr. D.N.M. June 1, 2018) (finding that a 58-year-old waitress with physical limitations and a son with severe mental health issues faced a persistent inability to repay her loans); *In re* Harvey, No. 11-23142 MER, 2013 WL 4478926, at *3–4 (Bankr. D. Colo. Aug. 20, 2013) (finding the second prong met for a debtor who his child with chronic medical issues and requiring ongoing care); *In re* Coats, 214 B.R. 397, 404 (Bankr. N.D. Okla. 1997) (finding the second prong met for a debtor who needed to work from home to care for a son with ADHD and with limited income); *cf. In re* Brown, 442 B.R. 776, 783 (Bankr. D. Colo. 2010) (denying discharge due to a lack of medical evidence supporting the debtor's claim that bipolar disorder and schizophrenia prevented her from working).

214. Harvey v. Educ. Credit Mgmt. Corp. (*In re* Harvey), No. 11-23142 MER, Adv. No. 11–1958 MER, 2013 WL 4478926, at *3 (Bankr. D. Colo. Aug. 20, 2013) (finding that a debtor is not required to provide expert testimony to support their health claims and may rely on their own testimony and any supporting evidence).

215. *E.g.*, *In re* Wistuba, No. 97-15340, 2003 WL 23838129, at *6 (Bankr. D. Kan. Oct. 9, 2003) (dismissing the debtor's claim of a possible layoff due to lack of concrete evidence); *In re* Junghans, No. 01–41733–7, 2003 WL 23807971, at *6 (Bankr. D. Kan. May 13, 2003) (finding that financial improvement must reach a level sufficient to repay loans while maintaining a minimal standard of living).

216. Educ. Credit Mgmt. Corp. v. Metz, No. 18-1281-JWB, 2019 WL 1953119, at *5 (D. Kan. May 2, 2019) (finding that a debtor nearing retirement with minimal raises and an inability to change careers could not repay loans); *In re* Ferrin, No. 05-23065, 2007 WL 1302563, at *3–4 (Bankr. D. Wyo. Apr. 30, 2007) (a 63-year-old debtor dependent on Social Security and pension income was unlikely to improve his financial situation due to age and health issues); *In re* Watson, No. 10-13963, 2012 WL 5360949, at *2 (Bankr. D. Kan. Oct. 30, 2012) (rejecting a claim of

The third prong of the *Brunner* test requires courts to determine whether a debtor has made a good faith effort to repay their student loans. Good faith is evaluated based on the debtor's attempts to find employment, increase income, and cut expenses.[217] Debtors who engage in settlement discussions or attempt to enroll in repayment programs demonstrate good faith, even if such efforts are unsuccessful.[218] While courts do not require debtors to have made payments if they lacked the financial ability, efforts to allocate available funds toward repayment are significant.[219] Debtors who prioritize discretionary spending over loan repayment may fail to demonstrate good faith.[220] Additionally, self-

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persistent hardship for a healthy 30-year-old debtor with no dependents and no evidence that a criminal record would impair future employment prospects).

217. *In re* Ester, 657 B.R. at 666–67 (finding that debtor's consistent overtime, frugal living, and repayment of $14,000 to NCSLT and $22,000 to ECMC demonstrated good faith); Edwards v. Navient Solutions, Inc., 561 B.R. 848, 859–60 (Bankr. D. Kan. 2016); Harrington v. Educ. Credit Mgmt. Corp. (*In re* Harrington), No. 02-24488-DLS, 2005 Bankr. LEXIS 349, at *16–17 (Bankr. D. Kan. Mar. 8, 2005); Stockstill v. A.C.S. (*In re* Stockstill), No. 02-42526, Adv. No. 03-7030, 2005 Bankr. LEXIS 626, at *16–19 (Bankr. D. Kan. Apr. 11, 2005) (finding good faith through job-seeking efforts and loan repayments using home sale proceeds); *cf. In re* Robinson, 390 B.R. 727, 734 (Bankr. W.D. Okla. 2008) (criticizing the debtor's unnecessary vehicle payment while using public transit, suggesting cost-cutting measures, and finding no good faith due to failure to maximize income despite advanced degrees).

218. *In re* Alderete, 308 B.R. 495, 507 (B.A.P. 10th Cir. 2004), *rev'd*, 412 F.3d 1200 (10th Cir. 2005) (holding that failure to explore repayment options like the William D. Ford Direct Loan Program does not automatically indicate bad faith if those programs wouldn't realistically ease the debtor's financial burden) (overturned); *see also In re* Watson, No. 10-13963, 2012 WL 5360949, at *2 (Bankr. D. Kan. Oct. 30, 2012) (considering the availability of income-based repayment plans (IBRPs), though finding it was not decisive in determining whether financial hardship would persist); *In re* Murphy, No. 15-11240-J7, 2018 WL 2670455, at *6 (Bankr. D.N.M. June 1, 2018) (finding that the debtor's willingness to participate in IBRPs supported a finding of good faith); *In re* Ester, 657 B.R. at 667 (finding that the debtor acted in good faith by making repeated efforts to settle the loan with NCSLT, despite the creditor not offering alternative repayment terms); *cf. In re* Brown, 442 B.R. 776, 784 (Bankr. D. Colo. 2010) (finding no good faith due to the debtor's failure to apply for available income-based repayment programs (IBRPs)); *In re* Robinson, 390 B.R. at 734 (the debtor declined to consolidate loans under the WDF Program due to concerns about long repayment terms and potential tax liability, which the court dismissed as insufficient justification).

219. Edwards v. Navient Solutions, Inc., 561 B.R. 848, 860 (*In re* Edwards) (Bankr. D. Kan. 2016) (the debtor's minimal payments were excused due to financial hardship, and her continued employment at a Title 1 school to qualify for loan forgiveness was viewed positively); *see also In re* Standish, 628 B.R. 692, 700–01 (Bankr. D. Kan. 2020) (finding that the debtor's use of a $45,000 inheritance for non-essential expenses rather than repaying student loans negated good faith).

220. *In re* Standish, 628 B.R. at 700–01; *cf. In re* Brown, 442 B.R. at 784 (finding that the debtor's decision to repay a personal debt to her mother using a tax refund, rather than addressing her student loans, was evidence of a lack of good faith), *cf. In re* Edwards, 561 B.R. at 859–60 (acknowledging that while the debtor failed to use tax refunds for payments, her overall circumstances and minimal income justified her limited repayment efforts).

imposed hardship can be seen as an indication of a lack of good faith.[221] Courts also consider whether the debtor's spending habits align with a claim of financial hardship.[222] The Tenth Circuit also cautioned against using good faith analysis to judge a debtor's life choices.[223] Filing for bankruptcy to discharge student loan debt alone does not imply bad faith if the debtor genuinely cannot repay.[224]

Accordingly, the Tenth Circuit applies *Brunner* rigidly. The following section examines the Eleventh Circuit's application of *Brunner*.

