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Disillusionment of Discharge: The FRESH START Through Bankruptcy Act

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DISILLUSIONMENT OF DISCHARGE: THE FRESH START THROUGH BANKRUPTCY ACT

ABSTRACT

Although its roots precede the twenty-first century, the student loan debt "issue" in America has evolved in recent years into a full-blown "crisis." Recently surpassing credit cards and auto loans, student loan debt is the second-largest type of consumer debt in the United States, behind only mortgage debt. Prior to the Higher Education Amendments of 1976, bankruptcy provided an avenue through which student loan debt could be discharged. A series of legislative amendments, however, led to the imposition of 11 U.S.C. § 523(a)(8), which bars the discharge of student loan debt absent a showing of "undue hardship." Courts have constructed the "undue hardship" standard into a major hurdle for student debtors seeking a fresh start through bankruptcy.

For most courts, demonstrating "undue hardship" requires a debtor to satisfy three prongs of a strict elements test. Referred to by some in the judiciary as the "certainty of hopelessness" standard, the test has come under scrutiny in the legal community. Many, including federal judges, the American Bar Association, and the American Bankruptcy Institute, have called for reform to better effectuate the relief sought by student loan debtors.

This Comment posits that the proposed FRESH START Through Bankruptcy Act of 2021 is the most viable solution to the student loan crisis and would address it in two primary ways. First, it would eliminate the need for student loan borrowers to satisfy the "undue hardship" standard, and would make discharge attainable—provided the debtor has already been in repayment for at least ten years. Second, it would address the underlying issues of "credentialism" and increased tuition costs, at least in part, through a "clawback" provision aimed to increase institutional accountability.

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INTRODUCTION

For decades, student loan debt has burdened the bank statements of America's college students.[1] Student loans have long been the subject of research by not only federal government agencies but also nonprofit organizations, economists, and the "students who carry the balance."[2] As evidenced by the Biden Administration's push for the passage of the Income-Driven Student Loan Forgiveness Act, the student loan crisis has now taken center stage in American politics and is on the forefront of the minds of many.[3] Furthermore, the crisis has become highly politicized, and perspectives on the issue are sharply divided according to the ever-widening gap between party lines.[4] Regardless of one's perspective on the forgiveness or discharge of student loans, this crisis must be addressed.

Some have made significant proposals to address the issue. This Comment discusses three such proposals: first, the outright forgiveness of student loans by the Biden Administration, which was halted by the Supreme Court;[5] second, the loosening of the current judicial standards used by bankruptcy courts, which the Supreme Court has refused to address;[6] and third, the imposition of certain presumptions applicable to students seeking discharge of student loans through bankruptcy. Ultimately, these proposals are only treatments for the symptoms of

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[1] *See* Abigail J. Hess, *How Student Debt Became a $1.6 Trillion Crisis*, CNBC (June 12, 2020, 11:33 AM), https://www.cnbc.com/2020/06/12/how-student-debt-became-a-1point6-trillion-crisis.html.

[2] *Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, AM. BANKR. INST. J., June 2022, at 8–9; Karen Sloan, *ABA Will Press Congress To Ease Student Loan Discharge in Bankruptcy*, REUTERS (Aug. 10, 2021, 2:23 PM), https://www.reuters.com/legal/transactional/aba-will-press-congress-ease-student-loan-discharge-bankruptcy-2021-08-10/. For an in-depth analysis of the impact student loan debt has on the "financial stability, career choice, professional development, and overall well-being" among pharmacy students and new practitioners see Kunal A. Amin et al., *Investigating the Impact of Student Loan Debt on New Practitioners*, 61 J. AM. PHARMACISTS ASS'N 191 (2021).

[3] *See* Income-Driven Student Loan Forgiveness Act, H.R. 2034, 117th Cong. (2021); *see also* Statement by President Biden Announcing Student Loan Relief for Borrowers Who Need It Most, WHITE HOUSE BRIEFING (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

[4] *See* Ariel Edwards-Levy, *Student Loan Forgiveness Divides Americans More by Party and Age than by Education*, CNN (May 28, 2022, 6:00 AM), https://www.cnn.com/2022/05/28/politics/student-loan-forgiveness-polling/index.html.

[5] Biden v. Nebraska, 600 U.S. 477, 507 (2023); *see also* Lauren Camera, *Legal Challenges Mount for Biden's Student Loan Debt Forgiveness Plan*, U.S. NEWS (Sept. 29, 2022, 2:39 PM), https://www.usnews.com/news/education-news/articles/2022-09-29/legal-challenges-mount-for-bidens-student-loan-debt-forgiveness-plan.

[6] *See That's a* Brunner*, Man. Supreme Court Declines To Revisit Overly Rigid Standard for Discharge of Student Loans in Bankruptcy*, PATTERSON BELKNAP WEBB & TYLER LLP (June 23, 2021), https://www.pbwt.com/bankruptcy-update-blog/thats-a-brunner-man-supreme-court-declines-to-revisit-overly-rigid-standard-for-discharge-of-student-loans-in-bankruptcy.

a much larger problem within the American higher education system—"credentialism"[7] and the consequent skyrocketing of tuition costs. Any realistic solution to the student loan crisis must remedy these underlying issues.

Not all proposed solutions are inadequate. This Comment focuses on a proposed bill that better addresses these underlying issues, and is the most viable solution at present. The "FRESH START Through Bankruptcy Act of 2021" (the "Act") is a bill sponsored by Senate Judiciary Committee Chair Richard Durbin (D-Ill.) and co-sponsored by Senators John Cornyn (R-Tex.) and Josh Hawley (R-Mo.).[8] Among other things, the Act would effectively result in a return to the treatment of student loan discharge prior to the Higher Education Amendments of 1998. The Act would also further the purpose of bankruptcy—providing a "fresh start" for the "honest but unfortunate debtor"—by allowing student loans to be discharged in bankruptcy after ten years, regardless of a showing of "undue hardship."[9] Unfortunately, the Act is currently caught up in bureaucratic red tape and has been frustrated by increasingly partisan attitudes.[10]

Part I of this Comment discusses the origin of the student loan crisis, its broad-reaching implications, and the impact it will have on the economy if left unchecked. Part II covers the current treatment of student loans under the Bankruptcy Code (the "Code"), the practical differences in the two primary "undue hardship" standards used, and the resulting inequities. Part II also examines judicial attempts to address the issue and the impact of the Supreme Court's refusal to resolve the circuit split. Part III of this Comment analyzes the viability of various proposed solutions, including large-scale loan forgiveness, looser judicial standards, and the Act. Finally, Part IV of this Comment argues that the Act is the most viable solution to the student loan crisis and highlights

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7 Fernando Furquim et al., *Like Any Other Trap: The Circuitous Path of Student Loan Repayment*, AERA OPEN, Jan.–Dec. 2022, at 1 (explaining that "credentialism" means an increased expectation from employers that their employees have attained a postsecondary education).

8 *See* Sloan, *supra* note 2.

9 Fostering Responsible Education Starts with Helping Students Through Accountability, Relief, and Taxpayer protections Through Bankruptcy Act (FRESH START Through Bankruptcy Act), S. 2589, 117th Cong. (2021); *see* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286, 287 (1991)) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'"); Richard Pallardy, *History of Student Loans: Bankruptcy Discharge*, SAVING FOR COLLEGE (Mar. 18, 2021), https://www.savingforcollege.com/article/history-of-student-loans-bankruptcy-discharge.

10 *See Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 8–9. Despite the Act being sponsored by members of both political parties, it has not received bipartisan support.

the need to further address the underlying issue of "credentialism" and skyrocketing tuition costs in higher education.

I. BACKGROUND: THE STUDENT LOAN DEBT PROBLEM

A glance at the history of student loans in the U.S. reveals that the origin of the current crisis is bigger and more complicated than the mere fiscal irresponsibility of student borrowers—although that is certainly one aspect of the equation.[11] A number of confounding variables, such as lax lending practices, stagnant wage growth, higher tuition costs, and credentialism further exacerbate the student loan debt crisis.

A. Confounding Variables: Lax Lending, Stagnant Wages, Higher Tuition, and "Credentialism"

One major contributor to the student loan crisis is lax lending practices that do not have reasonable gatekeeping functions.[12] To qualify for a business loan, most banks at least inquire as to the borrower's creditworthiness, their experience in the field, and the prospect that the borrower will turn a profit in the future.[13] Student loan lenders, however, will readily lend to prospective students with little inquiry into whether the student has the qualifications to attend college thanks to "the promise of federal guarantees." Moreover, lenders will continue to lend with little-to-no investigation into the academic progress of the student borrower.[14] This Comment does not advocate for a stringent vetting process that would entirely exclude certain students from receiving student loans. Instead, this Comment calls for more careful lending practices based on a student's—or their parent's[15]—likelihood of repayment.

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[11] *See* R. Michael Smith, *The Student Loan Debacle: Causes & Cures*, NACTT ACAD. (Sept. 18, 2022), https://considerchapter13.org/2022/09/18/the-student-loan-debacle-causes-cures/; Daryl J. Smith, *U.S. Student Loan Debt & the Power of Knowledge*, 31 NORTON J. BANKR. L. & PRAC. 3, Aug. 2022 (explaining the role of the federal government in creating student loans and the lack of student debt relief programs for borrowers).

[12] *See* R. Michael Smith, *supra* note 11 ("[T]he federal government . . . has foolishly guaranteed debt without safeguards."); Daryl J. Smith, *supra* note 11, at *3.

[13] Jerry Brown, *Business Loan Requirements: How To Qualify for a Business Loan*, FORBES ADVISOR (June 7, 2023, 12:08 PM), https://www.forbes.com/advisor/business-loans/business-loan-requirements/.

[14] R. Michael Smith, *supra* note 11.

[15] *See* Justin Draeger & Jill Desjean, *Op-Ed: Student Loan Underwriting Failures Undermine College Access*, NASFAA (July 29, 2019), https://www.nasfaa.org/news-item/18951/Op%20Ed_Student_Loan_Underwriting_Failures_Undermine_College_Access (describing the practices involved in federal Parent Loan for Undergraduate Students (the "PLUS" loan program), which requires an inquiry into a parent's ability to repay their child's loans).

Three circumstances prevent lenders from adequately vetting students they lend to: (1) there is no consistent set of criteria to assess a borrower's ability to repay the loan; (2) there are no incentives for lenders to assess the risk that the borrower will default due to guarantees by the federal government; and (3) there is a lack of consumer protection, since the student borrower will likely not be able to discharge their student loan in the event of default through bankruptcy.[16]

Further contributing to the crisis is a combination of "stagnant wages and soaring tuition prices."[17] Over the past thirty years, even taking into account inflation adjustments, university tuition costs have increased twice-over.[18] Simultaneously, state and local governments have decreased funding for higher education.[19] Meanwhile, annual median wages have not grown quickly enough to match the increases in tuition.[20]

It likely comes as no surprise that the cost of higher education has risen and continues to rise at a dramatic rate.[21] Even if one is not surprised, the increase in

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[16] R. Michael Smith, *supra* note 11; Pallardy, *supra* note 9. Some argue that student loan programs, such as the federal PLUS loan program, might initially seem to increase college access but counterintuitively end up "putting disadvantaged families even further behind the economic eight ball[.]" PLUS loans have helped fill the financial gap for middle-income families. However, for an argument that PLUS loans, due to a lack of proper underwriting standards, have led to "unintended and perverse consequences" for low-income, minority families with already unsustainable levels of debt, see Draeger & Desjean, *supra* note 15.

[17] John Waggoner, *Student Loan Debt Is an Unheralded Burden for Older Borrowers*, AARP (Nov. 22, 2022), https://www.aarp.org/money/credit-loans-debt/info-2021/student-debt-crisis-for-older-americans.html. "Wage stagnation" has long been the topic of academic study with regrettably little consensus regarding its primary cause. Some posit that "rising benefit costs," such as company health insurance benefit plans, may be "constraining employer's ability or willingness" to increase wages. Other theories point to the following factors:

> [C]ontinuing decline of labor unions; lagging educational attainment relative to other countries; noncompete clauses and other restrictions on job-switching; a large pool of potential workers who are outside the formally defined labor force, neither employed nor seeking work; and broad employment declines in manufacturing and production sectors and a consequent shift toward job growth in low-wage industries.

Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RESEARCH CENTER (Aug. 7, 2018), https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/.

[18] Waggoner, *supra* note 17.

[19] *Id.*

[20] Camilo Maldonado, *Price of College Increasing Almost 8 Times Faster Than Wages*, FORBES (July 24, 2018, 8:23 AM), https://www.forbes.com/sites/camilomaldonado/2018/07/24/price-of-college-increasing-almost-8-times-faster-than-wages.

[21] *See* Melissa Brock, *How Much Has College Outpaced Inflation*, SOFI (Jan. 17, 2023), https://www.sofi.com/learn/content/college-tuition-inflation/ (discussing the most recent data as of this Comment on the rise of college tuition from the National Center for Education Statistics).

tuition cost far "outpace[ing] inflation" should cause some alarm.[22] The cost[23] (i.e., tuition and associated fees) of attending a private university has increased by 132%, the cost of attending an out-of-state public university has increased by 127%, and the cost of attending an in-state public university has increased by 158%.[24] The cost of law school tuition has seen a similar spike. For example, in 1973, the cost to attend Harvard Law School for one year was approximately $13,000.[25] In 1993, the cost had risen to roughly $28,000, and, by 2021, it cost around $70,000 per year in tuition alone.[26]

Meanwhile, real wages for most low- to middle-income workers over the past twenty years have barely kept pace with inflation.[27] After adjusting for inflation, the average hourly wage in 2018 had approximately the same purchasing power as it did in the 1970s—the "$4.03-an-hour rate recorded in January 1973 had the same purchasing power that $23.68 [did in 2018]."[28] This is also true for the average weekly earnings of employed full-time salary workers. The "median usual weekly earnings" increased from $232 in the first quarter of 1979 to $879 in the second quarter of 2018. While that seems like positive growth, when put in terms of purchasing power, it becomes evident that this 'growth' is only nominal—$232 in 1979 had the same purchasing power as $840 in 2018's dollars.[29]

Thus, the interplay between the inflated cost of college tuition and relatively stagnant wages has resulted in a challenging landscape for individuals seeking higher education. As the price tag for higher education increases at a rapid rate, real median wages are advancing at a comparatively sluggish pace.[30] This

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22 *See id.* ("Ultimately, the average cost of tuition has increased nearly 180% over the past 20 years, even after accounting for inflation.").

23 Cost here is calculated prior to adjustment for inflation. Emma Kerr & Sarah Wood, *A Look at 20 Years of Tuition Costs at National Universities*, U.S. NEWS (Sept. 22, 2023, 4:15 PM), https://www.usnews.com/education/best-colleges/paying-for-college/articles/see-20-years-of-tuition-growth-at-national-universities.

24 In 2024 in the U.S., on average it costs (i.e., tuition and associated fees) $46,652 to attend a private university, $28,217 to attend an out-of-state public university, and $11,970 to attend an in-state public university. *Id.*

25 Stephen B. Selbst, *Discharging Student Loan Debt: The ABA Takes a Stand*, HERRICK FEINSTEIN LLP (Sept. 13, 2021), https://www.herrick.com/publications/discharging-student-loan-debt-the-aba-takes-a-stand/ (calculating tuition and fees adjusted for inflation).

26 *Id.*

27 DeSilver, *supra* note 17 (noting that, while the average purchase power has remained somewhat constant, this is misleading as "wage gains have gone largely to the highest earners").

28 *Id.*

29 *Id.*

30 Maldonado, *supra* note 20.

increases the need for students to take out large amounts of student loans, while being paid a wage that is insufficient to meet their repayment obligations, further exacerbating the student loan crisis.

Another culprit for this crisis is overeager colleges, universities and other educational institutions that have developed a taste for federal funding and now have a monetized incentive to admit as many students that qualify for federal aid as possible.[31] Although higher education in America is now more accessible, this incentive has led to diminishing returns on college degrees and an exponential increase in the price of tuition.[32] Counterintuitively, postsecondary education is now more critical than ever for "economic security and mobility."[33]

Research shows that as the employment prospects of individuals without a college degree continue to deteriorate,[34] employers' expectations of postsecondary degrees are rapidly increasing, and this "credentialism is a key driver of student debt."[35] In other words, the bachelor's degree has become the new high school diploma. The price to attain it has skyrocketed, forcing students to take out more loans, thus increasing total student loan debt. The underlying disease is the exponential increase in the cost of higher education, and the resulting student loan crisis is a symptom that demands immediate treatment.

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[31] R. Michael Smith, *supra* note 11. For an in-depth discussion of whether colleges increase tuition and admit as many students as possible in an effort the authors call "federal aid capture" see Stephanie Riegg Cellini & Claudia Goldin, *Does Federal Student Aid Raise Tuition? New Evidence on For-Profit Colleges*, 6 AM. ECON. J.: ECON. POL'Y 174, 174–75 (2014) (evaluating whether for-profit colleges, in particular, raise tuition costs to capture federal aid).

[32] *See* Abigail J. Hess, *3 Ways Student Debt Impacts the Economy*, CNBC (July 2, 2021, 12:41 PM), https://www.cnbc.com/2021/07/02/3-ways-student-debt-impacts-the-economy.html; KARINE TREMBLAY ET AL., ASSESSMENT OF HIGHER EDUCATION LEARNING OUTCOMES, FEASIBILITY STUDY REPORT: VOL. 1—DESIGN AND IMPLEMENTATION 26 (2012) (discussing the increase of costs in higher education internationally); Furquim et al., *supra* note 7, at 1.

[33] Furquim et al., *supra* note 7, at 1. While a college degree is not explicitly mandatory for entry into a professional career, it certainly seems that way in many instances. Robert Farrington, *A College Degree Is the New High School Diploma*, FORBES (Sept. 29, 2014, 9:29 AM), https://www.forbes.com/sites/robertfarrington/2014/09/29/a-college-degree-is-the-new-high-school-diploma/.

[34] Farrington, *supra* note 33.

[35] Furquim et al., *supra* note 7, at 1. ("[credentialism] creates an imperative for investing in one's education even though such investments carry some risk . . . ."). For an in-depth analysis of student loan repayment as a "longitudinal process" and the "complex, discontinuous" journey of frequent transactions that student loan repayment is, see *id.*

B. *The Breadth of the Student Loan Crisis*

The economic impact of the student loan crisis has broad implications, particularly if the speculative "student loan bubble" were to burst.[36] As of 2005, the median student loan debt amount was roughly $17,000 per student.[37] In the 2007 fiscal year, there was approximately $516 billion in outstanding student loans owed by 28.3 million different borrowers.[38] Data from 2023 shows that the amount of outstanding student loan debt increased to $1.75 trillion,[39] and the average student loan borrower owed more than $38,000.[40] In less than twenty years, debt from student loans has more than doubled both nationally and on an individual basis. A small percentage of debtors have disproportionately massive debt loads. "Six percent of borrowers owe more than $100,000 in debt, with two percent owing more than $200,000,"[41] and, notably, "this [six] percent owes one-third of the outstanding $1.5 trillion of [student] debt" in the U.S.[42] According to estimates from the Federal Reserve, student loan debt decreases the gross domestic product in America annually by approximately five percent.[43]

As the total amount of student loan debt is rising, so too are the interest rates on those loans, literally compounding the issue.[44] For example, before July 2023, federal direct loans had an interest rate of 4.99%; whereas, student loans taken out between July 2023 and July 2024 will have an interest rate of 5.50%.[45] As

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36 *The Future of Student Loans and Bankruptcy—Is There a Bubble Waiting to Burst?*, EPIQ (Sept. 15, 2021), https://www.epiqglobal.com/en-us/resource-center/articles/the-future-of-student-loans-and-bankruptcy ("For many, loans are the only option to attend a U.S. university or college . . . . However, after graduation, many individuals are unable to secure jobs in their fields that pay enough to support the cost of living and pay off these student loans."). This has resulted in what some have characterized as a "student loan bubble"—i.e., "when the price of something substantially exceeds [its] value." *Id.*

37 *65 Student Loan Debt Statistics for 2022*, MINT (Aug. 29, 2022), https://mint.intuit.com/blog/student-finances/student-loan-debt-statistics/.

38 Henry E. Hildebrand, III, *The Student Loan Solution*, NACTT ACAD. (Oct. 16, 2022), https://considerchapter13.org/2022/10/16/the-student-loan-solution/#8.

39 Alicia Hahn, *2024 Student Loan Debt Statistics: Average Student Loan Debt*, FORBES ADVISOR, https://www.forbes.com/advisor/student-loans/average-student-loan-statistics (last visited May 15, 2024).

40 Chris Horymski, *Experian Study: U.S. Consumer Debt Reaches $16.84 Trillion in Q2 2023*, EXPERIAN (Oct. 24, 2023), https://www.experian.com/blogs/ask-experian/research/consumer-debt-study/.

41 Kadija Yilla & David Wessel, *Five Facts About Student Loans*, BROOKINGS (Nov. 12, 2019), https://www.brookings.edu/articles/five-facts-about-student-loans/.

42 *65 Student Loan Debt Statistics for 2022*, *supra* note 37.

43 Daryl J. Smith, *supra* note 11, at *4.

44 Interest rates rose over 2% from July 2020 to June 2023. *Interest Rates and Fees for Federal Student Loans*, FEDERAL STUDENT AID: OFF. U.S. DEP'T EDUC., https://studentaid.gov/understand-aid/types/loans/interest-rates (last visited May 15, 2024).

45 Lisa Litant, *Rising Interest Rates: Why They're Increasing & How This Might Affect You*, SALLIE MAE (Sept. 27, 2023), https://www.salliemae.com/blog/rising-interest-rates/. It must be noted that despite this increase in student loan interest rates, during this same period a federal moratorium through the Coronavirus

the underlying debt load increases in tandem with interest rates, the debtor is presented with a Herculean task to repay their debts.

Data from 2023 shows that student loan borrowers are not confined to one age group. On one end of the spectrum, nearly half of a trillion dollars of the total federal student loan debt is held by borrowers ages twenty-five to thirty-four.[46] At the other end, over $100 billion of the outstanding student loan debt is held by borrowers over the age of sixty-one.[47] These figures demonstrate that the problem of student loan debt is not limited to one particular generation and directly affects more than just recent college graduates. While in part due to the cosigning of loans by parents and grandparents for their children and grandchildren, this is also a result of older Americans who are still struggling to pay for the expense of their college education, never having dug themselves out from under decades-old loans.[48]

It is also important to note that student loan debt disproportionately affects women and some minorities. In the U.S., women owe the majority of student loan debt and, as of 2020, were responsible for approximately $929 billion of the outstanding student loans across the nation.[49] On average, African American college graduates owe $25,000 more in student loan debt than their Caucasian counterparts do.[50] Moreover, the National Center for Education Statistics reports that, in 2022, nearly twenty-percent more black students take out federal student loans than white students.[51]

Aid, Relief, and Economic Security Act (the "CARES Act") was also put in place that consisted of a forbearance of both payments and interest accrual on all federal student loans "owned" by the Department of Education, regardless of default status. This moratorium covered "about 85 percent of federal loans." *Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 8. However, this moratorium expired in September 2023. *COVID-19 Emergency Relief and Federal Student Aid*, FEDERAL STUDENT AID: OFF. U.S. DEP'T EDUC., https://studentaid.gov/announcements-events/covid-19 (last visited May 15, 2024).

[46] *Federal Student Loan Portfolio: Portfolio by Age*, FEDERAL STUDENT AID: OFF. U.S. DEP'T EDUC., https://studentaid.gov/data-center/student/portfolio (last visited May 15, 2024).

[47] *Id.*

[48] Waggoner, *supra* note 17. Roughly twenty-five percent of borrowers aged fifty or older are currently responsible for repaying student loans on behalf of a student, often a family member, who has fallen behind on payments. As per the Federal Reserve, the average monthly payment for student loans stands at $393. Although this might appear manageable, it poses a significant burden on borrowers with lower incomes, especially retirees using their Social Security benefits to meet the financial demands of a relative's student loan debt. "The average Social Security retirement benefit is $1,543 per month: For 1 in 4 seniors, Social Security is 90 percent of their income." *Id.*

[49] Daryl J. Smith, *supra* note 11, at *4.

