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Defining the Undefined: Reimagining the "Undue Hardship" Standard in Light of Its Harmonious Interpretation

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NOTES

DEFINING THE UNDEFINED: REIMAGINING THE "UNDUE HARDSHIP" STANDARD IN LIGHT OF ITS HARMONIOUS INTERPRETATION

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INTRODUCTION

The Bankruptcy Code strives to allow for "the honest debtor [to] begin his financial life anew."[1] However, this longstanding principle begs the question: *By what means* can the "honest debtor" start over? This question is particularly meaningful in the context of loans given liberally by the federal government, where student ambition seemingly serves as the basis for creditworthiness.[2] Pursuant to Section 523(a)(8) of the Bankruptcy Code, student debt is presumptively nondischargeable.[3] However, a student debtor may obtain relief if they can prove that repaying the debt would cause "undue hardship."[4] The lack of a statutory definition of this ambiguous phrase has resulted in a circuit split over the stringency of the standard. From requiring a

† Associate Managing Editor, *St. John's Law Review*, J.D. Candidate, 2026, St. John's University School of Law; B.A., 2023, The University of Georgia. This Note is dedicated to my brilliant siblings and lifelong team—Isabella, Paulina, and P.D. As our parents always say, "education is the greatest gift you can give yourself," and I am beyond grateful for the opportunity to contribute to the legal literature on one of the largest inequities in our nation's education system. I would like to extend a huge thank you to the *St. John's Law Review* staff for their dedication to my piece, and, of course, thank you to my advisor, Professor Keith Sharfman, for supporting me throughout this process. Finally, thank you to my partner, Michael, for listening to me ramble about student loans as this piece took shape. You are everything.

[1] Bruning v. United States, 376 U.S. 358, 361 (1964).

[2] *See* Biden v. Nebraska, 600 U.S. 477, 484 (2023) ("The terms of federal loans are set by law, not the market, so they often come with benefits not offered by private lenders. Such benefits include deferment of any repayment until after graduation, loan qualification regardless of credit history, relatively low fixed interest rates, income-sensitive repayment plans, and—for undergraduate students with financial need—government payment of interest while the borrower is in school.").

[3] 11 U.S.C. § 523(a)(8) (2024).

[4] *Id.*

"certainty of hopelessness"[5] to looking at the "totality-of-the-circumstances,"[6] the issue of defining "undue hardship" remains salient in understanding the immense burden on student debtors in this country.[7]

"Undue hardship" is a phrase utilized in a variety of legal contexts and is typically accompanied by a statutory definition.[8] Without a definition of the phrase under the Bankruptcy Code, courts were left to craft rules to govern how and when student debt would be dischargeable in bankruptcy.[9] This Note argues that the current majority approach to the interpretation of "undue hardship" in student loan adversarial proceedings, known as the *Brunner* test, undermines the inherent discretion granted to the judiciary in the statutory language of Section 523(a)(8),[10] lacks textual foundation,[11] and flies in the face of practical and equitable administrability. Moreover, the "undue hardship" test, as presently employed, fails to harmonize the analysis under Section 523(a)(8) with the evolving nature of student loan policy.[12] Relying on the guidance jointly promulgated by the Department of Justice ("DOJ") and the Department of Education ("DOE") ("Guidance") and the intra-circuit criticism of the *Brunner* test's stringency, a more practical and equitable approach to the "undue hardship" standard comes into focus. [13] This approach adopts the presumptions outlined by the DOJ and the DOE regarding one's future

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[5] *In re* Brunner, 46 B.R. 752, 755 (S.D.N.Y. 1985) (quoting *In re* Briscoe, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981)), *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[6] *In re* Long, 322 F.3d 549, 554 (8th Cir. 2003).

[7] *Id.*

[8] Under the Americans with Disabilities Act, the term "undue hardship" is accompanied by a statutory definition. *See* 42 U.S.C. § 12111(10)(A) (2023) ("The term 'undue hardship' means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."). The definition is then followed by a list of factors to consider in the analysis of "undue hardship." *See id.* § 12111(10)(B).

[9] In re *Brunner*, 46 B.R. at 753, *aff'd sub nom. Brunner*, 831 F.2d 395.

[10] 11 U.S.C. § 523(a)(8) (2024).

[11] *See In re* Bronsdon, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) ("[W]e agree that the 'good faith' requirement of *Brunner* is 'without textual foundation.' " (quoting *In re* Hicks, 331 B.R. 18, 28 (Bankr. D. Mass. 2005))).

[12] SUPREME COURT OF THE U.S., RULES OF STATUTORY CONSTRUCTION & INTERPRETATION [hereinafter RULES], https://www.supremecourt.gov/DocketPDF/18/18-9575/102239/20190611092122150_00000055.pdf [https://perma.cc/UP4U-BRGC] (last visited Nov. 2, 2025) (describing the need for harmony among legal authorities when engaging in statutory interpretation).

[13] Memorandum from the U.S. Dep't of Educ. & U.S. Dep't of Just. on Guidance for Dep't Att'ys Regarding Student Bankr. Litig. to Dep't of Just. Att'ys (Nov. 17, 2022), at 1 (on file with the St. John's Law Review)) [hereinafter DOJ Memorandum].

ability to repay student debt. Additionally, it drastically alters the weight given to the "good faith" inquiry.[14]

Part I of this Note provides background on the student loan crisis and the history of the nondischargeability of student loan debt. Part II of this Note examines the DOJ's Guidance on litigating "undue hardship," the intra-circuit criticism of the *Brunner* framework, and the need for harmony in understanding "undue hardship" in light of other authority governing student loans. Part III of this Note argues for a shift in the analysis of "undue hardship" based on practical guidance from the DOJ, the DOE, and the courts. This shift focuses on the subjectivities of each bankruptcy case and the need for harmony in light of constantly evolving policy on student loan forgiveness. Finally, this Note will address concerns about the reliability and predictability of a more discretionary, subjective approach to student loan dischargeability.