I. *Eleventh Circuit's Interpretation of the* Brunner *Test*

The Eleventh Circuit applies the *Brunner* test to determine whether a debtor qualifies for student loan discharge under 11 U.S.C. § 523(a)(8).[225] The first prong of the *Brunner* test requires a debtor to demonstrate that they cannot maintain a minimal standard of living if forced to repay their student loans. In the Eleventh Circuit, a minimal standard of living includes essential expenses such as housing, utilities, food, hygiene products, transportation, health insurance, and necessary medical care.[226] Courts use common-sense to assess whether the debtor's expenses are reasonable and necessary.[227] Courts evaluate 401(k) contributions on a case-by-case basis, considering factors such as the debtor's age, income level, existing retirement savings, and any dependents' financial needs.[228]

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221. *In re* Watson, No. 10-13963, 2012 WL 5360949, at *3 (Bankr. D. Kan. Oct. 30, 2012) (finding a lack of good faith where the debtor's employment limitations resulted from his own criminal actions); *In re* Harvey, Case No. 11-23142, 2013 WL 4478926, at *4 (Bankr. D. Colo. Aug. 20, 2013) (finding prior criminal convictions irrelevant to the debtor's good faith since the debts arose from medical and financial hardships unrelated to the convictions).

222. *In re* Robinson, 390 B.R. at 734 (noting excessive transportation costs and unnecessary savings contributions, concluding the debtor had not adequately minimized expenses); *In re* Standish, 628 B.R. at 700.

223. *In re* Polleys, 356 F.3d at 1310; *In re* Edwards, 561 B.R. at 860 (declining to penalize the debtor for a modest annual family vacation, emphasizing that good faith should not impose a "spartan life" on children).

224. *In re* Alderete, 308 B.R. 495, 507–08 (B.A.P. 10th Cir. 2004), *rev'd*, 412 F.3d 1200 (10th Cir. 2005).

225. *See* Hemar Ins. Corp. Am. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003).

226. *See In re* Douglas, 366 B.R. 241, 253–54 (Bankr. M.D. Ga. 2007); *In re* Ivory, 269 B.R. at 899; *In re* Gordon, Adv. No. 07-009049-MGD, 2008 WL 5159783, at *6 (Bankr. N.D. Ga. Oct. 10, 2008); *In re* Savage, No. 20-63153-SMS, 2023 WL 2747198, at *10 (Bankr. N.D. Ga. Mar. 31, 2023).

227. *In re* Savage, No. 20-63153-SMS at *6 (quoting *In re* Douglas, 366 B.R. at 253–54).

228. Clark v. Wells Fargo Bank *(In re* Clark), No. 15-42603-BEM, 2021 WL 5702705, at *8–9 (Bankr. N.D. Ga. Nov. 29, 2021); *In re* Russotto, 370 B.R. 853, 856–59 (Bankr. S.D. Fla. 2007). In *In re* Clark, despite the plaintiffs being close to retirement and having over $230,000 in their 401(k) with employer contributions, the court found that a $61 reduction in contributions to help repay student loans would not cause undue hardship. 2021 WL 5702705, at *8–9. This decision was supported by their excess monthly income and the anticipated increase in income

Religious tithing is also reviewed on an individual basis; while some courts have allowed modest contributions, excessive donations may be viewed as discretionary spending inconsistent with undue hardship.[229] Courts also consider spousal income when assessing the first prong.[230] While participation in income-driven repayment is a relevant factor, it is not determinative in the undue hardship analysis.[231]

To satisfy the second prong, a debtor must prove that their financial difficulties will persist for a significant portion of the repayment period. The Eleventh Circuit follows the "certainty of hopelessness" standard, requiring debtors to provide substantial evidence—such as chronic illness, long-term disability, or severe employment limitations—showing that their financial condition is unlikely to improve.[232] Courts within this circuit struggle with the determination of a "repayment period."[233] Courts are not in agreement regarding whether or not they should consider the

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after paying off their home. *Id.* The court also found that reducing unnecessary 401(k) contributions would enable repayment without affecting the debtor's minimal living standard. *Id.*

229. *In re* McLaney, 375 B.R. 666, 678–83 (Bankr. M.D. Ala. 2007). Tithing could be considered an allowable expense under § 523(a)(8) in certain cases, particularly if it is required by the church for membership or services. *Id.* The court found that the McLaneys' tithe of $220 per month, representing less than 10% of their income, was reasonable given their tight budget and sacrifices in other areas, such as spending only $1.30 per meal on food. *Id.* The court rejected the argument that tithing should be excluded from the undue hardship analysis. *Id.*

230. *See* Tarpley v. Sallie Mae, Inc. (*In re* Tarpley), No. 14-80704-DHW, 2016 WL 403150, at *3 (Bankr. M.D. Ala. Feb. 2, 2016).

231. *See* Hill v. Educ. Credit Mgmt. Corp. (*In re* Hill), 598 B.R. 907, 921 (Bankr. N.D. Ga. 2019) ("[F]ailure to participate in an income-contingent repayment program is not per se bad faith."); *see also* Mosley v. Educ. Credit Mgmt. Corp., 494 F.3d 1320, 1327 (11th Cir. 2007); Cleveland v. Educ. Credit Mgmt. Corp., 559 B.R. 265, 273 (Bankr. N.D. Ga. 2016).

232. *In re* Hill, 598 B.R. at 916–22 (finding that long-term disabilities and reliance on SSDI benefits showed no reasonable financial improvement); Wolfe v. Dep't of Educ., 501 B.R. 426, 435–38 (Bankr. M.D. Fla. 2013) (finding that mental health issues and disability justified discharge); Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 342–44 (Bankr. S.D. Fla. 2013) (holding that the debtor failed to show a dire financial prospects); *see also In re* McGinnis, 289 B.R. 257, 265–68 (Bankr. M.D. Ga. 2003) (noting that age, chronic health issues, and an outdated degree supported undue hardship); Educ. Credit Mgmt. Corp. v. Stanley, 300 B.R. 813, 819–20 (Bankr. N.D. Fla. 2003) (finding that a 50-year-old debtor with PTSD and $30,000 annual income failed to meet the second prong due to minimal expenses and repayment ability); Graddy v. Educ. Credit Mgmt. Corp., 615 B.R. 336, 350 (Bankr. N.D. Ga. 2020) (stating that debtor's young age weighed against discharge); *In re* Savage, No. 20-63153-SMS, 2023 WL 2747198, at *7–8 (Bankr. N.D. Ga. Mar. 31, 2023) (holding that a 57-year-old debtor nearing retirement with no career prospects satisfied the second prong); Wheat v. Great Lakes Higher Educ. Corp. (*In re* Wheat), No. 18-30745-WRS, Adv. No. 18-03041, 2022 Bankr. LEXIS 168, at *6–13 (Bankr. M.D. Ala. Jan. 25, 2022) (finding that persistent caregiving duties supported undue hardship); *In re* Clark, No. 15-42603-BEM, 2021 WL 5702705, at *8–9 (Bankr. N.D. Ga. Nov. 29, 2021) (finding that dependent care expenses were likely to persist for most of the repayment period).

233. *See In re* Clark, 2021 WL 5702705, at *20–23.

tax consequences.[234] Speculation about potential income or future career prospects does not typically undermine a claim of persistent hardship.[235] Instead, courts focus on the qualitative aspects of hardship over the repayment period, weighing factors such as aging out of dependents, modest raises, and the terms of repayment plans against the debtor's ability to make meaningful loan payments.[236] Serious health conditions that impede a debtor's earning capacity often satisfy this prong.[237] Courts also assess whether health issues are compounded by other factors, such as criminal convictions.[238] While expert testimony is not required, well-documented medical treatment for psychological conditions is generally required.[239] Also, significant caregiving duties can support a claim of persistent hardship.[240]

234. *See In re* Hill, 598 B.R. at 916–22 (holding that a repayee's administrative burdens and potential tax liability after twenty years justified hardship). *But see* Lederman v. U.S. Dep't of Educ. (*In re* Lederman), No. 6:18-bk-06410-LVV, Adv. No. 6:18-ap-00126-LVV, 2021 Bankr. LEXIS, at *2–5 (Bankr. M.D. Fla. Mar. 30, 2021) (finding that tax consequences were speculative and did not establish undue hardship).