[50] Melanie Hanson, *Student Loan Debt by Race*, EDUC. DATA INITIATIVE (Dec. 8, 2023), https://educationdata.org/student-loan-debt-by-race.

[51] *65 Student Loan Debt Statistics for 2022*, *supra* note 37.

C. *The Consequences of the Student Loan Crisis*

To fully appreciate the negative impact of the student loan crisis, it must be recognized that the crisis manifests in more than simply the financial burden of monthly loan payments. Student loans have limited the future hopes and aspirations of many young Americans. The monthly loan payment has downstream effects, as debtors forego other life opportunities to make good on their obligations.

Younger Americans are in dire straits following the COVID-19 Pandemic. As of 2022, approximately "$158.5 billion worth of federally managed student loans [were] considered in default."[52] Roughly nine million of the twenty-two million student borrowers failed to make their first loan payments after the COVID-era forbearance period ended in the last months of 2023.[53] Additionally, research has shown a correlation between the rising student debt burden and the decelerated growth of new businesses, decreased rates of homeownership, heightened restraint on consumer spending, and, for numerous individuals, postponements in achieving "traditional life milestones."[54] Accordingly, commentators have said:

> Student debt impacts borrowers over time by raising debt burdens, lowering credit scores and ultimately, limiting the purchasing power of those with student debt. Because young people are disproportionately burdened by student debt, they will be less able to participate in—and help grow—the economy in the long run.[55]

In its final report, released in 2019, the American Bankruptcy Institute's Commission on Consumer Bankruptcy reported that "[s]tudent loan

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[52] Daryl J. Smith, *supra* note 11, at *4. The amount of student loans in default is likely even higher, but legislation, such as the CARES Act provided an option for borrowers to place their federal student loans in a type of temporary limbo, which protected them from default status. Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136 § 3513, 134 Stat. 281 (2020) (codified as amended at 11 U.S.C. § 1182).

[53] Katie Lobosco, *Nearly 9 Million Student Loan Borrowers Missed Their First Payment After Pandemic Pause Ended*, CNN (December 18, 2023, 3:08 PM), https://www.cnn.com/2023/12/18/politics/student-loan-missed-payments-november/index.html.

[54] Hildebrand, III, *supra* note 38; *see also* Amin et al., *supra* note 2, at 191 ("Excessive student loan debt has been hypothesized to affect students' career choice, diminish quality of life, negatively affect their ability to give back to society at large, and delay progress on achieving other financial goals such as saving for retirement.").

[55] Hess, *supra* note 32.

overindebtedness causes overall economic activity to decline and constrains the post-college options that students have."[56]

D. The Grim Statistics of Student Loan Discharge

The data demonstrates that incredibly few filing for bankruptcy are successful in getting their educational loan debt discharged. In 2020, approximately a quarter of a million student loan borrowers filed for bankruptcy.[57] However, of those, it was estimated that only three hundred debtors would get their student loan debt completely discharged through bankruptcy proceedings.[58] In other words, for roughly every 1,000 debtors holding student loans in bankruptcy, only one will fulfill the legal standards that must be satisfied for discharge of those loans.[59] These statistics indicate that there are grim odds for student loan debt holders who hope to discharge their student debt obligations through bankruptcy.[60]

Among those student loan borrowers that file for bankruptcy, the median salary is $42,444 per year.[61] The average age of the debtor receiving student loan relief through discharge is at least fifty years old.[62] These numbers alone should dispel and assuage fears that there is a mass of young lawyers and medical professionals abusing the bankruptcy courts by obtaining discharge of their student loans right after graduation. Instead, this demonstrates that student loan borrowers receiving relief through discharge are often middle-class Americans who are struggling to pay off the debt they amassed years prior in college.

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[56] *Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 8 (quoting FINAL REPORT OF ABI'S COMMISSION ON CONSUMER BANKRUPTCY, AM. BANKR. INST. 3 (2019)). Student loan debt was the first of many consumer bankruptcy issues discussed by the ABI's Commission on Consumer Bankruptcy in 2019.

[57] Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 498 (2020) (projecting as many filings for 2022, during December of the same year).

[58] *Id.*

[59] *Id.* Discharge may appear to be an "insurmountable hurdle," not due to the underlying bankruptcy law, but rather, due to myths created by creditors and their approach of "strategic settlement." *See id.* at 499–500. According to the author, strategic settlement is a process in which creditors "settl[e] unfavorable cases to avoid adverse precedent and aggressively litigat[e] favorable cases to tilt the law in their favor." *Id.* at 499.

[60] *Id.* at 498.

[61] Pamela Foohey et al., *Changing the Student Loan Dischargeability Framework: How the Department of Education Can Ease the Path for Borrowers in Bankruptcy*, 106 MINN. L. REV. HEADNOTES 1, 7 (2021).

[62] Daryl J. Smith, *supra* note 11, at *5.

II. ANALYSIS: STUDENT LOANS AND BANKRUPTCY

Prior to changes enacted in 1976, student loans could readily be discharged through bankruptcy proceedings under the Higher Education Act in the same way that most debt can be today.[63] However, over the past fifty years, the treatment of student loans in bankruptcy has changed drastically. Through a combination of educational amendments and judicial standards, student loans have become significantly more difficult to discharge through bankruptcy.

A. Early Treatment of Student Loans

During the early 1970s, journalists and legislators began to express concerns about student loan debt. Specifically, they were worried that student debtors might abuse the bankruptcy system by shirking their debt obligations in a bankruptcy case closely after graduating.[64] Of particular concern were professional students in medical and law school.[65] Notorious for amassing large amounts of student loan debt, it was feared that graduate students might then attempt to discharge their enormous debt figures despite their high earning potentials, which would allow them to pay off these debts with relative ease.[66] Despite these fears, no evidence of widespread abuse of the bankruptcy system in such a manner was ever presented to Congress.[67]

During this time, the Congressional Committee on Bankruptcy Laws of the United States (the "Committee") was formed.[68] In a 1973 report, the Committee attempted to assuage concerns of widespread abuse of the bankruptcy system by recommending a prohibition on the discharge of student loan debt for a five-year period following the commencement of repayment.[69] Three years after the

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[63] *Id.*; *see also* Michael R. Herz, *Second Circuit Stands by* Brunner *Test for Discharge of Student Loan Debt*, FOX ROTHSCHILD (Mar. 29, 2021), https://insolvency.foxrothschild.com/2021/03/second-circuit-stands-by-brunner-test-for-discharge-of-student-loan-debt/ (discussing the method of discharging student loan debt after the enactment of the Code in 1978).

[64] KEVIN M. LEWIS, CONG. RSCH. SERV., R45113, BANKRUPTCY AND STUDENT LOANS 6–7 (2019).

[65] Pallardy, *supra* note 9.

[66] *Id.*

[67] *Student Loan Bankruptcy Law: How We Got Here*, TATE L. (Jan. 21, 2024), https://www.tateesq.com/learn/student-loan-bankruptcy-law-history; *see also* Pallardy, *supra* note 9.

[68] Pallardy, *supra* note 9.

[69] DUKE CHEN, CONG. RSCH. SERV., RS22699, STUDENT LOANS IN BANKRUPTCY 3 (2007); *see also* Comm'n on the Bankr. L. of the U.S., *Report of the Commission on the Bankruptcy Laws of the United States*, 29 BUS. LAW. 75, 76 (1973) (explaining that the Congressional Committee was created to "encourage and facilitate widespread expression of views on the need for improvement in the bankruptcy laws" by persons affected by the laws, experts in the field, and the general public). There is a "grace period" of six months after graduation before a student debtor must begin to make payments on most federal student loans. *Student Loan*

Committee's recommendation, Congress commissioned the Government Accountability Office ("GAO") to conduct a study on the issue.[70] Among other things, the GAO found that less than one percent of student loans at the time had been discharged in bankruptcy proceedings.[71] Perhaps unsurprisingly, in spite of this finding, Congress would go on to pass a series of bills and amendments which would alter the treatment of education loans under the Code, ultimately making the discharge of student loans significantly more difficult.[72]

B. The Road to "Undue Hardship": The Education Amendments of 1976

Upon the recommendation of the Commission, the Education Amendments of 1976 (the "Amendments") changed the treatment of student loans in bankruptcy proceedings.[73] The Amendments stipulated that educational loans could continue to be discharged in bankruptcy but only five years after the commencement of the repayment period—apart, of course, from a showing of undue hardship.[74] Said repayment period begins approximately six months after graduation from university for most students.[75]

Supporters of the Amendments felt strongly that they were preventing widespread abuse. While advocating for the Amendments, Rep. John Erlenborn (R-Ill.) argued "if, shortly after graduation and before having an opportunity to get assets to repay the debt, [student loan borrowers] seek to discharge that obligation, I say that is tantamount to fraud."[76] Dissenters felt this change in the treatment of student loans was unnecessary and unjustified. Rep. James O'Hara (D-Mich.) asserted that the regulation "treats educational loans precisely as the law now treats loans incurred by fraud, felony, and alimony-dodging. No other legitimately contracted consumer loan . . . is subjected to the assumption of criminality which this provision applies to every educational loan."[77]

The passage of the Education Amendments of 1976 was a sign of things to come. Over the next few decades, a series of amendments—including the

Repayment, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment#when-begin (last visited May 15, 2024).

[70] Pallardy, *supra* note 9.

[71] *Id.*

[72] *See e.g.*, S. 2657, 94th Cong. (1976); H.R. 5174, 98th Cong. (1983); S. 3266, 101st Cong. (1990); H.R. 1118, 102d Cong. (1991); H.R. 6, 105th Cong. (1998).

[73] Pallardy, *supra* note 9.

[74] Selbst, *supra* note 25.

[75] Pallardy, *supra* note 9; *see* Herz, *supra* note 63 (detailing what a showing of "undue hardship" requires).

[76] 124 CONG. REC. 1793–94 (1976) (statement of Rep. John Erlenborn).

[77] *See* H.R. REP. NO. 94-1232 (1976) (reprinted in H.R. REP. NO. 95-595, at 147–48 (1977)).

Bankruptcy Amendments and Federal Judgeship Act of 1984, the Crime Control Act of 1990, the Student Loan Default Prevention Act of 1990, and the Higher Education Amendments of 1998—were passed. They led to harsher treatment of student loans by extending the waiting period necessary from five years to seven years, and eventually eliminating any period that would allow for the discharge of student loans.[78] The Code now generally excludes student loan debt from being discharged upon the conclusion of the case.[79]

Though Congress has shown a clear penchant for preventing student loan discharge, a statutory backdoor remains. The exception to the general rule barring discharge is set forth in 11 U.S.C. § 523(a)(8). It stipulates that student loans are dischargeable only upon a showing that exempting such debt from discharge would "impose an *undue hardship* on the debtor."[80] As such, student loans are still technically dischargeable in bankruptcy but only upon a showing of "undue hardship," which ultimately turns on a court's interpretation of what undue hardship means.[81]

C. The Circuit Split: Courts' Attempts To Interpret "Undue Hardship"

Undue hardship has proven difficult to define. In interpreting what constitutes an undue hardship, a circuit split has emerged. On one side of the split, the Eighth Circuit supports one interpretation[82] while many other circuits,[83] led by the Second Circuit,[84] champion another.[85]

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[78] *See* Selbst, *supra* note 25; *see also* Stephen W. Sather, *Dischargeability of Student Loans in Bankruptcy*, AM. BANKR. INST. (Apr. 25, 2014), https://www.abi.org/feed-item/dischargeability-of-student-loans-in-bankruptcy.

[79] *See* 11 U.S.C. § 523(a)(8); *That's a* Brunner*, Man. Supreme Court Declines To Revisit Overly Rigid Standard for Discharge of Student Loans in Bankruptcy*, *supra* note 6.

[80] 11 U.S.C. § 523(a)(8) (emphasis added).