I. BACKGROUND

A. The Student Loan Crisis

Student loan debt remains one of the largest financial burdens on the American people.[15] So much so that "[t]hirty percent of all adults . . . said they took out student loans for their education"[16] and almost forty-three million debtors collectively owe more than $1.8 trillion in student loan debt.[17] Of these debtors, 11.2% reported as of July 2023 that "they were unable to make at least one student loan payment that year-to-date."[18] These struggles to repay are in stark contrast with the experience of Americans obtaining a higher education in earlier eras of history.[19]

Federally-backed student loans arose in the mid-twentieth century pursuant to the National Defense Education Act[20] to ensure that the

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[14] *Id.*

[15] Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE (Aug. 8, 2025), https://educationdata.org/student-loan-debt-statistics [https://perma.cc/P4S2-96VD].

[16] BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2023 57 (2024).

[17] Hanson, *supra* note 15; Melanie Hanson, *Student Loan Debt Crisis*, EDUC. DATA INITIATIVE (July 14, 2024), https://educationdata.org/student-loan-debt-crisis [https://perma.cc/62XP-TC5J] ("When adjusted for inflation, federal education spending via student loans has nearly tripled since 1980, increasing 290.5%.").

[18] Hanson, *supra* note 15.

[19] *See* Sarah Holden, Note, *Rewarding Repayment: Removing the Fear from Crushing Student Loan Debt Through Alternatives to Discharge*, 46 U. ARK. LITTLE ROCK L. REV. 83, 89 (2023) ("In 1920, less than one in ten people attended college. For many, the primary barrier to matriculation was cost.").

[20] National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958).

United States could compete with the Soviet Union in academics and research.[21] However, under this authority, "student loans were issued directly from funds held by the U.S. Treasury," significantly augmenting the national deficit.[22] Through the adoption of the Higher Education Act of 1965 ("HEA"),[23] federal student aid developed into a robust and complex program involving both federal and state governments, private creditors, the DOE, and—when repayment goes awry—the judiciary.[24] The programs under the HEA "incentivize[d] private lenders to originate educational loans," significantly diminishing the risk of federal budget abuse.[25] Now, Title IV of the HEA functions as "the primary source of direct federal support to students pursuing postsecondary education."[26] Over time, the HEA's amendments have allowed for the federal student aid program to grow in opportunity and complexity.

B. Nondischargeability in Bankruptcy

But what if you cannot repay the loan? The discharge of federal student loan debt, and some private student loans known as qualified education loans, has proven an insurmountable challenge for students crushed by exorbitant student debt.[27] In 1976, Congress amended the HEA[28] "to include student loan debt as an exception to dischargeability."[29] Pursuant to the Education Amendments of 1976, students who sought discharge within five years of the commencement of repayment would be required to show that repayment would impose an "undue hardship"; otherwise, the debt would remain nondischargeable.[30] In 1990, the five-year limitation was extended to

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[21] *A Brief History of Student Loans*, BOS. UNIV., https://www.bu.edu/fairstudentloans/a-brief-history-of-student-loans/ [https://perma.cc/SA43-ZJQG] (last visited Nov. 2, 2025).

[22] Holden, *supra* note 19, at 90.

[23] 20 U.S.C. §§ 1001–1161(a)(a)–(1) (2024).

[24] ANGELICA CERVANTES, MARLENA CREUSERE, ROBIN MCMILLION, CARLA MCQUEEN, MATT SHORT, MATT STEINER & JEFF WEBSTER, OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER 23 (2005) ("[T]he federal government would appropriate funds to the states. These funds would be allocated based on the ratio of full-time postsecondary students in each state to the total number in the country."); *see also* JOSELYNN H. FOUNTAIN, THE HIGHER EDUCATION ACT (HEA): A PRIMER 1 (2023) ("The Department of Education (ED) administers the programs authorized by the HEA.").

[25] Holden, *supra* note 19, at 90.

[26] *See* FOUNTAIN, *supra* note 24, at Summary.

[27] *See* Rebekah Keller, Note, *The "Undue Hardship" Test: The Dangers of a Subjective Test in Determining the Dischargeability of Student Loan Debt in Bankruptcy*, 82 MO. L. REV. 211, 212 (2017).

[28] Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 208 (1976).

[29] Keller, *supra* note 27, at 221.

[30] *See* Holden, *supra* note 19, at 91.

seven years.[31] However, in 1998, this limitation was removed entirely, resulting in a requirement that any student debtor who seeks discharge must show "undue hardship."[32]

The purpose of nondischargeability was to "prevent abuse of the bankruptcy system by student borrowers who reap the benefits of access to higher education but seek to escape repayment of their student loan obligations upon graduation."[33] At the time of the HEA's amendment, various members of Congress aimed to emphasize bad actors—students attempting to swindle the federal government by seeking discharge soon after graduation—even though student debtors were not filing for bankruptcy at disproportionate rates compared to the general population.[34] Nonetheless, given this policy choice, student loans remain presumptively nondischargeable.