235. Acosta-Conniff v. ECMC, 632 B.R. 322, 336–37 (Bankr. M.D. Ala. 2021) (finding that physical limitations and minor financial improvements did not undermine hardship claim); *In re* Savage, No. 20-63153-SMS, 2023 WL 2747198, at *10 (Bankr. N.D. Ga. Mar. 31, 2023); *In re* Cleveland, 559 B.R. at 271–74; *cf.* Clark v. Tex. Guaranteed Student Loan Corp., 465 B.R. 896, 899–900 (Bankr. N.D. Ala. 2012) (noting that criminal convictions alone did not justify hardship); *In re* Matthews-Hamad, 377 B.R. 415, 421–23 (Bankr. M.D. Fla. 2007) (stating that low-wage job choices and failure to seek better opportunities undermined hardship claim); Tarpley v. Sallie Mae, Inc., No. 14-80704-DHW, 2016 WL 403150 (Bankr. M.D. Ala. Feb. 2, 2016) (denying discharge where the debtor failed to pursue career advancement).

236. Manigault v. Dep't of Educ. (*In re* Manigault), No. 17-67571-JWC, Adv. No. 18-5189-JWC, 2020 WL 4939170 (Bankr. N.D. Ga. Aug. 24, 2020).

237. Amos v. Nat'l Payment Ctr. (*In re* Amos), No. 05-16253, Adv. No. 06-01038, slip op. at *8–14 (Bankr. S.D. Ala. Aug. 4, 2006) (finding that 60-year-old debtor with mobility impairments satisfied second prong of hardship test); *In re* Wolfe, 501 B.R. at 435–38 (noting that persistent mental health issues such as depression and PTSD demonstrated that financial difficulties would persist); *In re* Mosley, 330 B.R. at 841–48; *cf.* Williams v. Am. Educ. Serv. (*In re* Williams), 492 B.R. 79, 85–90 (Bankr. M.D. Ga. 2013) (holding that a debtor with impaired vision failed to meet this prong because she had successfully transitioned careers before).

238. *In re* Champagne, No. 6:10-BK-14228-ABB, 2012 WL 293736, at *3–4 (Bankr. M.D. Fla. Jan. 12, 2012) (noting that mental health issues and a criminal history significantly limited employability, supporting a finding of persistent hardship); *In re* Douglas, 366 B.R. at 253–59 (finding that a criminal conviction and HIV diagnosis rendered the debtor's degree in early childhood education unmarketable).

239. *In re* Mosley, 330 B.R. 841–48 (stating that substantial credible evidence—such as medical records—is typically required to prove work incapacity); *see also In re* Brosnan, 323 B.R. 533, 537–39 (Bankr. M.D. Fla. 2005) (finding that debtor's testimony alone, without supporting medical records, was insufficient to prove undue hardship); *In re* Lykoudis, 381 B.R. 349, 354–58 (Bankr. M.D. Fla. 2007) (same).

240. *In re* Wheat, No. 18-30745-WRS, 2022 WL 243221, at *2–8 (Bankr. M.D. Ala. Jan. 25, 2022) (finding that ongoing caregiving responsibility for children and a mother with significant health issues made future improvement unlikely); *see also In re* Rutherford, 317 B.R. 865, 878–85 (Bankr. N.D. Ala. 2004).

The third prong of the *Brunner* test examines whether the debtor has made a good faith effort to repay their student loans. Courts assess whether the debtor has taken steps to gain or maintain employment, maximize income, and minimize expenses.[241] The debtor must show that their financial difficulties were not self-inflicted, but rather the result of circumstances beyond their control.[242] Courts look at whether the debtor has made reasonable efforts to secure or retain employment.[243] These efforts do not need to be perfect, but they must reflect a genuine attempt to increase earnings.[244] In addition, courts consider whether the debtor has curtailed discretionary spending and maintained a modest lifestyle.[245] A high ratio of student loan debt to total bankruptcy debt may indicate that the debtor filed for bankruptcy primarily to discharge student loans, which courts may consider evidence of bad faith.[246] Participation in IDR plans can demonstrate good faith, but failure to participate is not necessarily indicative of bad faith.[247] Similarly, making small payments or failing to make payments alone does not constitute bad faith.[248]

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241. *See* Kidd v. Student Loan Xpress, Inc. (*In re* Kidd), 472 B.R. 857, 862–64 (Bankr. N.D. Ga. 2012).

242. *In re* Mosley, 494 F.3d at 1327; *In re* Hill, 598 B.R. at 920.

243. *In re* Savage, No. 20-63153-SMS, 2023 WL 2747198, at *5 (Bankr. N.D. Ga. Mar. 31, 2023) (maintaining employment despite economic hardships showed good faith); *In re* Williams, 492 B.R. 79, 90–91 (Bankr. M.D. Ga. 2013) (concluding that participation in deferments and employment efforts supported good faith); *In re* Manigault, No. 17-67571-JWC, 2020 WL 4939170, at *5–6 (Bankr. N.D. Ga. Aug. 24, 2020) (finding that debtor with medical issues made attempts to secure full-time work, satisfying the good faith requirement).

244. *In re* Acosta-Conniff, 632 B.R. at 337–39.

245. *In re* Savage, 2023 WL 2747198, at *6 (noting that debtor minimized expenses by reducing vehicle costs and living with family); *In re* Acosta-Conniff, 632 B.R. at 338 (finding that a modest budget with no nonessential expenses supported good faith).

246. *In re* Kidd, 472 B.R. at 862–64.

247. *In re* Hill, 598 B.R. at 920–22 (concluding that debtor's disability and inability to manage administrative tasks excused failure to enroll in repayment programs); *In re* Lederman, No. 6:18-bk-06410-LVV, 2021 Bankr. LEXIS, at *2–5 (finding that debtor's refusal to enter an IBR plan due to speculative tax burdens showed bad faith); *In re* Wynn, 270 B.R. 799, 804–06 (Bankr. S.D. Ga. 2001) (noting that a lack of knowledge of repayment options did not indicate bad faith); *cf. In re* Chasser, 391 B.R. 482, 491–92 (Bankr. M.D. Fla. 2008) (finding that discretionary spending and failure to explore repayment options showed bad faith); Ulm v. Educ. Credit Mgmt. Corp., 304 B.R. 915, 921–22 (Bankr. S.D. Ga. 2004) (concluding that avoiding wage garnishment and not exploring repayment options failed to meet good faith). *See also In re* Rutherford, 317 B.R. 865, 878–85 (Bankr. N.D. Ala. 2004); *In re* Brosnan, 323 B.R. at 537–39.

248. *In re* Savage, No. 20-63153-SMS, 2023 WL 2747198, at *10 (Bankr. N.D. Ga. Mar. 31, 2023) (holding that nonpayment alone does not indicate bad faith if repayment was infeasible); *cf.* Amos v. Nat'l Payment Ctr. (*In re* Amos), No. 05-16253, Adv. No. 06-01038, slip op. at *8–14 (Bankr. S.D. Ala. Aug. 4, 2006) (noting that a lack of serious repayment efforts, even during deferment, suggested bad faith); *In re* Cleveland, 559 B.R. at 271–74 (finding that failure to make payments despite improved finances was bad faith); *see also* Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 344–47 (Bankr. S.D. Fla. 2013)(stating that failing to use tax refunds to reduce loan debt indicated bad faith).