[81] *See, e.g.*, Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987); Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549 (8th Cir. 2003); Fern v. FedLoan Servicing (*In re* Fern), 553 B.R. 362 (Bankr. N.D. Iowa 2016); *see also That's a* Brunner*, Man. Supreme Court Declines To Revisit Overly Rigid Standard for Discharge of Student Loans in Bankruptcy*, *supra* note 6.

[82] *Long*, 322 F.3d at 553.

[83] Ekenasi v. Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 541 (4th Cir. 2003); United Student Aid Funds v. Pena (*In re* Pena), 155 F.3d 1108 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298 (3d Cir. 1996); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993).

[84] *Brunner*, 831 F.2d 395.

[85] *Id.* at 396; *see also That's a* Brunner*, Man. Supreme Court Declines To Revisit Overly Rigid Standard for Discharge of Student Loans in Bankruptcy*, *supra* note 6.

1. *The Circuit Split*

The majority of courts interpret the crucial language via the "Brunner Test" established by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*, which requires that the debtor satisfy three strict elements to discharge their student loan debt.[86] However, the Eight Circuit has taken a more lenient approach.[87] Both standards and their respective applications are discussed below.

a. *The Second Circuit:* In re Brunner

In the lead-up to *Brunner*, the debtor, Marie Brunner, appeared pro se before the Honorable Howard J. Schwartzberg of the U.S. Bankruptcy Court for the Southern District of New York seeking chapter 7 discharge of her student loans.[88] Judge Schwartzberg determined that the debtor's student loans of $9,000 were dischargeable, but the lender, the New York State Higher Education Services Corporation, appealed.[89] On appeal, the U.S. District Court for the Southern District of New York held that the debtor had failed to satisfy the "undue hardship" standard and that her student loans were not dischargeable.[90] The district court emphasized that, although the debtor was unable financially to pay her student loans at that moment, there was nothing in the record indicating that she could not acquire employment in the future and make said payments.[91] Ms. Brunner appealed to the Second Circuit.[92]

The Second Circuit acknowledged that very little appellate authority on the definition of "undue hardship" existed and agreed with the district court's analysis of "legislative history and the decisions of other district and bankruptcy courts," which exhibit "clear congressional intent . . . to make the discharge of student loans more difficult than that of other nonexcepted debt."[93]

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[86] *Brunner*, 831 F.2d at 396; *see also That's a* Brunner*, Man. Supreme Court Declines To Revisit Overly Rigid Standard for Discharge of Student Loans in Bankruptcy*, *supra* note 6.

[87] *Long*, 322 F.3d at 553 (rejecting *Brunner* and reaffirming *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702 (8th Cir. 1981)); Fern v. FedLoan Servicing (*In re* Fern), 553 B.R. 362, 367 (Bankr. N.D. Iowa 2016) ("This approach is 'less restrictive' than the other widely used test for determining undue hardship set out in *Brunner* . . . .") (citation omitted).

[88] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 753 (S.D.N.Y. 1985) (summarizing the bankruptcy proceeding).

[89] *Id.*

[90] *See id.* at 757–58.

[91] *Id.* at 758.

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

[93] *Id.* at 396.

Unfortunately, the court did not engage in an analysis of the "legislative history" it referenced, but it did provide a host of prior case law decisions and noted that its ruling "comport[ed] with common sense as well."[94]

The Second Circuit adopted a three-part test for undue hardship requiring:

> (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.[95]

Under this analysis, if the bankruptcy court finds against the student loan debtor on any of the three prongs of the test, the inquiry ends.[96] If the debtor fails any of the three prongs, they are denied discharge of their student loan debt.[97]

Using this newly-developed test, the Second Circuit concluded that Ms. Brunner had failed to establish her eligibility for discharge of her student loans.[98] The court pointed to the record which demonstrated, among other things, Ms. Brunner was not disabled or elderly, had no dependents, and presented no evidence that her "current inability to find any work [would] extend for a significant portion of the loan repayment period."[99] Even worst for Ms. Brunner, "only ten months had elapsed since Brunner's graduation from her Master's program. . . . Brunner filed for the discharge within a month of the date the first payment of her loans came due."[100] Proponents of *Brunner* suggest that this strict undue hardship showing is necessary and does not offend any sense of justice; however, those proponents are wrong.[101]

Of the three elements in the *Brunner* test, the first seems to be the most difficult to overcome, and, at face value, is arguably the most amorphous. Since

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94 *See id.*
95 *Id.*
96 *Id.*
97 *See id.*
98 *Id.*
99 *Id.* at 396–97.
100 *Id.* at 397. Ms. Brunner's case is a prime example of the abuse and gaming of the bankruptcy system that supporters of the various higher education amendments feared. Unfortunately, as a result, individuals in desperate need of bankruptcy relief are unable to receive discharge of their student loans.
101 *Compare* Daryl J. Smith, *supra* note 11, at *5, *and* Foohey et al., *supra* note 61, at 4, *with* Pallardy, *supra* note 9 (noting certain congressional proponents of a more stringent threshold requirement for student loan discharge eligibility).

the court in *Brunner*, perhaps intentionally, did not define what constitutes a "minimal standard of living," there exists no bright-line test to determine whether this element has been met.[102] As a result, to determine what constitutes a "minimal standard of living," courts balance income against expenses required for basic necessities, such as "food, clothing, shelter, medical care and transportation."[103] This balancing involves an evaluation of the debtor's lifestyle by scrutinizing expenses to determine whether they could "make adjustments to [their] expenses" allowing them to make some payments toward their student loans.[104]

For example, in *In re Murrell*, the court said it is not necessary for a debtor to live in "abject poverty" to satisfy the requirements of the minimal standard under the *Brunner* test.[105] Instead, a debtor must "live within the strictures of a frugal budget for the foreseeable future."[106] Since cell phones, cable TV, and internet are not a part of a "minimal standard of living," the court found that the debtor could engage in recreational expense "belt-tightening" by spending less on these expenses, allowing the debtor to qualify for student loan payments under an income-based repayment plan of $63 to $94 per month.[107] As such, the debtor in *In re Murrell* failed to satisfy the first element of the test and was denied discharge.[108]

b. The Eighth Circuit: In re Long *and* In re Fern

The Eighth Circuit has rejected the *Brunner* test and, in *In re Long*, reaffirmed the alternative "totality-of-the-circumstances" test, which calls for a more holistic approach to the issue.[109] In *Long*, the debtor, Nanci Long, sought discharge of her student loans; however, unlike the debtor in *Brunner*, she did not appear pro se and was represented by counsel.[110] Judge O'Brien of the United States Bankruptcy Court for the District of Minnesota granted the

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102 Samantha Alfano, Note, *The High Burden of a "Minimal Standard of Living" Under the First Prong of the* Brunner *Test*, 12 ST. JOHN'S BANKR. RSCH. LIBR. NO. 2, at *3 (2020).

103 *Id.*

104 *See* Murrell v. Edsouth (*In re* Murrell), 605 B.R. 464, 470 (Bankr. N.D. Ohio 2019).

105 *Id.* (quoting Larson v. United States (*In re* Larson), 426 B.R. 782, 789 (Bankr. N.D. Ill. 2010)).

106 *Id.* at 470 (quoting *Larson*, 426 B.R. at 789).

107 *Id.* at 471.

108 *Id.* at 472.

109 Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 552 (8th Cir. 2003) (rejecting *Brunner*, but reaffirming their previous ruling from *Andrews*); *see also* Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981); *That's a* Brunner*, Man. Supreme Court Declines To Revisit Overly Rigid Standard for Discharge of Student Loans in Bankruptcy*, *supra* note 6.

110 *See Long*, 322 F.3d at 551.

discharge and found that repayment of the loans would impose an undue hardship on the debtor.[111] On appeal, the Bankruptcy Appellate Panel ("BAP") affirmed the bankruptcy court's ruling, and the lender then appealed to the Eighth Circuit arguing that the "BAP relied on an incorrect review standard."[112]

The Eighth Circuit considered, but ultimately rejected, the *Brunner* test and instead implemented a totality-of-the-circumstances test. The Eighth Circuit reasoned:

> We prefer a less restrictive approach to the "undue hardship" inquiry. . . . We are convinced that requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B). Therefore, we [choose] . . . to embrace a totality-of-the-circumstances approach to the "undue hardship" inquiry. We believe that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.[113]

In place of three strict elements, the Eighth Circuit stipulated that in evaluating the totality-of-the-circumstances surrounding a discharge petition, the reviewing bankruptcy court should consider three factors: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) *any other relevant facts and circumstances* surrounding each particular bankruptcy case."[114]

In *In re Fern*, the Eighth Circuit BAP applied the totality-of-the-circumstances test and demonstrated its "more flexible" approach.[115] It also clarified what the third factor of the test means in practice (i.e., "any other relevant facts and circumstances").[116] The debtor, Ms. Fern, took out approximately $27,000 in student loans for two separate educational programs.[117] She never completed the program required for accounting clerks and, although she successfully acquired her esthetician license, it did not lead to

[111] *Id.* at 552.
[112] *Id.* at 551.
[113] *Id.* at 554 (citation omitted).
[114] *Id.* (quoting *In re* Andresen, 232 B.R. 127, 139 (B.A.P. 8th Cir. 1999)) (emphasis added).
[115] *See* Fern v. FedLoan Servicing (*In re* Fern), 563 B.R. 1, 3 (B.A.P. 8th Cir. 2017).
[116] *See id.* at 4–5.
[117] *Id.* at 3.

gainful employment and the license expired.[118] Before making payments on any of her student loans, she declared bankruptcy and sought their discharge.[119]

An analysis of the first factor, "the debtor's past, present, and reasonably reliable future financial resources," revealed that Ms. Fern was "a 35 year old single mother of three children"—ages three, eleven, and sixteen—for whom she received "minimal or no child support payments" from the children's fathers.[120] She received a monthly income of $1,506.78 from her job and also received food stamps and rental assistance.[121] As to Ms. Fern's annual income, she never earned more than $25,000 in any one given year.[122]

With regard to the second factor, the court concluded that "[t]o be reasonable and necessary, an expense must be 'modest and commensurate with the debtor's resources.'"[123] Ms. Fern's total monthly income was estimated to be $2,413 and her reasonable and necessary monthly expenses were $2,475.[124] In calculating her monthly expenses, the court allowed for the inclusion of costs for food, rent, renter's insurance, medical insurance, car payments, car insurance, and also the costs of "home upkeep," cell phone and internet payments, "household items," and clothing.[125] This $62 monthly deficit in Ms. Fern's budget weighed in favor of discharge.[126]

As to the intentionally vague third factor—"any other relevant facts and circumstances"—the Eighth Circuit explained it "permits evaluation of a wide range of facts and issues," and it allowed for the consideration of any relevant information that "would be persuasive [to the court] to overcome the income and expense analysis of undue hardship under the first two factors of the totality of the circumstances test."[127] The facts and issues to be evaluated include, but are not limited to, the following:

> (1) total present and future incapacity to pay debts for reasons not within the control of the debtor; (2) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment; (3) whether the hardship will be long-term; (4) whether the debtor has

118 Fern v. FedLoan Servicing (*In re* Fern), 553 B.R. 362, 365 (Bankr. N.D. Iowa 2016).
119 *See id.*
120 *Fern*, 563 B.R. at 3–4.
121 *Id.* at 4.
122 *Id.*
123 *Id.* (citing Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 780 (8th Cir. 2009)).
124 *Id.*
125 Fern v. FedLoan Servicing (*In re* Fern), 553 B.R. 362, 368 (Bankr. N.D. Iowa 2016).
126 *Fern*, 563 B.R. at 4.
127 *Id.* at 4–5.