However, there still remains the "undue hardship" exception to nondischargeability pursuant to the adoption of Section 523(a)(8) of the 1978 Bankruptcy Code: "[U]nless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents," the debt remains nondischargeable.[35] The standard of "undue hardship" has proven difficult to define and implement.[36] Indeed, *nowhere* in either the Bankruptcy Code or the HEA is there a definition of the term.[37] The majority approach has resulted in the application of a standard that requires, as some circuits approvingly cite, "a certainty of hopelessness."[38]

In crafting an applicable standard for "undue hardship," courts relied on reports by the Commission on the Bankruptcy Laws of the United States prior to the adoption of Section 523(a)(8), given that " 'undue hardship' was lifted verbatim from the draft bill proposed by the Commission."[39] Specifically, courts point to the fact that "[t]he Commission's report provide[d] some inkling of its intent in creating the exception, intent which in the absence of any contrary indication courts have imputed to Congress."[40] The Commission attempted to explain

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[31] *Id.*

[32] *Id.*

[33] *In re* Conway, 489 B.R. 828, 833 (Bankr. E.D. Mo. 2013), *rev'd and remanded to*, 495 B.R. 416 (B.A.P. 8th Cir. 2013), *aff'd*, 559 F. App'x 610 (8th Cir. 2014) (per curiam).

[34] *See* Holden, *supra* note 19, at 86.

[35] 11 U.S.C. § 523(a)(8) (2024).

[36] *See* 2 CONSUMER CREDIT LAW MANUAL § 12.06(4)(c) (2025).

[37] *Id.* ("There is no statutory definition of 'undue hardship' in the student loan context.").

[38] *In re* Acosta-Conniff, 632 B.R. 322, 346 (Bankr. M.D. Ala. 2021) (quoting *In re* Mosley, 494 F.3d 1320, 1326 (11th Cir. 2007)); *see infra* Part I.C.1.

[39] *In re* Brunner, 46 B.R. 752, 754 (S.D.N.Y. 1985), *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[40] *Id.*

what was relevant to an "undue hardship" analysis, and courts have grappled with filling in the blanks.[41]

Various theories attempt to ground the rationale behind the difficulty in obtaining a discharge of student loan debt under Section 523(a)(8). Scholars in the bankruptcy field argue that "creditors are engaging in strategic settlement—a process that involves settling unfavorable cases to avoid adverse precedent and aggressively litigating favorable cases to tilt the law in their favor."[42] This theory suggests that the bad actors are not the student debtors themselves but rather the creditors.[43] Moreover, "student loan debtors often lack the ability to pay for adequate counsel" even when "they have strong legal claims," rendering any attempt at discharge wholly ineffective.[44] Even those students who do file an adversarial proceeding rarely have their student loans discharged.[45]

The HEA and its subsequent amendments have granted the DOE significant discretionary authority to discharge or forgive student loan debt. For example, the Secretary has the ability to discharge student loan debt on account of: (1) death and disability;[46] (2) school closure;[47] (3) false loan certification;[48] or (4) a school's failure to pay loan proceeds owed to a lender.[49] When it comes to bankruptcy, the administrative discharge is seemingly more complex. Although the Supreme Court in *Biden v. Nebraska* held that "[b]ankrupt borrowers may have their loans forgiven,"[50] such a blanket statement undermines the true complexity of the regulatory mechanisms that student debtors

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[41] *See* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1306–07 (10th Cir. 2004) ("The Commission noted that in order to determine whether nondischargeability of the debt will impose an 'undue hardship,' 'the rate and amount of his future resources should be estimated reasonably in terms of ability to obtain, retain, and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and his dependents, at a minimal standard of living within their management capability, as well as to pay the education debt.' ").

[42] Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 499 (2020).

[43] *See id.* (arguing that "creditor manipulation" is "the primary source" of the difficulty in obtaining the discharge of student loan debt).

[44] *Id.* at 512.

[45] *See id.* at 498. Of "almost a quarter of a million student loan debtors," only about 300 of them, or 0.1%, will ever see the discharge of student loan debt. *Id.*

[46] 20 U.S.C. § 1087(a) (2014).

[47] 20 U.S.C. § 1087(c) (2014).

[48] *Id.*

[49] *Id.*

[50] 600 U.S. 477, 485 (2023).

must surmount to discharge student loans in bankruptcy.[51] The regulations promulgated by the DOE, as sanctioned by the HEA, reflect the discretionary judgments that must be considered when a creditor seeks to oppose an adversarial proceeding filed by a student debtor. These discretionary judgements include, among other things, requiring that a guaranty agency[52] make a preliminary, extrajudicial determination of "undue hardship" when a petition is filed for an adversary proceeding under Section 523(a)(8).[53] Moreover, the DOE granted guaranty agencies discretion in determining whether to oppose the petition.[54] Thus, although the Secretary can "forgive" these loans, the process is altogether complex and governed by various sources of authority.