II. JUDICIAL INCONSISTENCIES IN THE APPLICATION OF THE *BRUNNER* STANDARD

The *Brunner* test remains the predominant standard for evaluating undue hardship in student loan discharge cases. Despite variations, courts generally recognize certain core principles. Under the first prong of *Brunner*, debtors are not required to live in absolute poverty, but they must eliminate unnecessary expenses. Household income typically includes spousal earnings. Additionally, speculative claims of future hardship are insufficient. The good-faith prong generally requires debtors to make some effort to repay their loans or explore alternative repayment options, and a failure to do so while financially capable often weakens their case.

Despite these shared principles, courts apply *Brunner* inconsistently, leading to significant variations in outcomes across jurisdictions. Some courts interpret *Brunner* narrowly—making discharge nearly impossible—while others take a more flexible approach, considering economic realities and long-term financial stability. These discrepancies are particularly evident in three key areas: (1) the treatment of 401(k) contributions and religious tithing; (2) the role of IDR under the first, second, and third prong; and (3) evidentiary burdens, particularly the role of expert testimony in proving persistent hardship.

A. *The Treatment of 401(k) Retirement Contributions*

Courts differ on whether 401(k) retirement contributions should be considered necessary expenses in undue hardship cases. Some courts recognize that eliminating all retirement savings could create undue hardship. For instance, in *Clavell*,[249] the court permitted modest 401(k) contributions for a thirty-five-year-old debtor, acknowledging the importance of retirement security.[250] In contrast, other courts disallow retirement contributions, arguing that student loan repayment must take precedence as in *Speer*[251] and *Woody*.[252]

Other courts take a middle-ground approach, assessing contributions on a case-by-case basis, considering factors such as age, financial

249. *In re* Clavell, 611 B.R. 504 (Bankr. S.D.N.Y. 2020).

250. *Id.* at 511.

251. *In re* Speer, 272 B.R. 186, 194 (Bankr. W.D. Tex. 2001).

252. *In re* Woody, 494 F.3d 939, 952 (10th Cir. 2007); *see also* Educ. Credit Mgmt. Corp. v. Young, 376 B.R. 795, 799 (E.D. Tex. 2007); *In re* Eady, No. 20-40208, 2021 WL 3148951, at *7 (Bankr. E.D. Tex. July 26, 2021); *In re* Perkins, 318 B.R. 300, 306 (Bankr. M.D.N.C. 2004) (finding that retirement contribution is not necessary); Shirzadi v. Dep't of Educ., 269 B.R. 664, 668 (Bankr. S.D. Ind. 2001); *In re* Hull, No. 18-32076, 2021 WL 1602880, at *1 (Bankr. W.D. Ky. Apr. 23, 2021); *see also In re* Pobiner, 309 B.R. 405, 418 (Bankr. E.D.N.Y. 2004) (denying discharge where the debtor's wife contributed $462 to her 401(k) while seeking to discharge a $72,000 student loan).

circumstances, and the impact of eliminating retirement savings.[253] In *Craig*,[254] the court rejected a categorical prohibition against retirement contributions, ruling that reasonable savings could be justified.[255] Likewise, in *Johnson*,[256] the court held that requiring a debtor to redirect retirement contributions to loan payments would violate public policy by undermining financial security.[257]

Overall, courts are split on whether 401(k) contributions should be permitted. Some view them as essential for long-term financial stability, while others view them as non-essential expenses that should be redirected toward student loan repayment.

B. *The Treatment of Tithing Under the Undue Hardship Analysis*

Courts are divided on the treatment of religious tithing and charitable contributions in the undue hardship analysis. The enactment of the Religious Liberty and Charitable Donation Protection Act (RLCDPA) in 1998, which protects charitable donations of up to fifteen percent of a debtor's gross income, further complicated the issue.[258]

Before the RLCDPA, courts generally disallowed tithing as an allowable expense in bankruptcy proceedings. In *In re Lynn*,[259] the court emphasized that "[section] 523(a)(8) is a neutral law that neither promotes nor restricts religious beliefs," citing earlier cases that found tithing unnecessary for a debtor's maintenance and support.[260] For example, in *In re Young*,[261] a trustee was permitted to void church donations as fraudulent transfers under section 548.[262] Similarly, in *In re*

253. *In re* Larson, 426 B.R. 782, 791–93 (Bankr. N.D. Ill. 2010) (finding the debtor's 401(k) contributions reasonable based on the debtor's age, the employer's matching policy, limited savings, and an overall frugal budget); *In re* Mendenhall, 621 B.R. 472, 485–89 (Bankr. D. Idaho 2020) (finding 7% contribution reasonable, given the absence of excessive spending); *In re* Clark, No. 15-42603-BEM, 2021 WL 5702705, at *8–9 (same); *In re* Russotto, 370 B.R. 853, 856–59 (Bankr. S.D. Fla. 2007); *In re* Weldon, No. 03-49320, 2008 WL 4527654, at *1 (Bankr. W.D. Wash. Sep. 30, 2008); *In re* Carlson-Callow, No. 05-04260, 2008 WL 2357012, at *5–7 (Bankr. D. Idaho June 6, 2008); *In re* Doernte, No. 10-24280-JAD, 2017 WL 231226, at *7–9 (Bankr. W.D. Pa. May 25, 2017) (finding that 403(b) contributions were unnecessary for a forty-eight-year-old debtor with ample disposable income, expected raises, and significant assets, including retirement savings and home equity); *cf. In re* Allen, 329 B.R. 544 at 545–46.

254. *In re* Craig, 579 F.3d 1040, 1046 (9th Cir. 2009).

255. *Id.*

256. *In re* Johnson, 577 B.R. 895, 906 (Bankr. D. Kan. 2017).

257. *Id.*

258. The Religious Liberty and Charitable Donation Protection Act, Pub. L. No. 105-183, 112 Stat. 517 (1998).

259. *In re* Lynn, 168 B.R. 693, 700 (Bankr. D. Ariz. 1994).

260. *Id.*

261. *In re* Young, 152 B.R. 939, 950 (D. Minn. 1993), *rev'd*, 82 F.3d 1407 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997).

262. *Id.*

Lee,[263] the court held that tithing did not qualify as a necessary expense under section 707(b) since it was not a requirement for church membership.[264] Likewise, in *In re Miles*,[265] while court acknowledged the spiritual significance of tithing, the court categorized such contributions as nonessential expenses.[266]

In response to concerns from religious organizations, Congress passed the RLCDPA in 1998.[267] The law amended the Bankruptcy Code to provide greater protection for charitable contributions. The law amended the Bankruptcy Code to (1) protect charitable donations up to fifteen percent of a debtor's gross income from being considered fraudulent transfers; and (2) allow such contributions to be factored into the disposable income calculation in bankruptcy.[268] However, the RLCDPA did not explicitly state whether charitable contributions should be considered necessary expenses in undue hardship determinations under section 523(a)(8) (which governs student loan discharge).[269] This ambiguity has led courts to adopt three distinct approaches.[270]

The first approach holds that the RLCDPA does not apply to section 523(a)(8) cases and, therefore, exclude tithing from undue hardship considerations. In *In re Ritchie*,[271] the court determined that the RLCDPA had no bearing on student loan dischargeability, effectively rejecting its application to undue hardship determinations.[272] Similarly, in *In re McLeroy*[273] the court ruled that tithing does not automatically qualify as a reasonable expense.[274] Likewise, in *In re Lynch*,[275] the court held that tithing was not an essential expense and should not be considered in the undue hardship analysis.[276]

The second approach allows tithing and charitable contributions as long as they fall within the RLCDPA's fifteen percent threshold. In *In re*

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263. *In re* Lee, 162 B.R. 31, 39 (Bankr. N.D. Ga. 1993).