> made payments on the student loan; (5) whether there is permanent or long-term disability of the debtor; (6) the ability of the debtor to obtain gainful employment in the area of the study; (7) whether the debtor has made a good faith effort to maximize income and minimize expenses; (8) whether the dominant purpose of the bankruptcy petition was to discharge the student loan; and (9) the ratio of student loan debt to total indebtedness.[128]

In *Fern*, the court took into consideration the "emotional burden" on the debtor resulting from the student loan debt, the compounding effect of interest rates on that debt, the negative impact this had on the debtor's ability to obtain good credit, and the resulting tax obligations related to the debt if the debtor were forced into a repayment plan.[129] Of particular significance was the fact that Ms. Fern was able to receive discharge of her student debt as an undue hardship, despite her qualification for "at least two repayment plans."[130] According to the Eighth Circuit's totality-of-the-circumstances test, the availability of some type of repayment option is a relevant fact to be considered under the third factor, but it is in no way dispositive on its own.[131]

c. Difference Between the Standards

To highlight the different outcomes under each respective standard, one can simply apply the undue hardship standard from the *Brunner* test to the fact pattern in *Fern*. It is possible that Ms. Fern would have failed under the very first element of the *Brunner* test.[132] As demonstrated in *Murrell*, courts following *Brunner* have a relatively strict view of a "minimal standard of living" and often take issue with expenditures on items not considered a necessity, such as cell phone, internet, and cable bills.[133] Ms. Fern spent approximately 13% of her monthly income on these very expenses.[134] Thus, it seems likely that a court applying *Brunner* would not find undue hardship and refuse discharge on this

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[128] *Id.* at 4 (quoting Brown v. Am. Educ. Servs., Inc. (*In re* Brown), 378 B.R. 623, 626–27 (Bankr. W.D. Mo. 2007)).

[129] *See id.* at 5.

[130] *See id.*

[131] *See id.*

[132] *Cf.* Murrell v. Edsouth (*In re* Murrell), 605 B.R. 464, 471 (Bankr. N.D. Ohio 2019). The *Murrell* court held that a debtor in a *Brunner* jurisdiction did not satisfy the first element of the *Brunner* test because he failed to demonstrate his "minimal standard of living burden" due to certain "nonessential expenses," such as payments for TV, internet, and cell phone service. All of these are also expenses that Ms. Fern incurred; however, she was not faulted for these expenses under the totality-of-the-circumstances test. Fern v. FedLoan Servicing (*In re* Fern), 553 B.R. 362, 369 (Bankr. N.D. Iowa 2016).

[133] *See Murrell*, 605 B.R. at 471.

[134] *See Fern*, 553 B.R. at 367–68.

basis alone. Given reliance on cell phones and internet access in the twenty-first century for employment and professional purposes, it makes little sense to penalize debtors under the "undue hardship" standard for the mere possession and maintenance of such necessary devices.

For the purpose of this exercise, assume that Ms. Fern was not faulted on the "minimal standard of living" element, which would have been sufficient grounds by itself to deny discharge.[135] Even granting this assumption, it is very likely that Ms. Fern would have been denied discharge of her student loans under the third element of the *Brunner* test, which requires that the debtor make "good faith efforts to repay the loans."[136] In *Brunner*, the district court took issue with and originally denied discharge in part because the debtor had "made virtually no attempt to repay" her student loans.[137] Similarly, Ms. Fern never attempted to make a payment on any of her student loans because, as she testified, she felt she would need to make $45,000 to $50,000 per year before she would be able to.[138] Again, it is important to note that Ms. Fern had never earned more than $25,000 in any one given year.[139] Regardless, given that she qualified for two repayment plans,[140] a court in a jurisdiction following the *Brunner* test would very likely conclude that Ms. Fern had failed to make a good faith effort at repaying her loans and should, as a result, be denied discharge.[141]

As demonstrated above, the varying interpretations of the undue hardship standard have led to very different treatments depending on the circuit in which the debtor files for bankruptcy. This is particularly problematic for pro se filers as they must file in the jurisdiction in which they reside, regardless of what standard is followed.[142] In a circuit following the *Brunner* test, it is generally very difficult for young debtors to obtain discharge of their student loans, especially those under age fifty.[143] Conversely, in a circuit using the totality-of-the-circumstances approach, one's chances of getting student loans discharged

[135] *See Murrell*, 605 B.R. at 471–72.

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

[137] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 758 (S.D.N.Y. 1985).

[138] *Fern*, 553 B.R. at 365 (according to the court's discussion, technically Ms. Fern may have *attempted* to pay, but the court explicitly found that she had "not attempted to get a loan").

[139] Fern v. FedLoan Servicing (*In re* Fern), 563 B.R. 1, 4 (B.A.P. 8th Cir. 2017).

[140] *Id.* at 5.

[141] *See* Murrell v. Edsouth (*In re* Murrell), 605 B.R. 464, 471 (Bankr. N.D. Ohio 2019) (demonstrating that a court which adheres to the *Brunner* test noted the fact that the debtor qualified for a repayment plan as a factor against granting discharge).

[142] *See* 28 U.S.C. § 1408 (establishing that the proper venue for cases filed under Title 11, the "Bankruptcy Statute," is determined by, among other things, the residence of the debtor).

[143] Daryl J. Smith, *supra* note 11, at *5.

are better, regardless of age. Even within the circuits that follow the *Brunner* test, some bankruptcy judges attempt to add flexibility to the harsh test, with varying degrees of success.[144]

This uncertainty in outcomes likely prevents many debtors from filing, especially those that appear pro se for financial reasons—the very individuals that need discharge of their student loan debt the most. In fact, most bankruptcy attorneys counsel their clients that getting student loans discharged is "complicated and costly" and that judges in bankruptcy court rarely grant discharge applications, reserving its use for "extreme situations."[145]

2. *Practicality of Student Loan Discharge*

Putting aside the likelihood of receiving a discharge under the various interpretations of undue hardship, when dealing with the discharge of student loans, it is not sufficient for the debtor to simply file a chapter 7 case in the relevant bankruptcy court. There are other impediments: (a) adversary proceedings; (b) the "certainty of hopelessness" standard; and (c) the Department of Justice (the "DOJ") and Department of Education's (the "DOE") "new process."

a. *Adversary Proceedings*

Because of their special treatment under 11 U.S.C. § 523(a)(8), discharging student loans, unlike many other consumer loans, requires the filing of a "lawsuit within a lawsuit": an adversary proceeding. An adversary proceeding requires the debtor to initiate the filing of an independent adversary complaint within the

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[144] *See* Herz, *supra* note 63 ("[T]he average debtor receiving loan relief is at least 50 years of age.").

[145] Cara O'Neill, *Student Loan Debt in Bankruptcy*, NOLO, https://www.nolo.com/legal-encyclopedia/student-loan-debt-bankruptcy.html (last visited May 15, 2024); *see* Mark Kantrowitz, *When Is Student Loan Discharge Legally Allowed?*, COLL. INV. (Nov. 28, 2023), https://thecollegeinvestor.com/38254/student-loan-discharge-bankruptcy-legal/ (noting that "[o]nly 0.04% of student loan borrowers who file for bankruptcy succeed in getting a full or partial discharge" and that "many [debtors do not] even try to [discharge their student loans] because of the expense and difficulty in qualifying for a discharge"). *Cf.* Aaron N. Taylor & Daniel J. Sheffner, *Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions To Discharge Student Loans*, 27 STAN. L. & POL'Y REV. 295, 319, 331 (2016) (finding that "judges granted undue hardship discharges at a much higher rate in the First Circuit," a totality-of-the-circumstances jurisdiction "than in the Third [Circuit]," a *Brunner* jurisdiction, and suggesting that "a primary culprit behind the disparate rates of undue hardship discharge between the circuits could very well be the different undue hardship tests applied in the circuits"). *But cf.* Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 U. WASH. L. REV. 1115, 1141 (2016) ("The data reveal[s] that debtors experienced litigation success 38.8% of the time in *Brunner* jurisdictions and 40.6% of the time in totality jurisdictions . . . . The difference . . . is not statistically significant.").

bankruptcy court.[146] Thus, along with the cost of filing a chapter 7 case, a debtor already in dire financial straits must pay the additional cost of filing an adversary proceeding to initiate a lawsuit in which it is very difficult to predict the outcome. To do so, student debtors must undergo often "burdensome discovery and disclose earnings and spending data" to the court to establish that non-discharge of their debt does in fact constitute an undue hardship.[147]

In addition to the regular expense of filing a chapter 7, an undue hardship adversary proceeding "can cost the debtor as much as $10,000, and most . . . are estimated to cost the debtor at least $4,000."[148] As a result, only a small number of student debtors satisfy the thresholds in place required to demonstrate that educational debts constitute an undue hardship.[149] When filing said adversary proceeding, the debtor is in essence bringing a lawsuit against the DOE—a daunting prospect.

b. Certainty of Hopelessness

In 2021, the DOE maintained that *Brunner* requires a showing of a "certainty of hopelessness" by the debtor to satisfy the "undue hardship" standard.[150] Decades ago, Judge Lifland, a bankruptcy court judge for the Southern District of New York, said that the *Brunner* test requires "a certainty of hopelessness, not simply a present inability to fulfill the financial commitment."[151] More recently, Chief Bankruptcy Judge Morris of the Southern District of New York applied a more flexible version of the test and posited that the certainty of hopelessness standard has elevated the *Brunner* test's discharge requirements to "mythic proportions" and has made it more punitive than originally intended.[152] The DOE has vehemently opposed Judge Morris's conception of the test and continues to advocate for a stringent certainty of hopelessness standard.[153]

Due to the "certainty of hopelessness" standard, the DOE has been able to scrutinize and "nitpick borrower's spending" and contend that the debtor

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[146] FED. R. BANKR. P. 7001; *see also* O'Neill, *supra* note 145.

[147] Foohey et al., *supra* note 61, at 4.

[148] *Id.* at 7–8.

[149] *Id.* at 4.

[150] *Id.*

[151] Briscoe v. Bank of N.Y. and N.Y. State Higher Educ. Servs. Corp. (*In re* Briscoe), 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981).

[152] Rosenburg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenburg), 610 B.R. 454, 458–59 (Bankr. S.D. N.Y. 2020); *see also* Herz, *supra* note 63.

[153] Foohey et al., *supra* note 61, at 4–5 (according to the DOE, the correct interpretation of undue hardship was the one articulated in *Briscoe*).

"could" always make payments once "back on their feet."[154] For example, in 2020, the DOE contested the discharge of student loan debt in an adversary proceeding in the bankruptcy case of Ronishia Monique Bradley.[155] Mrs. Bradley, was "a thirty-eight-year-old single mother of three children with approximately $50,000 in student loans," and she lived in subsidized-rent housing.[156] She held multiple "low-wage jobs" for several years, though she never earned more than $27,000 per year in any given year.[157] Despite evidence demonstrating her carefully calculated spending habits, the DOE challenged Mrs. Bradley's occasional expenditures on "fast food" and "streaming service[s]" and contended that she did not meet the undue hardship standard."[158]

A year earlier, another bankruptcy case presented similar facts. Jamie Mudd, a fifty-year-old grandmother supported herself and her autistic grandson by working two jobs for a total of fifty hours per week.[159] Mrs. Mudd sought discharge of approximately $73,000 of debt owed across twenty-six student loans.[160] The DOE argued against discharge because, among other things, Mrs. Mudd had inflated her monthly food expenses by not accounting for donated food and insisted that Mrs. Mudd had to maintain two jobs to meet her burden of showing undue hardship.[161]

However, recently, the DOE withdrew appeals against two undue hardship adversary proceedings won by debtors following widespread public outcry.[162] In both cases, the respective bankruptcy judges discharged around $100,000 of student loan debt over the DOE's opposition while noting long-standing medical issues, which constituted undue hardships.[163] The DOE's withdrawal of appeal sends mixed signals to debtors and highlights the need for a uniform standard across the nation.

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[154] *Id.* at 5.

[155] *Id.* (citing Brief for Defendant at 13, Bradley v. Dep't of Educ., No. 1:20-ap-01012 (Bankr. N.D. Ohio Feb. 7, 2020)).

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Updates on Federal Student Loan Dischargeability in Bankruptcy*, BARCLAY DAMON LLP (Apr. 26, 2022), https://www.barclaydamon.com/alerts/updates-on-federal-student-loan-dischargeabilty-in-bankruptcy. *See generally* Wolfson v. DeVos (*In re* Wolfson), No. 19-11618 (LSS), 2022 WL 5055468 (Bankr. D. Del. Jan. 14, 2022); Wheat v. Great Lakes Higher Educ. Corp. (*In re* Wheat), No. 18-30745-WRS, 2022 WL 243221 (Bankr. M.D. Ala. Jan. 25, 2022).