C. Circuit Split on "Undue Hardship"

1. The *Brunner* Test

In *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, the Second Circuit developed a three-pronged test to apply in an adversarial proceeding where a student debtor seeks to discharge federal student loans in bankruptcy.[55] In that case, Marie Brunner, a recipient of both a Bachelor of Arts and a Master's degree in Social Work, sought to discharge her student loan debt approximately seven months after the completion of her Master's program.[56] In an adversarial proceeding in the Bankruptcy Court for the Southern District of New York, the court found that her lack of present employment due to a lack of demand for psychologists or social workers in conjunction with a "psychological impairment" was a sufficient showing of "undue hardship" as required for discharge.[57] On

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[51] *See* 34 C.F.R. § 682.402(f)–(h). These regulations describe the procedural and substantive prerequisites for the discharge of student loan debt in bankruptcy. *Id.*

[52] Per the Federal Student Aid website, "[a] guaranty agency is a state or private non-profit agency that helps administer the Federal Family Education Loan (FFEL) Program. A guaranty agency insures federal loans by repaying the loan holder when a loan defaults." *Guaranty Agency*, FED. STUDENT AID, https://studentaid.gov/help-center/answers/article/guaranty-agency [https://perma.cc/KHY6-469F] (last visited Nov. 2, 2025). Although FFEL loans are no longer dispersed, past FFEL loans still fall into the purview of the DOE in bankruptcy proceedings. *See What to Know About Federal Family Education Loan (FFEL) Program Loans*, FED. STUDENT AID, https://studentaid.gov/articles/what-to-know-about-ffel-loans/ [https://perma.cc/5URQ-QLJW] (last visited Nov. 2, 2025).

[53] 34 C.F.R. § 682.402(i)(1)(ii) (2005).

[54] *Id.* § 682.402(i)(1)(iii).

[55] 831 F.2d 395, 396 (2d Cir. 1987).

[56] *In re* Brunner, 46 B.R. 752, 753 (S.D.N.Y. 1985), *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[57] *Id.* at 757.

appeal to the United States District Court for the Southern District of New York, the court reversed, finding that absent " 'unique' or 'exceptional' circumstances,"[58] a present inability to repay "alone cannot support a finding that the failure to discharge her loans will impose undue hardship."[59] On appeal yet again, the Second Circuit affirmed the district court's holding of nondischargeability, adopting a three-prong test that requires the following showing by a debtor to discharge federal student loan debt:

> (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.[60]

Although federal student loan debt is presumptively nondischargeable, this framework provides a means for debtors to obtain relief through bankruptcy.[61] However, this framework has been restricted to require an "inability to pay [that] is likely to continue for a significant time, thereby creating a 'certainty of hopelessness' that a debtor will be able to repay the loans."[62] The majority of circuits have adopted this test, including the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.[63] This has resulted in the dominance of a restrictive approach to the dischargeability of student loan debt that is absent from the text of Section 523(a)(8), nor is it reflective of the general intention behind Title XI.[64] Indeed, "if the bankruptcy court finds against the debtor on any of the three prongs of the test, the inquiry ends[,] and the student loan is not dischargeable."[65]

2. The "Totality-of-the-Circumstances" Approach

The remaining circuits have adopted an alternative approach to the interpretation of "undue hardship" under Section 523(a)(8): a "totality-

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[58] *Id.* at 755.

[59] *Id.* at 758.

[60] *Brunner*, 831 F.2d at 396.

[61] 11 U.S.C. § 523(a)(8) (2024).

[62] *In re* Acosta-Conniff, 632 B.R. 322, 346 (Bankr. M.D. Ala. 2021) (quoting *In re* Mosley, 494 F.3d 1320, 1326 (11th Cir. 2007)).

[63] John Patrick Hunt, *Student Loan Purpose and the* Brunner *Test*, 15 HARV. L. & POL'Y REV. 237, 238 n.2 (2020).

[64] *See In re* Bronsdon, 435 B.R. 791, 799–800 (B.A.P. 1st Cir. 2010).

[65] *In re* Long, 322 F.3d 549, 554 (8th Cir. 2003).

of-the-circumstances" approach.[66] In *In re Long*, the Eighth Circuit found the *Brunner* test to be overly restrictive, holding that "fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy."[67] In *In re Bronsdon*, the First Circuit adopted the same approach, noting the heightened restrictiveness of *Brunner*:

> While under the totality of the circumstances approach, the court may also consider "any additional facts and circumstances unique to the case" that are relevant to the central inquiry (i.e., the debtor's ability to maintain a minimum standard of living while repaying the loans), the *Brunner* test imposes two additional requirements on the debtor that *must* be met if the student loans are to be discharged.[68]

In applying the "totality-of-the-circumstances" approach, the First and Eighth circuits inquire into the following: "(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."[69] In applying this approach to interpreting "undue hardship," it is generally understood "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)."[70] Thus, courts in these circuits find that a more fact-intensive approach to determining what constitutes "undue hardship" in this context more accurately reflects the breadth of the meaning of the phrase itself.[71]

II. GUIDANCE AND CRITICISM: THE REALITY OF "UNDUE HARDSHIP"

A. Administrative Guidance

In 2022, the DOE, in conjunction with the DOJ, released Guidance on the opposition to adversarial proceedings filed by student debtors seeking federal student loan discharge on the basis of "undue hardship."[72] In the Guidance, the DOJ emphasizes that "[s]ome debtors have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and due to

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[66] *Id.*

[67] *Id.*

[68] 435 B.R. 791, 799 (B.A.P. 1st Cir. 2010) (quoting *In re* Hicks, 331 B.R. 18, 26 (Bankr. D. Mass. 2005)).

[69] *In re Long*, 322 F.3d at 554.