264. *Id.*

265. *In re* Miles, 96 B.R. 348, 350 (Bankr. N.D. Fla. 1989).

266. *Id.* at 349–50.

267. Anne McLaughlin, *Tithing in a Chapter 13 Plan: The Requirement of Reasonableness Under the Religious Liberty and Charitable Donation Protection Act*, 47 B.C. L. REV. 375, 376–77 (2006).

268. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105–183, 112 Stat. 517 (1998).

269. *Id.*

270. *See In re* Lozada, 604 B.R. 427, 433–35 (Bankr. S.D.N.Y. 2019) (discussing the three primary judicial approaches that have emerged after the enactment of RLCDPA).

271. *In re* Ritchie, 254 B.R. 913, 917–24 (Bankr. D. Idaho 2000).

272. *Id.*

273. *In re* McLeroy, 250 B.R. 872, 880 (Bankr. N.D. Tex. 2000).

274. *Id.* at 880.

275. *In re* Lynch, 299 B.R. 62, 75 (Bankr. S.D.N.Y. 2003).

276. *Id.* at 75; *In re* Allen, 329 B.R. 544, 552 (Bankr. W.D. Pa. 2005) (disallowing religious tithing as an unnecessary expense).

Lebovits,[277] the court approved a $60 monthly tithe as it was within RLCDPA threshold.[278] Likewise, in *In re Pratt*,[279] the court questioned the validity of tithing as an allowable deduction but upheld the bankruptcy court's decision allowing tithing under the RLCDPA.[280]

The third approach evaluates the reasonableness of charitable contributions on a case-by-case basis. In *In re McLaney*,[281] the court allowed a $220 monthly tithe, reasoning that it represented less than ten percent of the debtor's household income and was part of a tight budget.[282] In contrast, in *In re Cartwright*,[283] the court found a debtor's $500 monthly tithing excessive and ruled that such contributions should be reduced to facilitate loan repayment.[284] Furthermore, in *In re Fulbright*,[285] the court held ten percent of disposable income to tithing was "significantly above a de minimis amount."[286] By contrast, in *In re McCafferty*,[287] the court found $300 in charitable donations was reasonable, citing the debtor's deep religious commitment.[288]

Ultimately, judicial treatment of tithing under section 523(a)(8) remains unsettled. Some courts maintain a strict exclusion of tithing, others recognize RLCDPA's fifteen percent threshold, while a third group assesses reasonableness on a case-by-case basis, weighing the debtor's financial circumstances.

C. *The Role of IDR Plans and Tax Consequences*

Another contentious issue in *Brunner* litigation is whether a debtor's failure to enroll in an IDR plan constitutes bad faith under the third prong. Some courts have effectively required IDR enrollment, treating non-participation as evidence of bad faith, while others recognize that IDR participation may not alleviate financial hardship, particularly in light of potential tax liabilities upon loan forgiveness. For example, in *In re Murphy*,[289] the court held that the debtor's refusal to enter an IDR plan

277. *In re* Lebovits, 223 B.R. 265, 273 (Bankr. E.D.N.Y. 1998).

278. *Id.* at 273.

279. *In re* Pratt, 375 B.R. 753, 760 (Bankr. S.D. Tex. 2007).

280. *Id.* at 760–61; *see also In re* Durrani, 311 B.R. 496, 504 (Bankr. N.D. Ill. 2004) (charitable contributions were protected).

281. *In re* McLaney, 375 B.R. 666, 682–83 (Bankr. M.D. Ala. 2007).

282. *Id.*; *In re* Larson, 426 B.R. 782, 791–93 (Bankr. N.D. Ill. 2010) (considering the debtor's religious tithing, which was under five percent of gross income, as a reasonable expense).

283. *In re* Cartwright, No. 01-20547-RLJ-7, Adv. No. 01-2020, 2002 Bankr. LEXIS 1971 (Bankr. N.D. Tex. Mar. 27, 2002).

284. *Id*. at *10.

285. *In re* Fulbright, 319 B.R. 650, 660–61 (Bankr. D. Mont. 2005).

286. *Id.* at 660.

287. *In re* McCafferty, No. 14-04545-FPC7, 2015 Bankr. LEXIS 3600, at *10 (Bankr. E.D. Wash. Oct. 23, 2015).

288. *Id.*

289. *In re* Murphy, 535 B.R. 97 (Bankr. W.D. Pa. 2015), *appeal dismissed*, No. 16-1082,

was a factor weighing against good faith efforts, reasoning that the debtor had not exhausted all available repayment options.[290] Similarly, in *Munch*,[291] the court determined that the debtor's failure to enroll in IDR, despite qualifying for a $0 payment, weighed against a finding of good faith.[292] Conversely, other courts have declined to treat non-enrollment in an IDR plan as per se lack of good faith, instead considering additional factors when a debtor chooses not to pursue alternative repayment options.[293] In *In re Roth*,[294] the court found that the debtor's refusal to enroll was reasonable, given her advanced age and limited future earning potential.[295] Likewise, in *In re Crawley*,[296] the court held that the debtor's

2016 WL 6124496 (W.D. Pa. Oct. 20, 2016), *aff'd*, 679 F. App'x 107 (3d Cir. 2017).

290. *Id.* at 106–08.

291. Munch v. Educ. Credit Mgmt. Corp., No. CV 18-868-R, Adv. No. 9:17-ap-01008-PC, 2018 WL 4636173 (C.D. Cal. Sep. 25, 2018), *aff'd*, No. 18-56300, 2021 WL 4438767 (9th Cir. Sep. 1, 2021).

292. *Id.* at *6; Gesualdi v. Educ. Credit Mgmt. Corp. (*In re* Gesualdi), 505 B.R. 330, 344–47 (Bankr. S.D. Fla. 2013). *See also* Newchurch v. SLM Corp. (*In re* Newchurch), No. 05-11747, Adv. No. 06-1009, 2006 WL 3246593, at *4 (Bankr. M.D. La. Nov. 2, 2006) (holding that the debtor's failure to make payments or enroll in an ICRP constituted evidence of a lack of good faith); Gnahoua v. Dep't of Educ. (*In re* Gnahoua), No. 14-50222-RLJ-7, Adv. No. 14–05020, 2016 WL 1238831, at *3 (Bankr. N.D. Tex. Mar. 28, 2016) (emphasizing that failure to engage in ICRPs, renegotiate terms, or make any payments typically leads to finding a lack of good faith effort); Sperazza v. Educ. Credit Mgmt. Corp. (*In re* Sperazza), 366 B.R. 397, 413–14 (Bankr. E.D. Pa. 2007) (discussing that participation in an ICRP is not a prerequisite to dischargeability but is one factor courts consider in assessing the debtor's good faith); Brosnan v. Am. Educ. Servs. (*In re* Brosnan), 323 B.R. 533, 537–39 (Bankr. M.D. Fla. 2005) (considering the debtor's failure to make payments and to pursue repayment-plan negotiations as evidence of a lack of good faith); Ulm v. Educ. Credit Mgmt. Corp., 304 B.R. 915, 922 (S.D. Ga. 2004) (explaining that "lack of bad faith" is not the standard and that good faith requires efforts to repay or adjust repayment terms by means within the debtor's reasonable control); Chasser v. United Student Aid Funds (*In re* Chasser), 391 B.R. 482, 491 (Bankr. M.D. Fla. 2008) (discussing that the debtor was offered the Ford Program ICRP but declined to participate, supporting a finding that there was a lack of good faith effort to repay).