[163] *Wolfson*, 2022 WL 5055468 at *1, *3; *Wheat*, 2022 WL 243221 at *1.

c. *The Department of Justice and Department of Education's "New Process"*

In November of 2022, the DOJ and the DOE announced a "new process" to be employed when bankruptcy courts are dealing with a discharge application for federal student loan debt.[164] The Under Secretary of Education James Kaval noted:

> "Congress may have set a higher bar for granting student loan discharges during bankruptcy, but in practice that bar has become very difficult for deserving borrowers to clear," . . . . "[O]ur Department of Education team [is] determined to partner with the Justice Department to craft clearer, fairer, and more practical standards to guide recommendations for student debt discharges during bankruptcy proceedings. This guidance is an important step toward helping struggling borrowers, many of whom never completed college or were misled into debt by dishonest schools."[165]

This new process utilizes DOE data on student borrowers and information gathered via a new borrower-completed attestation form.[166] This information is then provided to the DOJ who reviews the data and, in consultation with the DOE, applies the factors from the relevant undue hardship standard (i.e., the *Brunner* test or the totality-of-the-circumstances test), and makes a recommendation to the bankruptcy judge to either grant or deny the discharge.[167]

It remains to be seen what practical effect, if any, this will have on the discharge process. At the very least it seems to signal a turning of the tide with regard to the federal government's stance on student loan discharge. Along with a change in public opinion on the issue, it is possible that this new stance is motivated by the increasing legal costs the DOE is accumulating as it opposes undue hardship petitions.[168]

The American Bankruptcy Institute ("ABI") Commission and the National Association of Chapter 13 Trustees have criticized the *Brunner* test as being

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[164] Press Release No. 22-1231, U.S. Dep't of Just., *Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers* (Aug. 10, 2023), https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *See generally* Kantrowitz, *supra* note 145 (discussing the litigation cost to the DOE while opposing adversary proceedings in the discharge petitions, as balanced against the likelihood of collecting the loan from the debtor, and the amount that is likely to be collected).

overly harsh and inflexible and have suggested it "be stricken or revised."[169] The Second Circuit, however, has demonstrated a commitment to a strict interpretation of undue hardship which suggests that any solution to the student loan crisis on a national scale will most likely require legislative action.[170]

3. *The Supreme Court's Failure To Address "Undue Hardship"*

In 2021, the Supreme Court denied a petition for writ of certiorari in *McCoy v. United States*,[171] thus passing up on a "golden opportunity" that would have allowed the Court to address the meaning of undue hardship directly and to create a uniform standard.[172] Ms. McCoy suggested that the case presented "an ideal vehicle to resolve the conflict" caused by these varying approaches which "diverge sharply in both application and outcome."[173] Ms. McCoy argued that the *Brunner* test, currently embraced by the Fifth Circuit, "disqualifies even the most downtrodden debtors from discharge" and requires the debtor to show a "total incapacity" to pay the debt in the future.[174]

Ms. McCoy made a persuasive case for the Supreme Court to weigh in on the circuit split:

> The courts below denied discharge on the view that Ms. McCoy might be able to repay some of her student loan debt in the future, which they treated as dispositive under *Brunner's* second prong. Had Ms. McCoy filed for bankruptcy in a non-*Brunner* jurisdiction, the court would have exercised its discretion to consider all facts relevant to undue hardship, including her age (62 years old), her debilitating disabilities (degenerative back problem, fatigue, chronic headaches, panic attacks, depression, etc.), and her exhaustive job search.[175]

Despite this, the Court refused to grant certiorari. Perhaps this was their nod to Congress to step in. The Court may be demonstrating a penchant for leaving such a widespread and far-reaching issue to the will of the people through state or federal legislation. However, given the Court's recent decisions touching on

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[169] *See* Daryl J. Smith, *supra* note 11, at *5.

[170] *See, e.g.*, Tingling v. Educ. Credit Mgmt. Corp. (*In re* Tingling), 990 F.3d 304, 308–09 (2d Cir. 2021); Herz, *supra* note 63 (discussing the implications of the Second Circuit's holding in *Tingling*).

[171] McCoy v. United States, No. 3:18-CV-21, 2019 WL 1084211 (S.D. Tex. Mar. 7, 2019), *aff'd*, 810 Fed. App'x 315 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021).

[172] *That's a* Brunner*, Man. Supreme Court Declines To Revisit Overly Rigid Standard for Discharge of Student Loans in Bankruptcy*, *supra* note 6.

[173] Petition for Writ of Certiorari, McCoy v. United States, 141 S. Ct. 2794, at *2–3 (2021).

[174] *Id.* at *2.

[175] *Id.*

highly politicized issues with major implications for the American public,[176] this seems unlikely. At any rate, the Court refused to hear *McCoy*.

III. PROPOSED SOLUTIONS TO THE STUDENT LOAN CRISIS AND THEIR SHORTCOMINGS

Currently few real options exist for student debtors to obtain relief outside of bankruptcy. Among these few options are Income-Driven Repayment ("IDR") plans and Public Service Loan Forgiveness ("PSLF").[177] However, these programs have seen limited success and any such success accrues to only a small fraction of the student debtors they were designed to help.[178] For example, as of March 2021, the National Consumer Law Center announced that "over 8 million are currently enrolled in the federal government's [IDR] plans."[179] Since the IDR program's inception in 1995, a measly thirty-two student loan borrowers have achieved a full cancellation of their student loan debt.[180] Additionally, these types of programs, specifically IDRs, are often criticized for their accompanying complications such as negative amortization of the student debt interest and its adverse effect on credit history.[181] Given the lack of success that these programs have had, a variety of other possible solutions have been proposed to help address the student loan crisis, such as relief through the imposition of certain presumptions in chapter 13 for purposes of discharging student loans[182] or even large-scale blanket forgiveness of student loans.[183] Unfortunately, most of these proposals fail to address the underlying causes of the issue and instead function merely as a short-term treatment of the symptoms.

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176 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022); West Virginia v. EPA, 597 U.S. 697 (2022); Biden v. Texas, 597 U.S. 785 (2021); Carson v. Makin, 596 U.S. 767 (2022).

177 *See* Pallardy, *supra* note 9.

178 Daryl J. Smith, *supra* note 11, at *4; *see* Kantrowitz, *supra* note 145.

179 *Education Department's Decades-Old Debt Trap: How Mismanagement of Income Driven Repayment Locked Millions in Debt*, NAT'L CONSUMER L. CTR., Mar. 2021, at 1, https://www.nclc.org/wp-content/uploads/2022/08/IB_IDR-1.pdf.

180 Daryl J. Smith, *supra* note 11, at *4.

181 *See* Kantrowitz, *supra* note 145 (discussing the negative complications and effects that accompany IDRs).

182 Hildebrand, III, *supra* note 38.

183 Statement by President Biden Announcing Student Loan Relief for Borrowers Who Need It Most, *supra* note 3.

A. *Relief Through Presumptions in Chapter 13*

Individuals working within the consumer bankruptcy system point to the "lack of a visible, understandable path to relief from the student loan quagmire" and the "confusing, misleading, unpredictable, [and] unclear" nature of student loans repayment programs, such as IDR and PLSF, as a source of frustration for debtors with student loans.[184] One chapter 13 Standing Trustee suggests that there is already a solution within the confines of chapter 13 that would allow student loan borrowers to pay "the best they can for a ten-year period," with no need for involvement on the legislative level.[185] Their proposed solution would simply require the cooperation of three groups: (1) the DOE; (2) the judiciary; and (3) debtors.[186]

First, the DOE would need to presume that the "undue hardship" standard has been satisfied in certain, predetermined situations, including: when a debtor's income is principally derived from Social Security Disability, or when a debtor's taxable income in the previous two tax years totaled less than 175% of the U.S. poverty level.[187] Secondly, bankruptcy judges "would need to recognize that a student loan can be *partially* discharged."[188] Lastly, at the end of the ten-year repayment period, debtors would need to initiate an adversary proceedings to pursue "a partial discharge of the remaining student loan balance" as an undue hardship.[189]

Since debtors are already required to file an adversary proceeding when seeking discharge,[190] it seems likely that they would cooperate with the above presumptions. However, bankruptcy judges themselves, the DOE, or perhaps even both would potentially object to such a scheme. With regard to the judiciary, only the Sixth Circuit has been willing to recognize that where undue hardship is shown, the court may discharge a student loan in part.[191] As far as the DOE is concerned, it is difficult to ascertain their position in regard to

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184 Hildebrand, III, *supra* note 38.
185 *Id.*
186 *Id.*
187 *Id.*
188 *Id.* (emphasis added).
189 *Id.*
190 Foohey et al., *supra* note 61, at 2.
191 *See, e.g.*, Miller v. Penn. Higher Educ. Assistance Agency (*In re* Miller), 377 F.3d 616, 624 (6th Cir. 2004); Sequeira v. Sallie Mae Servicing Corp. (*In re* Sequeira), 278 B.R. 861, 867 (Bankr. D. Or. 2001); Bossardet v. Educ. Credit Mgmt. Corp. (*In re* Bossardet), 336 B.R. 451, 458–59 (Bankr. D. Ariz. 2005); Mendenhall v. Navient Corp. (*In re* Mendenhall), 621 B.R. 472, 494 (Bankr. D. Idaho 2020).

presuming "undue hardship,"[192] though it is unlikely it will stray from its prior position that required proof of the debtor's "certainty of hopelessness."

B. Large-Scale Blanket Forgiveness

The most widely known attempt at addressing the student loan crisis currently is the student debt forgiveness plan proposed by the Biden Administration. The White House claimed that this plan would have resulted in the forgiveness of "up to $10,000 in student loan debt for borrowers making less than $125,000 a year, or $250,000 for married couples" filing jointly.[193] Those students who received Pell Grants, generally given to lower-income college students while pursuing their undergraduate degree, would have been eligible for forgiveness of up to $20,000 in student loans.[194]

However, forgiving student loans outright presents several problems, including: (1) the Committee for a Responsible Federal Budget projects substantial costs to the federal government; (2) relatively few of the benefits will go to those that pursued only an undergraduate degree; and (3) it would fail to address the *root issue* of unsustainably high costs of higher education.[195] Regardless, this specific attempt at student loan forgiveness is not a viable solution given the Supreme Court's ruling in *Biden v. Nebraska*.[196]

A number of states—Arkansas, Kansas, Missouri, Nebraska, and South Carolina—jointly filed a lawsuit against the Biden Administration alleging that President Biden had "violated federal law, the constitutional principle of separation of powers and the Administrative Procedure Act" by "'skirt[ing]' congressional authority to implement the debt forgiveness plan."[197] Similarly, the Pacific Legal Foundation filed a lawsuit in the U.S. District Court for the Southern District of Indiana claiming that the Biden Administration had improperly used the Higher Education Relief Opportunities for Students Act (the "HEROS Act"), a legislative instrument providing the Secretary of Education with broad discretion in times of national emergencies, and claimed that the debt

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[192] U.S. Dep't of Just. Press Release, *supra* note 164.

[193] Statement by President Biden Announcing Student Loan Relief for Borrowers Who Need It Most, *supra* note 3; *see also* Andrew Chung & Nate Raymond, *Biden's Student Loan Forgiveness Plan Survives Two Legal Challenges*, REUTERS (Oct. 20, 2022, 8:26 PM), https://www.reuters.com/markets/us/us-supreme-courts-barrett-declines-block-biden-student-loan-relief-2022-10-20/.

[194] *See* Chung & Raymond, *supra* note 193.

[195] *See* Daryl J. Smith, *supra* note 11, at *7.

[196] Biden v. Nebraska, 600 U.S. 477 (2023).