[70] *Id.*

[71] *See id.*

[72] *See* DOJ Memorandum, *supra* note 13.

the mistaken belief that student loans are ineligible for discharge."[73] The Guidance expressly lists three goals with respect to the litigation of "undue hardship":

> 1. To set clear, transparent, and consistent expectations for discharge that debtors understand, regardless of representation.
> 2. To reduce debtors' burdens in pursuing an adversary proceeding by simplifying the fact-gathering process. This includes the use of an Attestation, and, where feasible, information provided through prior submission to the bankruptcy court and available student loan servicing records;
> 3. Where the facts support it, to increase the number of cases where the government stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor's student loans be discharged.[74]

In highlighting these goals, the Guidance aims to "ensure the final decision is informed by [the DOE]'s experience administering student loans and its role as creditor."[75] The Guidance expounds on the three factors from *Brunner*, aiming to produce more equitable results through its application of the "undue hardship" standard than the way in which the standard is applied by judges in adversarial proceedings.[76] The most significant aspect of the Guidance is its approach to the second factor of the *Brunner* test; the DOJ and DOE established various rebuttable presumptions of the persistence of a debtor's inability to repay student loan debt.[77] These presumptions of an inability to repay include:

> (1) the debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential; (3) the debtor has been unemployed for at least five of the last ten years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than 'in-school' for at least ten years.[78]

The Guidance notes that "circumstances supporting rebuttal of a presumption will likely be uncommon"[79] and that the presumptions do not constitute an exhaustive list of "bases upon which a future inability

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[73] *Id.*

[74] *Id.* at 2.

[75] *Id.* The DOE and DOJ note that "[t]his Guidance applies in both *Brunner* and Totality Test jurisdictions." *Id.* at 3.

[76] *See id.* at 5.

[77] *Id.* at 9.

[78] *Id.*

[79] *Id.*

to pay may be found."[80] Thus, although it seems the DOJ and DOE are developing bright-line rules to facilitate administrative ease, the Guidance's rhetoric supports the proposition that discretionary judgments are vital to ensuring justice in student loan discharge proceedings.

Moreover, the Guidance discusses the *Brunner* test's third prong—"good faith."[81] In analyzing the "good faith" prong, courts have often relied on a debtor's participation in various administrative programs the DOE offers for those struggling to repay student loan debt, such as Income Driven Repayment Plans ("IDRP").[82] However, the Guidance suggests that a DOJ attorney's discretionary judgment is necessary with respect to the third *Brunner* prong in light of the "widespread problems with IDRP servicing."[83] Although the Guidance gives clear examples of efforts that constitute "good faith,"[84] it notes that the "inquiry 'should not be used as a means for courts or Department attorneys to impose their own values on a debtor's life choices.' "[85] Moreover, the Guidance emphasizes that "[i]ssues concerning employment, income, and expenses are case-specific and may be highly dependent on a debtor's family, community, and individual circumstances."[86]

The DOJ and DOE maintain that the Guidance is in line with both the *Brunner* and "totality-of-the-circumstances" approaches.[87] However, the amount of discretion granted to DOJ attorneys reveals that factual considerations that supersede the strict bounds of the *Brunner* test are inherent to the practical reality of student loan debt litigation.[88] These judgments are demonstrated through the Departments' approach to stipulating to "undue hardship" when warranted.[89] Moreover, the adoption of presumptions in analyzing the second-prong and the Departments' consideration of the failures of relief programs in

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[80] *Id.* at 10.

[81] *See id.* at 10–13.

[82] *Id.* at 12 n.18 (collecting cases).

[83] *Id.* at 13.

[84] *Id.* at 11. The Guidance notes the following as evincing "good faith" efforts at repayment: "[M]aking a payment; applying for a deferment or forbearance (other than in-school or grace period deferments); applying for an IDRP plan; applying for a federal consolidation loan; responding to outreach from a servicer or collector; engaging meaningfully with [DOE] or their loan servicer, regarding payment options, forbearance and deferment options, or loan consolidation; or engaging meaningfully with a third party they believed would assist them in managing their student loan debt." *Id.*

[85] *Id.* at 10 (quoting Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004)).

[86] *Id.* at 11.

[87] *Id.* at 3.

[88] *Id.* at 1–2.

[89] *Id.* at 1.

analyzing the third-prong goes beyond the role typically employed by a judge under the stringent *Brunner* standard; the Guidance certainly does not call for discharge only in light of "a certainty of hopelessness."[90]

The data following the implementation of the Guidance is compelling: "[i]n cases decided by the courts from November 2022 through March [2024], ninety-eight percent have provided debt relief through full or partial discharge" out of a total of 1,220 cases filed.[91] These results are drastically distinct from the data between 2015 and 2020, when "approximately 250,000 people with student loan debt filed for bankruptcy, of which less than one percent filed an adversary proceeding to attempt to have the student debt discharged."[92]

B. Intra-Circuit Criticism of Brunner

By surveying trial court cases in *Brunner* circuits, it becomes clear that a more flexible test is necessary, given the lack of textual or historical support for the *Brunner* test and the inherent subjectivity in student loan bankruptcy cases. Courts' reflections on the credibility of the *Brunner* test reveal that the Guidance by the DOJ and DOE is not unfounded.[93] Within circuits applying the *Brunner* test, there is a substantial amount of criticism against the test, suggesting that it supersedes the statutory language.[94] In *In re Palmer*, the court notes that the *Brunner* test was established "long before . . . nondischargeable private student loans, and [it was] issued at a time when public student loans were nondischargeable only for a period of five years."[95] The court applied the *Brunner* test with hesitation, in light of the fact that the Sixth Circuit "approvingly cites the 'certainty of hopelessness' elaboration from the Seventh Circuit . . . that even that circuit itself

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[90] *Id.* at 9.

[91] Press Release, U.S. Dep't of Educ., Justice Department and Department of Education Announce Continuing Success of Student-Loan Bankruptcy Discharge Process: New Data Shows Streamlined Procedure Is Helping Increasing Numbers of Eligible Borrowers (July 17, 2024), https://www.justice.gov/archives/opa/pr/justice-department-and-department-education-announce-continuing-success-student-loan [https://perma.cc/8QJA-G6Y4].