293. *See* French v. NCO Fin. Sys., Inc. (*In re* French), No. 04-40365 (ALG), Adv. No. 04–03060, 2006 WL 2583646, at *7 (Bankr. S.D.N.Y. Aug. 31, 2006) (holding that a debtor's failure to explore alternative repayment options is not per se evidence of a lack of good faith but may be a factor supporting such a finding); *see also* Allen v. Am. Educ. Servs. (*In re* Allen), 329 B.R. 544, 548–50 (Bankr. W.D. Pa. 2005) (holding that the debtor did not exhibit bad faith merely by declining to participate in the William D. Ford ICRP); Educ. Credit Mgmt. Corp. v. Kelly, No. C11-1263RSL, 2012 WL 1378725, at *3 (W.D. Wash. Apr. 20, 2012) (noting that good faith is assessed by factors such as efforts to maximize income and minimize expenses, and that failure to negotiate a repayment plan may raise an inference of a lack of good faith), *rev'd sub nom.*, Kelly v. Sallie Mae, Inc., 594 F. App'x 413 (9th Cir. 2015) (mem.).

294. Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908 (B.A.P. 9th Cir. 2013).

295. *Id.* at 917–20 (holding debtor's refusal to enroll in an IBRP did not weigh against her given her advanced age, poor health, and limited income, finding her overall efforts demonstrated good faith).

296. Roundtree-Crawley v. Educ. Credit Mgmt. Corp. (*In re* Crawley), 460 B.R. 421 (Bankr. E.D. Pa. 2011).

decision not to participate in IDR was justified by financial hardship and medical conditions.[297] Similarly, in *In re Koeut*,[298] the court declined to find bad faith where the debtor provided legitimate reasons for avoiding IDR enrollment, such as concerns over credit damage or long-term tax consequences.[299]

Courts also remain divided on whether eligibility for IDR plans should be considered under the first or second prong of the *Brunner* test. In *In re Coplin*,[300] the court rejected that IDR should replace a debtor's original contract, reasoning that if Congress had intended to substitute IDR for the undue hardship standard in section 523(a)(8), it would have been done so

297. *In re Crawley*, 460 B.R. at 445; *see also* Hill v. Educ. Credit Mgmt. Corp. (*In re* Hill), 598 B.R. 907, 920–22 (Bankr. N.D. Ga. 2019) (excusing a debtor's failure to enroll due to disability and an inability to manage administrative requirements); Rutherford v. William D. Ford Direct Loan Program (*In re* Rutherford), 317 B.R. 865, 878–85 (Bankr. N.D. Ala. 2004) (holding the debtor's caregiving responsibilities and financial limitations supported a finding of good faith despite nonparticipation in IDR plans); *In re* Douglas, 366 B.R. 241, 253–59 (Bankr. M.D. Ga. 2007).

298. *In re* Koeut, 622 B.R. 72, 84 (Bankr. S.D. Cal. 2020).

299. *See id.* at 84. *But see In re* Lederman, No. 6:18-bk-06410-LVV, Adv. No. 6:18-ap-00126-LVV, 2021 Bankr. LEXIS 1052, at *6–7 (Bankr. M.D. Fla. Mar. 30, 2021) (finding that tax consequences from potential loan forgiveness were speculative and did not justify nonparticipation in an IDR plan); *In re* Robinson, 390 B.R. 727, 734 (Bankr. W.D. Okla. 2008) (stating that the debtor declined to consolidate loans under the WDF Program due to concerns about long repayment terms and potential tax liability, which the court dismissed as insufficient justification). *See also In re* Lozada, 604 B.R. 427, 437 (S.D.N.Y. 2019); Tingling v. U.S. Dep't of Educ., 611 B.R. 710, 727–28 (E.D.N.Y. 2020). *But see* Coco v. N.J. Higher Educ. Student Assistance Auth. (*In re* Coco), 335 F. App'x 224, 228–29 (3d Cir. 2009) (finding that the debtor's refusal to enter an IDR plan was reasonable due to concerns about creating future IRS debt from loan forgiveness tax liabilities); Wynn v. Mo. Coordinating Bd. of Educ. (*In re* Wynn), 270 B.R. 799, 804–06 (Bankr. S.D. Ga. 2001) (holding limited knowledge of repayment options did not indicate bad faith, given the debtor's efforts to manage loans). *See also* King v. Vt. Student Assistance Corp. (*In re* King), 368 B.R. 358, 373–74 (Bankr. D. Vt. 2007) (finding the debtor's consistent job search and expense reduction, despite psychological challenges, demonstrated good faith, so the court ruled that failure to enroll in an ICRP did not negate that finding); Trejo v. Navient (*In re* Trejo), No. 17-42439-MXM-7, Adversary No. 17-4052, 2020 WL 1884444, at *27 (Bankr. N.D. Tex. Apr. 15, 2020) (noting that making payments when possible and engaging in repayment plans supported a good faith finding); Educ. Credit Mgmt. Corp. v. Pratt (*In re* Pratt), 375 B.R. 753, 763 (S.D. Tex. 2007) (holding that a debtor's failure to seek a reduced payment plan through the William D. Ford Program, combined with failure to make any payments, demonstrated a lack of good faith).

300. *In re* Coplin, No. 13-46108, 2017 WL 6061580 (Bankr. W.D. Wash. Dec. 6, 2017).

explicitly.[301] In contrast, other courts, such as *In re Beattie*,[302] have incorporated IDR payment amounts into the first prong analysis—even when the debtor was not enrolled in an IDR plan—on the grounds that strictly applying contract-based repayment terms would make it easier for almost every debtor to satisfy the first prong of the *Brunner* test.[303]

Courts also differ in how they apply IDR plans when evaluating the second prong of *Brunner*. Some rely on the original loan agreement or a court judgment, while others consider the repayment period outlined in the debtor's IDR plan.[304] For example, in *In re Hollins*,[305] the court denied discharge for a debtor whose loans had matured and were past due.[306] The court compared *In re Hollins* to *In re Barron*,[307] where the debtor's loans had also matured, and the lender had obtained a judgment against the debtor.[308] In *In re Barron*, the court found that the debtor satisfied the second prong because there was no realistic possibility of repayment.[309] However, in *In re Hollins*, no judgment had been obtained

301. *Id.* at *9; *see also* Morrison v. Sallie Mae, Inc. (*In re* Morrison), No. 13-00933-FPC7, Adv. No. 13-80034-FPC, 2014 WL 739838 (Bankr. E.D. Wash. Feb. 26, 2014); Tinsley v. U.S. Dep't of Educ. (*In re* Tinsley), No. 17-28611-ABA, Adv. No. 17-1622-ABA, 2018 WL 6819515, at *18 (Bankr. D.N.J. Dec. 26, 2018) (holding that when a debtor's expenses exceed their income to the extent that they cannot afford loan payments, the first prong of the *Brunner* test is satisfied regardless of repayment plan options); *In re* Crawley, 460 B.R. 421, 438 (Bankr. E.D. Pa. 2011) (ruling that the debtor's inability to maintain a minimal standard of living, even under a $0.00 payment plan, made eligibility for the Income Contingent Repayment Plan (ICRP) irrelevant under the first prong of the *Brunner* test, emphasizing that bankruptcy courts, not the Department of Education, should determine student loan dischargeability).