[197] Camera, *supra* note 5.

forgiveness plan would result in a "profound and transformational policy" with "untold economic impacts."[198]

In late June of 2023, the Supreme Court ruled that the Biden Administration lacked the constitutional authority to forgive student loans under the HEROS Act.[199] The Court explained that, although the HEROS Act allowed the Secretary of Education to "'waive or modify' existing statutory or regulatory provisions applicable to financial assistance programs under the [Higher Education Act of 1965]," it does not authorize the Secretary to "rewrite that statute from the ground up" so as to allow for the cancellation of roughly $430 billion in student loans.[200]

C. The American Bankruptcy Institute's Commission on Consumer Bankruptcy

In 2019, student loan debt was the first issue addressed by the ABI Commission on Consumer Bankruptcy in its final report.[201] The ABI Commission consisted of three advisory committees composed of fifty-two bankruptcy professionals representing a wide variety of stakeholders in the bankruptcy system.[202] After its formation, the Commission identified fifty discrete bankruptcy issues over a period of approximately three years.[203]

According to the report, "[s]tudent loan over indebtedness causes overall economic activity to decline and constrains the post-college options that students have."[204] The report further noted that "[s]tudent loan debt significantly depresses U.S. economic activity, and current bankruptcy law ineffectively addresses it."[205] In the final report, the Commission recommended "statutory amendments to discharge student loans that are:" (1) incurred by an individual other than the individual completing the educational program; (2) "being paid through a five-year chapter 13 plan"; (3) first payable at a period that is more

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198 Complaint at 3, Garrison v. Dep't of Educ., No 22A373, 2022 WL 20619368 (2022).

199 *Biden*, 600 U.S. 477, 506 (2023).

200 *Id.* at 494.

201 *See* AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 1 (2019).

202 *See id.*

203 *See id.*

204 *Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 8 (quoting AM. BANKR. INST., *supra* note 201, at 3) (quotation marks omitted).

205 *See* AM. BANKR. INST., *supra* note 201, at 1.

than seven years prior to the filing of a chapter 7 bankruptcy; or (4) "made by nongovernmental entities."[206]

The first recommended category would primarily provide relief for parents who, on behalf of their student children, took out educational loans through the PLUS loan program. As mentioned earlier, the student loan crisis is often seen as an issue only affecting the students, but parents also suffer adverse consequences.[207] Due to the lax "no adverse credit" underwriting criterion, which only looks at past repayment history and fails to consider a parent's future ability to pay based on factors such as current income and existing debt obligations, many parent borrowers seriously struggle to repay the PLUS loan taken out on behalf of their child.[208] For example, twenty-five percent of parent borrowers make less than $40,000 in annual income but are borrowing an average of $10,000 per year for their children's higher education.[209] The situation is even worse for some minority populations: "Nearly one-third of black parent PLUS loan borrowers have incomes below $30,000."[210]

The second and third recommended categories would result in treating student loans similarly to how they were treated just after the Education Amendments of 1976 and the Crime Control Act of 1990.[211] The last recommended category would be primarily limited to private loans, which only account for approximately eight percent of all educational loan debt in the U.S.[212]

In September 2021, the House Delegates for the American Bar Association ("ABA"), responsible for setting ABA policy positions, overwhelmingly passed Resolution 521, once again urging Congress to amend the Code to allow for student loans to be discharged, even without a showing of undue hardship.[213]

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[206] *Summary of Selected Recommendations by ABI's Commission on Consumer Bankruptcy*, ABI COMM'N ON CONSUMER BANKR., https://s3.amazonaws.com/abi-org/Newsroom/Summary+of+Key+Recommendations_FINALv2.pdf (last visited May 15, 2024).

[207] *See* Waggoner, *supra* note 17; *see also* Draeger & Desjean, *supra* note 15.

[208] Draeger & Desjean, *supra* note 15.

[209] *Id.*

[210] *Id.*

[211] *See* Pallardy, *supra* note 9 (noting that, after the Education Amendments of 1976, student loans could be discharged only five years after the commencement of the repayment period and, after the Crime Control Act of 1990, student loans could be discharged only seven years after the commencement of the same).

[212] *See* Hahn, *supra* note 39 ("[A]bout 92% of all student debt are federal student loans . . . .").

[213] *See* Sloan, *supra* note 2; Selbst, *supra* note 25. Chris Jennison, a past speaker of the ABA's Young Lawyer Division, stated, "Student debt is a real and present crisis, . . . [and] it is imperative to create a lifeline for those who are several years into practice and are drowning in debt, by removing hurdles to clearing insurmountable educational debt in bankruptcy proceedings." Sloan, *supra* note 2. According to the latest figures

Nevertheless, despite the repeated recommendations of nationally respected legal organizations (such as the ABI and the ABA) they remain just that, recommendations. For as much influence as they have, the ABI and the ABA lack the authority and ability to effectively implement these suggested amendments to the Code. For these reasons, it is necessary to back a solution duly authorized by the governing bodies put in place to represent the interests of the people of the United States—including American students.

IV. THE BEST SOLUTION: THE FRESH START THROUGH BANKRUPTCY ACT OF 2021

In August 2021, the Senate Judiciary Committee held the "Student Loan Bankruptcy Reform" hearing. [214] The official purpose of the hearing was "to discuss the current state of student loan debt bankruptcy and potential legislative fixes."[215] Senate Judiciary Committee Chair Richard Durbin (D-Ill.), and Senators John Cornyn (R-Tex.) and Josh Hawley (R-Mo.) introduced the FRESH START Through Bankruptcy Act of 2021 (the "Act").[216]

Senator Durbin emphasized that "undue hardship" is not defined within the Code and that "whatever the definition is under the *Brunner* test, it practically is no relief."[217] The senators who introduced the bill were attempting to remedy some of the problems articulated by the Honorable William Houston Brown, co-chair of the ABI Commission on Consumer Bankruptcy, who stated:

> Amid the financial challenges brought on by the COVID-19 pandemic, student over-indebtedness also has significant adverse consequences for the national economy . . . . High levels of post-secondary education debt correlate with lower earnings, lower rates of home ownership, fewer automobile purchases, higher household financial distress, and delayed marriage and family formation, among other ripple effects.[218]

While no plan is perfect, and each presents its own hurdles to implementation, the Act is the most comprehensive and realistic solution to the student loan crisis.

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provided by the DOE, attorneys now graduate from law school with an average of $138,500 in educational loan debt. *Id.*

[214] *Legislative Highlights*, AM. BANKR. INST. J, Sept. 2021, at 10.

[215] *Id.*

[216] Sloan, *supra* note 2; Fostering Responsible Education Starts with Helping Students Through Accountability, Relief, and Taxpayer protections Through Bankruptcy Act (FRESH START Through Bankruptcy Act), S. 2589, 117th Cong. (2021).

[217] *Legislative Highlights*, *supra* note 214, at 10.

[218] *Id.* (quotation marks omitted).

It is particularly promising for two reasons: First, it presents a practical solution to the crisis at hand with an avenue for easy implementation; second, it addresses some of the much larger problems within the American higher education system—namely, "credentialism"[219] and the skyrocketing of tuition cost for universities.

A. A Practical Solution to the Student Loan Crisis

The Act would eliminate the need for student loan borrowers to satisfy the undue hardship standard, provided they have been in repayment for at least ten years.[220] Borrowers could still receive discharge of their educational debts prior to the ten-year period, but they would be required to pass either the *Brunner* test or the totality-of-the-circumstances test, depending on their jurisdiction.[221] Each jurisdiction would maintain its respective standard.

The Act would uniformly provide student loan borrowers a clear path out of debt. At the same time, the ten-year waiting period would prevent a student debtor from engaging in a quick burn-and-turn of their educational loans (i.e., amassing mountains of debt only to discharge it immediately after graduation). Consequently, Congress would further the "fresh start for an honest but unfortunate debtor" purpose of bankruptcy.[222]

The Act would essentially revert the treatment of student loan discharge to its pre-1998 status. Before the Higher Education Amendments of 1998, student loans could be discharged seven years after commencement of the repayment period for those loans, typically beginning six-months after graduation.[223] The Act would not be quite as generous, due to the ten-year repayment period requirement,[224] but it would eliminate the need to demonstrate undue hardship after the ten-year period and the cost of an adversary proceeding.

[219] Furquim et al., *supra* note 7, at 1.

[220] *Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 9.

[221] *Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 9.

[222] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286, 287 (1991)).

[223] Pallardy, *supra* note 9. This is similar to the third amendment to the Code that the ABI's Commission on Consumer Bankruptcy recommended in its final report. *See also* AM. BANKR. INST., *supra* note 201; *Student Loan Repayment*, *supra* note 69.

[224] *Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 9.

Requiring a ten-year waiting period, as opposed to the previous seven-year period,[225] increases the likelihood that such a bill could pass. This longer waiting period would likely help appease fiscally-conservative politicians by addressing their concern of widespread abuse. Similarly, doing away with the undue hardship standard would likely garner support from socially-liberal politicians that feel the current standards are too strict. Moreover, the Act could be easily implemented by bankruptcy courts without changing the existing framework and procedures for discharging debt.

B. The Act Addresses the Underlying Issues of Credentialism and Increased Tuition

The second reason the Act is promising is that it addresses the underlying problems, of which the student loan crisis is merely a symptom. Allowing student loans to be discharged ten years after commencement of the repayment period would no doubt bring relief to thousands of borrowers, particularly older debtors in *Brunner* jurisdictions.[226] However, this would do nothing on its own to curb the staggering number of students taking out federal loans each year to attend college. As long as employers require higher levels of education for entry-level positions and academic institutions continue to charge higher and higher tuition costs, students will continue to incur more and more debt.

Recent polls conducted by NPR/Ipsos and the CATO Institute are revealing. When asked whether the federal government should (a) prioritize forgiving debt for those with existing loans or (b) prioritize making college more affordable for current and future students, 82% of respondents to the NPR/Ipsos poll said that the government should prioritize affordability.[227] The Vice-President of public polling at Ipsos said: "What that tells me is that, while student loan forgiveness for some is seen as a good proposal and a short-term fix, where we actually need to go from here is true, systematic change."[228] In a national poll, the CATO Institute found similar results. Data from the CATO poll revealed that 76% of Americans would oppose student debt cancellation if it caused universities to

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[225] Pallardy, *supra* note 9.

[226] *Federal Student Loan Portfolio: Portfolio by Age*, *supra* note 46 (noting that, as of 2023, there are over 18 million student loan debtors age thirty-five and older); Waggoner, *supra* note 17.

[227] Cory Turner & Sequoia Carrillo, *Americans Support Student Loan Forgiveness, but Would Rather Rein in College Costs*, NPR (June 17, 2022, 5:00 AM), https://www.npr.org/2022/06/17/1104920545/poll-student-loan-forgiveness ("The nationally representative poll of 1,022 Americans was conducted between June 3 and 5, and included an oversample of more than 400 student loan borrowers. The margin of error is +/- 3.3 percentage points for all respondents and +/- 4.8 percentage points for those with student loans.").

[228] *Id.*

raise tuition or if it caused more employers to require college degrees for employment.[229]

These poll results underline the root issue of "credentialism,"[230] also known as "credential inflation."[231] The results also reflect concerns about the exponential increase in the cost of higher education over the past few decades that has far outpaced inflation.[232] These two phenomena in tandem are the primary drivers of the student loan crisis, and any solution seeking to properly solve the crisis must address them both.

As briefly explained earlier, the term "credentialism" or "credential inflation" refers to an increase in the level of education required for jobs that previously required less education.[233] An analysis of over three million American jobs across a variety of occupations reveals that employers are increasingly posting job openings with four-year college degree requirements when those same jobs before did not require such credentials.[234] According to that analysis, "[e]mployers are seeking a bachelor's degree for jobs that formerly required less education, *even when the actual skills required haven't changed or when this makes the position harder to fill.*"[235] As more degrees are required for low-level positions with low levels of compensation, students entering the job market must take out more loans to finance those degrees.