[92] Holden, *supra* note 19 at 93.

[93] *See In re* Palmer, No. 12-51428, 2021 WL 1259258, at *15 (Bankr. N.D. Ohio Mar. 31, 2021) ("Congress has never defined the circumstances constituting the sort of undue hardship justifying the discharge of an educational debt under § 523(a)(8), apparently preferring that bankruptcy courts craft a working definition. While it might have been appropriate and helpful when adopted, respectfully, the *Brunner* test for determining undue hardship is truly a relic of times long gone." (quoting *In re* Roth, 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring))).

[94] *See In re* Bronsdon, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) ("[W]e agree that the 'good faith' requirement of *Brunner* is 'without textual foundation.' " (quoting *In re* Hicks, 331 B.R. 18, 28 (Bankr. D. Mass. 2005))).

[95] *In re* Palmer, 2021 WL 1259258, at *14.

recently dryly noted 'sounds more restrictive than the statutory "undue hardship." ' "[96] Other courts have described the test as "without textual foundation,"[97] ridden with "judicial glosses" that extend beyond the statutory language,[98] and "overkill" with respect to the requirement of "unique" or "extraordinary" circumstances.[99] Courts have attributed "[t]he harsh results that often are associated with *Brunner*" not to the standard itself but as a "result of cases interpreting *Brunner.*"[100] In *In re Rosenberg*, the Honorable Cecelia G. Morris, Chief United States Bankruptcy Judge for the Southern District of New York, noted that phrases like "certainty of hopelessness" are merely "retributive dicta" that have been "applied and reapplied so frequently . . . that they have subsumed the actual language of the *Brunner* test."[101] Even in the *Brunner* district court case, the court noted that "[t]he effect of [the *Brunner*] requirements is to make student loans a very difficult burden to shake without actually paying them off," noting the standard's seemingly "draconian" nature.[102] This trend of hesitation in the application of the *Brunner* standard calls for action to develop a consistent understanding of the just bounds of "undue hardship."[103]

C. The Need for Harmony in Light of Evolving Student Loan Policy

Per the Supreme Court's published rules of statutory construction, "[s]tatutes must be interpreted so as to be entirely harmonious with all laws as a whole."[104] The notion of the need for harmony among legal authorities is well rooted in case law throughout history, regardless of the legal context, unless granted express direction from Congress to the contrary.[105] Thus, in light of the complex legislative history of student

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[96] *Id.* at *15 (quoting Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 885 (7th Cir. 2013)).

[97] *In re Bronsdon*, 435 B.R. at 800 (quoting *In re* Hicks, 331 B.R. at 28).

[98] *Krieger*, 713 F.3d at 884.

[99] *In re* Hicks, 331 B.R. 18, 28 (Bankr. D. Mass. 2005).

[100] *In re* Rosenberg, 610 B.R. 454, 458 (Bankr. S.D.N.Y. 2020).

[101] *Id.* at 459; *see also id.* (noting that "many cases have pinned on *Brunner* punitive standards that are not contained therein").

[102] *In re* Brunner, 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987). Nonetheless, the district court concluded that the standard "plainly serves the purposes of the guaranteed student loan program." *Id.*

[103] *Id.*

[104] RULES, *supra* note 12.

[105] *See, e.g.*, BFP v. Resol. Trust Co., 511 U.S. 531, 543 (1994) ("Surely Congress has the power pursuant to its constitutional grant of authority over bankruptcy . . . to disrupt the ancient harmony that foreclosure law and fraudulent conveyance law, those two pillars of debtor-creditor jurisprudence, have heretofore enjoyed. But absent clearer textual guidance

loan discharge, harmonizing the analysis of "undue hardship" with the evolving nature of student loan policy is necessary to give effect to the equitable purpose of the bankruptcy system.[106]

As of the writing of this Note, executive policy surrounding student loan debt management has become seemingly more restrictive than in prior administrations. In signing the One Big Beautiful Bill ("OBBB") into law, the Trump-Vance administration made several changes to federal student loan programs that will seemingly augment the struggles student debtors face.[107] For example, the OBBB has eradicated "economic hardship or unemployment deferments to pause payments if [debtors] cannot afford them."[108] Additionally, the OBBB's new income-driven repayment plan, the Repayment Assistance Plan, is likely to exacerbate the financial inequities suffered by low-income borrowers, as monthly payments are likely to increase.[109] However, the OBBB also "eliminates the requirement that borrowers have a partial financial hardship to qualify for enrollment in an income-based repayment . . . plan authorized under section 493C of the HEA."[110]

The Trump-Vance administration's changes to student loan administration are in stark contrast to the Biden-Harris administration's approach, which took substantial steps to ease the burden on student loan borrowers, especially amid the COVID-19 pandemic.[111] Thus, the authorities governing student loans are in

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than the phrase 'reasonably equivalent value'—a phrase entirely compatible with pre-existing practice—we will not presume such a radical departure.").

[106] *See* Holden, *supra* note 19, at 87 (commenting on the complicated legislative history of student loan discharge).

[107] *See* "Dear Colleague" Letter from Jeffrey R. Andrade Deputy Assistant Sec'y for Policy, Planning, and Innovation, U.S. Dep't of Educ., Office for Fed. Student Aid (July 18, 2025) [hereinafter Dear Colleague Letter], https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2025-07-18/federal-student-loan-program-provisions-effective-upon-enactment-under-one-big-beautiful-bill-act [https://perma.cc/7WWA-X69F].