302. Educ. Credit Mgmt. Corp. v. Beattie (*In re* Beattie), 490 B.R. 581 (Bankr. W.D. Wash. 2012).

303. *Id.* at 588; *see also* Educ. Credit Mgmt. Corp. v. Durrani (*In re* Durrani), No. 97 B 16918, Adv. No. 02 A. 1859, 2004 Bankr. LEXIS 920, at *11 (Bankr. N.D. Ill. June 30, 2004).

304. *See* Devos v. Price, 583 B.R. 850, 855 (Bankr. E.D. Pa. 2018) (declining to make the determination as the applicable repayment period but noting that the debtor argued that her repayment period should be limited to the terms of her existing loan agreement, which was set to end within seven years while the Department of Education contended that the appropriate period should be the maximum twenty-five-year term available under an income-contingent repayment plan). Notably, several courts have recognized the absence of a clear determination regarding the "repayment period." *In re* Robinson, No. 00-82044, 2002 WL 32001246, at *4 (Bankr. C.D. Ill. Oct. 22, 2002) (noting that the "repayment period" "was not established through any trial testimony or exhibits"); *see also* Manigault v. U.S. Dep't of Educ. (*In re* Manigault), No. 17-67571-JWC, Adv. No. 18-5189-JWC, 2020 Bankr. LEXIS 2252, at *6–9 (Bankr. N.D. Ga. Aug. 21, 2020) (finding genuine issues of material fact where information about the repayment period and the loan amount is missing).

305. Hollins v. U.S. Dep't of Educ. (*In re* Hollins), 286 B.R. 310, 311 (Bankr. N.D. Tex. 2002).

306. *Id*. at 317.

307. *Id.* at 318; Barron v. Tex. Guaranteed Student Loan Corp. (*In re* Barron), 264 B.R. 833 (Bankr. E.D. Tex. 2001).

308. *Id.* at 847.

309. *Id*. at 841–42.

against the debtor, and the court determined that the debtor's eligibility for IDR negated her claim that financial hardship would persist.[310] Similarly, in *In re Murphy*[311] and *In re Watson*,[312] courts considered the repayment period outlined in the debtor's IDR plan.[313]

By contrast, in *In re Bell*,[314] the court rejected the notion that the undue hardship inquiry should be based on the IDR's plan, holding that "the inquiry is not whether participation in a repayment program for twenty years for an ultimate forgiveness would be an undue hardship; the inquiry according to the *Brunner* test is whether repayment of the loan over the repayment period would be an undue hardship."[315] Likewise in *In re Robinson*,[316] where the debtor's loans had matured and were past due at the time of filing, the court found that the debtor satisfied the second prong without considering IDR plans.[317] The Bankruptcy Court for the Southern District of New York reached a similar conclusion in *In re Rosenberg*, also without factoring in an IDR plan.[318]

Relying on IDR plans to assess long-term financial hardship raises concerns because 11 U.S.C. § 523(a)(8) does not authorize courts to modify repayment terms or require IDR enrollment. Furthermore, even if bankruptcy courts had authority under section 105(a) of the Bankruptcy Code to modify student loan agreements or compel IDR enrollment, this provision does not permit courts to override explicit statutory requirements. This issue is particularly problematic in cases where courts have denied partial discharge, holding that section 105(a) cannot be used to restructure student loan debt in a manner that conflicts with section 523(a)(8).[319] By the same reasoning, section 105(a) does not grant

310. *In re* Hollins, 286 B.R. at 314; *see also* Ester v. Pa. Higher Educ. Assistance Agency (*In re* Ester), 657 B.R. 655, 664 (Bankr. N.D. Okla. 2024) (holding debtor met the first prong when his loan was nearing $60,000 with 10.5% interest, was subject to a 25% wage garnishment under Oklahoma law, which previously totaled $900 per month, which was above debtor's disposable income, and such garnishment would continue for 8-9 years unless the loan was discharged); *In re* Rosenberg, 610 B.R. at 457, 460–61.

311. *In re* Murphy, No. 15-11240-j7, Adv. No. 15-1051-j, 2018 Bankr. LEXIS 1598, at *19 (Bankr. D.N.M. June 1, 2018).

312. Watson v. Sallie Mae (*In re* Watson), No. 10-13963, Adv. No. 11–5138, 2012 WL 5360949, at *5–6 (Bankr. D. Kan. Oct. 30, 2012).

313. *In re* Murphy, 2018 Bankr. LEXIS 1598, at *16; *In re* Watson, 2012 WL 5360949, at *5–6.

314. Bell v. U.S. Dep't of Educ. (*In re* Bell), 633 B.R. 164 (Bankr. W.D. Va. 2021).

315. *Id*. at 181–82.

316. No. 00-82044, 2002 WL 32001246, at *1 (Bankr. C.D. Ill. Oct. 22, 2002).

317. *Id.* at *4.

318. Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 457, 460–61 (Bankr. S.D.N.Y. 2020).

319. *See In re* Faktor, 306 B.R. 256, 262–63 (Bankr. N.D. Iowa 2004) (holding that the court explicitly lacked authority to modify the payment terms of a student loan or to grant partial discharge); *see also In re* Lederman, No. 6:18-bk-06410-LVV, Adv. No. 6:18-ap-00126-LVV, 2021 Bankr. LEXIS 1052, at *2–5 (Bankr. M.D. Fla. Mar. 30, 2021) (holding that partial

courts the authority to mandate IDR participation, as doing so would effectively create a judicially imposed repayment plan—a power that Congress never authorized.[320]

Without clear appellate precedent or legislative reform, courts will likely continue issuing inconsistent rulings on IDR participation, financial hardship, and tax consequences.

D. *The Role of Expert Testimony, Corroborative Evidence, and Debtor Testimony*

Courts assessing undue hardship claims under *Brunner* often require concrete evidence, typically through expert testimony, corroborative medical records, and debtor testimony. While some jurisdictions impose strict evidentiary requirements, others adopt a more flexible approach.

Certain courts mandate expert medical testimony, particularly for psychological conditions. In *In re Kelsey*,[321] the court held that claims based on mental health issues are susceptible to fabrication and that qualified expert testimony is necessary to ensure legitimacy.[322] Similarly, in *In re Porrazzo*,[323] the debtor successfully discharged his student loans by presenting expert testimony that his Asperger's Syndrome and generalized anxiety disorder severely impaired his ability to secure stable employment.[324]

Other courts do not impose an expert testimony requirement, permitting medical records and debtor testimony as sufficient proof.[325] In

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discharge is inconsistent with § 523(a)(8), and that Congress never intended for courts to modify or restructure student loan debts through judicial discretion). *But see* Saxman v. Educ. Credit Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168, 1173–74 (9th Cir. 2003) (affirming that partial discharge is permissible, creating a stark circuit split on the issue).

320. 11 U.S.C. § 105(a) (2018).