Another aspect of the student loan crisis is the rapidly-increasing cost of higher education. As discussed earlier, the average cost of a four-year undergraduate degree at a private university has increased by 132%, the cost of acquiring the same at an out-of-state public university has increased by 127%,

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229 *See* Emily Ekins, *New Poll: 76% of Americans Oppose Student Debt Cancellation if It Drives up the Price of College, 64% Oppose if It Raises Taxes*, CATO INST. (Sept. 1, 2022, 10:43 AM), https://www.cato.org/blog/new-poll-76-americans-oppose-student-debt-cancellation-it-drives-price-college-64-oppose-it ("YouGov collected responses online August 17 to 23, 2022, from a national sample of 2,000 Americans 18 years of age and older. Restrictions are put in place to ensure that only the people selected and contacted by YouGov are allowed to participate. The margin of error for the survey is +/- 2.39 percentage points at the 95% level of confidence.").

230 Furquim et al., *supra* note 7, at 1.

231 Ekins, *supra* note 229.

232 Kerr & Wood, *supra* note 23; Waggoner, *supra* note 17.

233 *See* JOSEPH B. FULLER & MANJARI RAMAN, DISMISSED BY DEGREES: HOW DEGREE INFLATION IS UNDERMINING U.S. COMPETITIVENESS AND HURTING AMERICA'S MIDDLE CLASS 6 (2017).

234 *See id.* at 5. Estimates by researchers at Harvard Business School show that "degree inflation" is affecting jobs in "virtually every major industry": 800,000 jobs in manufacturing, 650,000 jobs in retail, 630,000 jobs in accommodation and food services, 621,000 jobs in health care and social assistance, and 342,000 jobs in construction. *Id.* at 11–12.

235 *Id.* at 5 (emphasis in original).

and the cost at an in-state public university has increased by 158%.[236] The same can be said for the cost of acquiring a law degree.[237]

A variety of explanations have been proposed as to why this is. One such explanation is the Bennett Hypothesis, named after the former Secretary of Education, William J. Bennett. The Bennett Hypothesis proposes that there exists a link between federal loan subsidies and the rising cost of tuition.[238] Bennett said:

> If anything, increases in financial aid in recent years have enabled colleges and universities blithely to raise their tuitions, confident that Federal loan subsidies would help cushion the increase . . . Federal student aid policies do not cause college price inflation, but there is little doubt that they help make it possible.[239]

In its most basic form, this hypothesis suggests that colleges and universities will raise tuition prices as the federal government increases federal student aid amounts, the implication being that "increases in financial aid will not improve college affordability."[240]

The Bennett Hypothesis is highly contested and wide-ranging research has attempted to ascertain its accuracy—the results are varied.[241] In support of the hypothesis, the National Bureau of Economic Research found in 2014 that the cost of tuition at for-profit institutions *eligible for federal aid* was 78% higher

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[236] Kerr & Wood, *supra* note 23.

[237] *See* Selbst, *supra* note 25.

[238] Magdalene Mannebach, Comment, *I Am Once Again Asking for Federal Student Loan Debt Reform: A Discussion on Federal Student Loan Debt and Its Negative Effects on the Race Wealth Gap*, 90 UMKC L. REV. 909, 913 (2022); Pallardy, *supra* note 9.

[239] William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES, Feb. 18, 1987, at A31.

[240] ANDREW GILLEN, INTRODUCING BENNETT HYPOTHESIS 2.0, CTR. FOR COLL. AFFORDABILITY & PRODUCTIVITY 1 (2012). *See generally* BETH AKERS, A NEW APPROACH FOR CURBING COLLEGE TUITION INFLATION 5 (2022) ("Over the last two decades, prices in higher education have grown more quickly than prices in almost any other sector of the economy. The relative rise in tuition costs is a problem—not only for students who are paying, or will have to pay, for college but also for policy makers who have made increasing college attendance a central priority.").

[241] GILLEN, *supra* note 240, at 1. Some have argued the idea is "preposterous" given that most colleges are public or non-profit. However, others have noted that "just as one couldn't imagine house prices being as high as they now are if mortgage financing were not available, it is difficult to believe that colleges and universities could have increased their charges so rapidly over time without the ready availability of students' ability to borrow." Arthur M. Hauptman, Opinion, *Rising College Costs: A Federal Role?*, N.Y. TIMES: ROOM FOR DEBATE (Feb. 3, 2010, 7:11 PM), https://archive.nytimes.com/roomfordebate.blogs.nytimes.com/2010/02/03/rising-college-costs-a-federal-role.

than the cost of tuition at for-profit institutions not eligible for the same.[242] In 2015, a study by the Federal Reserve Bank of New York found that an increase in the amount of subsidized loans offered in 2007 resulted in tuition hikes of up to sixty cents on the dollar.[243] This suggests that aid-eligible higher education institutions may indeed be raising tuition costs to "capture" the most federal aid possible.[244]

At least two studies oppose the Bennett Hypothesis. For instance, in a 1998 report based on metrics from 1987–1996, the National Commission on the Cost of Higher Education said that its findings did not support a causal relationship between federal loans and rising tuition costs.[245] Additionally, the National Center for Education Statistics analyzed data from 1988 to 1998 and found no causal relationship between state or federal aid subsidies and tuition costs.[246]

As evidenced by the above studies, the debate centers around whether a causal relationship exists between increased amounts of financial aid and the increased cost of tuition. The varied results make it unclear whether the Bennett Hypothesis is true. Regardless, what is clear is that there exists at the very least a correlation between the two phenomena: "Rising tuition costs have mirrored increases in federal student loans, which in 1978 became available to all students regardless of income."[247]

C. *The Act Addresses Credentialism and Increased Tuition Through a "Clawback" Provision*

The Act addresses the issues of credentialism and increased tuition, at least in part, through a "clawback" provision aimed at increasing institutional accountability. The provision requires colleges with more than one-third of their students receiving federal student loans to partially reimburse the government if a student's loan is later discharged in bankruptcy and if the colleges have

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[242] *Cf.* Cellini & Goldin, *supra* note 31, at 174 (explaining the results of a study examining the tuition costs and federal student aid grants for *sub-bachelor programs*, such as community college and vocational or technical schools).

[243] DAVID O. LUCCA ET AL., CREDIT SUPPLY AND THE RISE IN COLLEGE TUITION: EVIDENCE FROM THE EXPANSION IN FEDERAL STUDENT AID PROGRAMS 1–2 (2015).

[244] *Id.*; *see also* Cellini & Goldin, *supra* note 31, at 175–177.

[245] *See* JAMES HARVEY ET AL., STRAIGHT TALK ABOUT COLLEGE COSTS AND PRICES 112–14 (1998).

[246] *See* ALISA F. CUNNINGHAM ET AL., STUDY OF COLLEGE COSTS AND PRICES, 1988–89 TO 1997–98 99–102 (2001).

[247] Pallardy, *supra* note 9.

consistently high-default rates and low-repayment rates.[248] Under such circumstances, the school would be required to reimburse the DOE for a percentage of the discharged loan, anywhere from twenty to fifty percent—the precise percentage being determined by "how badly the school missed the [Act's statutory] thresholds."[249]

With the knowledge that student-loan borrowers would be able to discharge their education loans after a ten-year period, lenders would be incentivized to put into place more stringent underwriting requirements thus lowering the amount of educational loans that students could take out. Consequentially colleges and universities would likely lower the cost of their degrees to be more in line with what the average student could afford.

Furthermore, the "clawback" provision acts as a deterrent against the imposition of unnecessary educational requirements for certain jobs—in other words, credentialism. Rather than perpetuating the practice of requiring advanced degrees for roles where such qualifications may not be imperative solely because college degrees have become a dime-a-dozen, employers would be compelled to assess their job requirements, and, in turn, colleges would be pushed to examine the practicality of their degree offerings. This would encourage a more realistic matching between educational requirements and the actual skills and knowledge necessary for any job.

While the ABI supports the bill overall, some members have taken issue with this particular provision and the effects it might have on certain educational institutes.[250] To be clear, proponents of the Act are not advocating for the discontinuation of federally-backed student loans, just a scaling back of the practice to avoid a potential bursting of a "student loan bubble." Similar to the economic fallout created in the wake of the housing crisis in 2008, due in large part to lack of underwriting requirements for mortgage loans,[251] the student loan

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[248] *See Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 8–9.

[249] *Id.* at 9.

[250] Stacy Salters, a panel member of both the ABI's Consumer Bankruptcy and Legislation Committees, expressed concern over the "clawback" provision noting that while this would greatly increase the number of students eligible for discharge in bankruptcy, it might disproportionally affect particular institutions, such as historically black universities and colleges. Salters stated, "[w]hen you consider those cohort default rates and who that [clawback] might negatively impact, you have some schools that are not going to be able to pay that [reimbursement]." *Id.*

[251] *See The Real Causes—and Casualties—of the Housing Crisis*, KNOWLEDGE AT WHARTON (Sept. 13, 2018), https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/housing-bubble-real-causes/.

market could experience a similar crash if aggressive lending, without the proper gatekeeping functions, is left unchecked.

D. Potential Political Hurdles to the Act

As of now, the Act has seen minimal progress in the Senate, only having been read twice in the chamber and being referred to the Senate Judiciary Committee—two of the most introductory steps.[252] Given the very thin Democratic majority in the Senate and the slight Republican majority in the House,[253] it is unclear whether there is, at this moment, a path forward for this type of large-scale reform. In a move that might seem novel to some on Capitol Hill, the Act could be amended to garner more political support without significantly negating its benefits. One possible amendment might be to extend the period after which "undue hardship" is presumed. While ten years is already an extension on the five-year period required prior to the Higher Education Amendment of 1976, a twelve- or even fifteen-year waiting period before a presumption of "undue hardship" kicks in is preferable to the current standard. Another possible amendment might be to require a certain dollar amount or number of payments that must be made by the debtor on their student loan debt prior to becoming eligible for discharge.

Surprisingly enough, the Supreme Court's ruling against the Biden Administration's student loan forgiveness plan might help the Act overcome the political hurdles standing in its way. If President Biden is unable to fulfill his campaign promise of large-scale student loan forgiveness through his student loan forgiveness plan, he and others in Congress might be inclined to champion a more realistic solution to the student loan crisis in America: the FRESH START Through Bankruptcy Act.

CONCLUSION

Despite differing opinions on whether student loan debt should be more easily dischargeable through bankruptcy, it cannot be denied that the issue of student loan debt poses a significant problem that threatens wide-reaching negative consequences for the economy. With an increase in the amount and

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[252] *Will Student Loan Debt Proposals Accelerate on Capitol Hill This Summer, or Remain Stuck in D.C. Traffic?*, *supra* note 2, at 9; Fostering Responsible Education Starts with Helping Students Through Accountability, Relief, and Taxpayer protections Through Bankruptcy Act (FRESH START Through Bankruptcy Act), S. 2598, 117th Cong. (2021).

[253] James M. Lindsay, *The 118th Congress by the Numbers*, COUNCIL ON FOREIGN REL. (Jan. 9, 2023, 5:07 PM), https://www.cfr.org/blog/118th-congress-numbers.

number of educational loans being issued and rising interest rates on those loans, the student loan crisis demands attention.

While no solution is without its challenges, the FRESH START Through Bankruptcy Act offers a clear path to relief for those burdened by student loan debt, and it also addresses the underlying issue of credentialism and the exponential increase in the cost of higher education. Furthermore, unlike some of the other proposed solutions, its implementation is not hampered by questions of legality or administrability. The Act would simply constitute a return to the treatment of student loan discharge in times past, and it could be readily implemented by bankruptcy courts through an already established framework to discharge student debt.

One of the primary purposes of the Code is to provide a fresh start for the honest but unfortunate debtor. As argued in this Comment, the "undue hardship" standard, as currently interpreted, fails to further this purpose for student loan debtors. However, as implied by its name, the FRESH START Through Bankruptcy Act aligns with the "fresh start" purpose and would better serve those struggling with the burden of student loan debt.

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* Managing Editor, *Emory Bankruptcy Developments Journal*; J.D., Emory University School of Law (2024); B.S., Criminal Justice and Legal Studies, Sam Houston State University (2020). First and foremost, my deepest love and thanks goes to my dear mother for the painstaking and often thankless hours she spent teaching me to write. I extend thanks also to Edward Safir and Professor Alexander "Sasha" Volokh for their mentorship and practical guidance. Lastly, my gratitude to the editorial board and the entire *EBDJ* staff for their tireless efforts and immense patience throughout the publication process.