[108] *Big Bill Means Big Changes for Student Loan Borrowers: What You Need to Know*, NAT'L CONSUMER L. CTR. (July 15, 2025), https://studentloanborrowerassistance.org/big-bill-means-big-changes-for-student-loan-borrowers-what-you-need-to-know/ [https://perma.cc/4VQS-RUFC].

[109] Michele Zampini & Ellie Bruecker, *A Bad "RAP": Everything Wrong with House Republicans' Poorly Designed "Repayment Assistance Plan"*, INST. FOR COLL. ACCESS & SUCCESS (May 5, 2025), https://ticas.org/affordability-2/repayment-assistance-plan-reconciliation-2025/ [https://perma.cc/6ZZL-9MRW].

[110] Dear Colleague Letter, *supra* note 107.

[111] *See, e.g.*, Biden v. Nebraska, 600 U.S. 477 (2023). During the COVID-19 pandemic, President Biden aimed to rely on the HEROES Act to allow for the Secretary to forgive "$430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600." *Id.* at 483. The Court found that the language "waive or modify" in the HEROES Act did not provide such sweeping authority to the Secretary. *Id.* at 500.

constant flux.[112] To harmonize the "undue hardship" standard with the changing authorities on student loans, it must reflect the discretion inherent in the evolving nature of student loan policy. As such, the standard must be flexible in balancing the equitable purpose of the bankruptcy system and the everchanging policy approaches of diametrically opposed presidential administrations.

III. ARGUMENT—REIMAGINING "UNDUE HARDSHIP"

Since the inception of the "totality-of-the-circumstances" approach to "undue hardship," courts have recognized that "[r]igid adherence by the court to a particular test robs the court of the discretion envisioned by Congress in drafting § 523(a)(8)(B)."[113] While the *Brunner* test has maintained its dominance over the circuits, an "undue hardship case ultimately rests on its own facts"[114] and therefore cannot be adequately and thoroughly assessed through inflexible standards like the *Brunner* test.

To fairly evaluate the interpretation of "undue hardship," we begin with the text. "Hardship," as defined by Black's Law Dictionary, means "[p]rivation; suffering or adversity."[115] In its plain meaning, "undue" means "exceeding or violating propriety or fitness."[116] Thus, altogether, the plain meaning of the phrase undue hardship would read something along the lines of excessive suffering or adversity.[117] How courts got from this plain meaning to the employment of the *Brunner* test today is a matter of flawed contextual and historical analysis.

In cases employing the "totality-of-the-circumstances" approach, courts note that both the *Brunner* and minority test "consider similar information—the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment."[118] Some courts have even recognized that the difference between the two standards "may not be that significant."[119] Nonetheless, courts that have rejected the "totality-of-the-

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[112] *See* Dear Colleague Letter, *supra* note 107 ("The OBBB delays implementation of the Biden Administration's Borrower Defense to Repayment regulations under 34 CFR Part 685, Subpart D.").

[113] *In re* Andresen, 232 B.R. 127, 138 (B.A.P. 8th Cir. 1999) (quoting *In re* Pena, 207 B.R. 919, 921 (B.A.P. 9th Cir. 1997)).

[114] *In re* Clay, 12 B.R. 251, 253 (Bankr. N.D. Iowa 1981).

[115] *Hardship*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[116] *Undue*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/undue [https://perma.cc/63WU-WMTJ] (last visited Nov. 2, 2025).

[117] *See id.*

[118] Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004).

[119] Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 791 n.1 (8th Cir. 2009).

circumstances" approach note that "it has an unfortunate tendency to generate lists of factors that should be considered—lists that grow ever longer as the case law develops."[120] Thus, this approach poses other issues: administrability and predictability. Though it should be uplifted for its attempts at ensuring equity in the outcomes of student loan debt adversarial proceedings, a new understanding of "undue hardship" must be developed that strikes a balance between equity and administrability to ensure more fair and predictable outcomes. This new understanding allows for flexibility in administration, thus harmonizing the analysis with the evolving nature of student loan policy.

A. Adopting the Administrative Guidance

By establishing rebuttable presumptions of a future inability to repay, as relevant to both the *Brunner* and "totality-of-the-circumstances" approaches, the Guidance from the DOJ and DOE has created a standard that is administrable while allowing for the equitable discretionary judgments necessary in the fact-intensive analysis of determining student loan dischargeability.[121] Each presumption demonstrates a reasonable basis upon which an inability to repay could be found.[122] In fact, some of the presumptions are even criteria considered in the discharge of debt separate from the "undue hardship" analysis, such as chronic injuries and disabilities.[123] By providing clearer guidelines on what constitutes an inability to repay, the first prong becomes more equitable and lenient in its application.[124] For example, for those aged sixty-five or older, not having to litigate a key aspect of the analysis, unless adequately rebutted, ensures more equitable outcomes for those who have already struggled financially throughout the life of the debt.[125]

In establishing these presumptions, the Guidance does not attempt to undermine the subjectivities of each bankruptcy case.[126] While some scholars argue that the context of student loan dischargeability calls for

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[120] *Polleys*, 356 F.3d at 1309.

[121] *See supra* Part II.A.

[122] *See supra* Part II.A.

[123] *See* 34 C.F.R. § 682.402(c)(1) (explaining the discharge procedure for student loans on account of "[t]otal and permanent disability").

[124] *See* DOJ Memorandum, *supra* note 13 (noting that "this Guidance will enhance consistency and equity in the handling of these cases").

[125] *Id.* at 9.