321. *See In re* Kelsey, 287 B.R. 132, 145 (Bankr. D. Vt. 2001) (finding that the debtor satisfied the *Brunner* test).

322. *See id.* at 143 (requiring debtors to provide expert testimony for psychological or emotional disability).

323. *See In re* Porrazzo, 307 B.R. 345, 353 (Bankr. D. Conn. 2004) (holding that the debtor established undue hardship by presenting evidence of Asperger's syndrome and inability to be employed).

324. *See id.* (granting a discharge of student loan debt); *In re* Todd, 473 B.R. 676, 688–95 (Bankr. D. Md. 2012) (finding that the debtor's Autism, PTSD, and osteoporosis created a certainty of hopelessness, which was supported by expert testimony); *In re* Vang, 324 B.R. 76, 85 (Bankr. W.D. Wis. 2005) (finding that the debtor, a thirty-one-year-old with mild mental retardation and language barriers, met the *Brunner* test for undue hardship due to limited employability despite educational assistance, supported by expert testimony). *But see In re* Jackson, No. 05-15085 (PCB), 2007 WL 2295585, at *9 (Bankr. S.D.N.Y. Aug. 9, 2007) (granting discharge despite a lack of expert testimony).

325. *See In re* Mosley, 330 B.R. 832, 841–48 (Bankr. N.D. Ga.) (holding that substantial, credible evidence, often including medical records or expert testimony, may be necessary to prove a debtor's inability to work).

In re Brightful,[326] the Third Circuit explicitly rejected a per se rule requiring expert testimony, allowing judges to assess debtor credibility without it.[327] Likewise, in *In re Crawley*, the court granted discharge based on medical records and frequent work absences due to chronic illness, even though no expert testified.[328]

By contrast, in *In re Braun*,[329] the court rejected the debtor's PTSD and ADHD claims due to a lack of medical documentation, underscoring the importance of supporting evidence.[330] Also, in *In re Doherty*,[331] the court recognized that expert testimony is often financially unattainable for low-income debtors, leading it to consider alternative medical records.[332] Similarly, in *In re Harvey*,[333] the court ruled that a debtor may rely on medical records and personal testimony if expert testimony is unavailable.[334] Additionally, in *In re Hoskins*,[335] the court granted discharge where the debtor's chronic epilepsy was well-documented through medical records and Social Security disability benefits.[336] Conversely, in *In re Benjumen*,[337] the court denied discharge, finding that the debtor lacked medical corroboration and her admission that her condition had not caused job loss was insufficient.[338] Similarly, in *In re Brosnan*,[339] the debtor's claims of medical hardship were rejected for lack of medical documentation or expert testimony.[340]

Although less common, some courts have relied on debtor testimony when medical evidence is unavailable. In *In re O'Donohoe*, the court found that the debtor's observable cognitive and social impairments indicated that he could not maintain stable employment, allowing him to meet the *Brunner* standard despite lacking expert medical testimony.[341]

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326. *See In re* Brightful, 267 F.3d 324, 331 (3d Cir. 2001) (holding that the debtor failed to establish undue hardship and denying discharge for student loan debt).

327. *See id.* at 329–30 (rejecting arguments that required expert testimony to discharge student loan debt).

328. *See In re* Crawley, 460 B.R. 421, 447 (Bankr. E.D. Pa. 2011) (finding that the debtor met the undue hardship requirement and granting a discharge of student loan debt).

329. *In re* Braun, No. 1.10-BK-1169-GM, 2012 WL 5199163, at *1 (Bankr. E.D. Va. Oct. 19, 2012).

330. *Id*. at *7.

331. *In re* Doherty, 219 B.R. 665 (Bankr. W.D.N.Y. 1998).

332. *Id*. at 669.

333. *In re* Harvey, No. 11-23142, 2013 WL 4478926, at *1 (Bankr. D. Colo. Aug. 20, 2013).

334. *Id*. at *3.

335. *In re* Hoskins, 292 B.R. 883 (Bankr. C.D. Ill. 2003).

336. *Id*. at 886–89.

337. *In re* Benjumen, 408 B.R 9 (Bankr. E.D.N.Y. 2009).

338. *Id*. at 16–18.

339. 323 B.R. 533 (Bankr. M.D. Fla. 2005).

340. *Id.* at 537–39; *see also In re* Thompson, 329 B.R. 145, 177–79 (Bankr. E.D. Va. 2005) (emphasizing the importance of corroborative medical evidence for pro se debtors).

341. O'Donohoe v. Panhandle-Plains Higher Educ. Auth. (*In re* O'Donohoe), No. 12-33870, Adv. No. 12–03281, 2013 WL 2905275, at *5 (Bankr. S.D. Tex. June 13, 2013); *In re* Doherty,

However, courts generally disfavor self-reported hardship claims that lack objective evidence. In *In re Lykoudis*, for example, the debtor's claims of chronic fatigue, pain, and anxiety were dismissed due to a lack of current medical documentation or expert testimony.[342]

Evidentiary requirements under *Brunner* vary significantly across jurisdictions. While some courts demand expert medical testimony, others accept corroborative medical and employment records, and in rare cases, debtor testimony alone. Generally, courts favor cases supported by objective medical documentation over those relying exclusively on self-reported hardship claims. The absence of a uniform standard creates uncertainty for debtors, as evidentiary burdens vary by jurisdiction. Until a more standardized approach is adopted, debtors will continue to face inconsistent requirements in proving undue hardship under *Brunner*.

CONCLUSION

The judicial landscape surrounding student loan discharge under *Brunner* remains fragmented, with courts applying inconsistent standards across several critical areas. The treatment of 401(k) contributions, religious tithing, IDR participation, and evidentiary requirements varies significantly, leaving debtors uncertain about the level of proof required to demonstrate undue hardship.

Courts disagree on whether 401(k) contributions constitute necessary expenses, with some recognizing their role in financial security while others prioritize student loan repayment. Similarly, the treatment of religious tithing remains unsettled, as courts diverge in their interpretation of the RLCDPA—some entirely exclude tithing from undue hardship analyses, others allow it within statutory limits, and a third group evaluates reasonableness on a case-by-case basis.

Perhaps the most contentious issue is IDR participation, where courts are divided on whether a debtor's refusal to enroll constitutes bad faith under *Brunner*'s third prong. Some courts equate non-enrollment with bad faith, while others acknowledge legitimate concerns such as credit impact and tax liabilities. This inconsistency also extends to the application of IDR plans under the first and second prongs, with courts differing on whether to consider IDR eligibility when evaluating a debtor's financial hardship.

Finally, courts apply inconsistent evidentiary standards: some require expert medical testimony to establish undue hardship, while others accept corroborative medical records or debtor testimony alone. The lack of a uniform evidentiary framework leads to unpredictable outcomes,

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219 B.R. 665, 669 (Bankr. W.D.N.Y. 1998) (relying on the debtor's testimony and judicial notice of facts regarding bipolar disorder to discharge the debtor's student loans).

342. *In re* Lykoudis, 381 B.R. 349, 354–58 (Bankr. M.D. Fla. 2007).

particularly for pro se debtors who may struggle to secure expert witnesses.

Without binding appellate precedent or legislative reform, these inconsistencies will persist, making it difficult for debtors and attorneys to navigate the undue hardship standard under *Brunner*. A more standardized approach, whether through clearer statutory guidelines or Supreme Court intervention, would provide much-needed clarity and ensure that similarly situated debtors receive consistent treatment across jurisdictions.