[126] *See id.* at 10 ("The presumptions . . . are not the sole bases upon which a future inability to pay may be found.").

a bright-line rule rather than "facts-and-circumstances tests,"[127] that would undermine the well-accepted notion that "each undue hardship case [should] be examined on the unique facts and circumstances that surround the particular bankruptcy."[128] Bright-line rules are simply unworkable when each adversarial proceeding involves different educational outcomes, occupations, and family circumstances.[129] Thus, in the Guidance, it expressly notes that the presumptions are not exhaustive, allowing for the necessary discretionary judgments when a debtor presents facts that may be relevant to a future inability to repay.[130] The adoption of these rebuttable presumptions for the first prong of the *Brunner* test strikes a balance between the inherent discretion granted the courts in Section 523(a)(8) and the need for flexibility in light of evolving student loan policy.[131]

B. The Issue of the "Good Faith" Requirement

During the initial consideration of Section 523(a)(8) in the 1970s, Congress noted that there exists "a heightened risk of abuse in the first five years of repayment and required student-loan debtors who sought discharge during that period, and only during that period, to show 'undue hardship.' "[132] However, in later findings by the National Bankruptcy Commission, "empirical evidence did not support the allegation that changes in 'bankruptcy law entitlements,' such as the discharge of educational loans, would affect the rate of bankruptcy filings."[133] Nonetheless, the Second Circuit in *Brunner* affirmed the district court's reliance on Congress's flawed logic in adopting the stringent requirements of the test.[134] This flawed reliance on misinformation informs the restrictive analysis of "undue hardship" now employed in the majority of jurisdictions.[135]

It is important to emphasize that this underlying notion—fear of abuse of the bankruptcy system—was initially only pertinent to

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[127] *See* Keller, *supra* note 27, at 234 (arguing that "Congress should altogether reject a subjective facts-and-circumstances analysis and create a bright-line rule").

[128] *In re* Long, 322 F.3d 549, 554 (8th Cir. 2003).

[129] *Id.*

[130] DOJ Memorandum, *supra* note 13, at 10.

[131] *See supra* Part II.C.

[132] John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student Loan Bankruptcies*, 106 GEO. L.J. 1287, 1292 (2018).

[133] Veryl Victoria Miles, *Fairness, Responsibility, and Efficiency in the Bankruptcy Discharge: Are the Commission's Recommendations Enough?*, 102 DICK. L. REV. 795, 825 (1998) (quoting Nat'l Bankr. Rev. Comm'n, 1 BANKRUPTCY: THE NEXT TWENTY YEARS 213 (1997)).

[134] *In re* Brunner, 46 B.R. 752, 754 (S.D.N.Y. 1985), *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[135] *Id.*

discharge within the first five years of loan repayment.[136] After this time period, the presumption of nondischargeability ended.[137] Underlying this five-year limitation was the notion that "in some circumstances the debtor, because of factors beyond his reasonable control, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments."[138] However, when Congress removed the time limit in 1998, these policy choices were thwarted by a goal "to increase recovery of federal student loan funds."[139]

In crafting the "good faith" requirement of the majority approach, the district court in *Brunner* noted that "[t]here is no specific authority for this requirement, but the need for some showing of this type may be inferred from comments of the Commission report."[140] In expressly recognizing the lack of textual foundation for the requirement, the court decidedly relied on legislative history and policy choices aimed at "forestall[ing] students, who frequently have a large excess of liabilities over assets solely because of their student loans, from abusing the bankruptcy system to shed these loans."[141] Today, however, there is no limited time period in which a student debtor is required to show "undue hardship"; *any and all* student debtors are subject to this showing.[142] Thus, the fact that the current legal context of student loan dischargeability is drastically different than it was in *Brunner* completely undermines the employment of the "good faith" requirement today based on Congress's initial fears, which were limited to a five-year scope.

The argument against the stringent "good faith" requirement is further bolstered by the Guidance from the DOJ and DOE.[143] Courts have frequently relied on enrollment in an income contingency plan in determining whether a student debtor has acted in "good faith" to repay their debt.[144] However, in discussing the "good faith" requirement, the Guidance references studies completed by the DOE that demonstrate that "the servicing of student loan debt has been plagued at times by

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[136] *See id.* ("The Commission implemented this policy by delaying dischargeability for five years, a time period which, it was anticipated, 'gives the debtor an opportunity to try to meet his payment obligation.' ").

[137] *Id.*

[138] *Id.*

[139] Hunt, *supra* note 132.

[140] *In re* Brunner, 46 B.R. 752, 755 (S.D.N.Y. 1985), *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[141] *Id.*

[142] *Id.* at 755–56.

[143] DOJ Memorandum, *supra* note 13, at 12.

[144] *See In re* Frushour, 433 F.3d 393, 402 (4th Cir. 2005) (collecting cases).

administrative errors and dissemination of confusing and inaccurate information," which has meaningfully affected debtors' interactions with loan repayment.[145] The Guidance specifically references the Consumer Financial Protection Bureau's evidence showing that "debtors have been wrongfully denied IDRP enrollment," monthly payments have been calculated inaccurately, and false representations of nondischargeability have been given to debtors.[146] This evidence has resulted in the DOJ lessening the stringency in their determinations of "good faith" prior to litigating "undue hardship."[147] An approach that accounts for these discrepancies and allows for more flexibility aligns with the ever-changing nature of authority governing student loan administration.

From a flawed reliance on historical policy choices to the courts' limited understanding of the realities of income-contingency plans, the issue of the "good faith" requirement in use today comes to light. In fact, in some cases, courts will expressly note that the standard initially applied only to debtors seeking discharge within the first five years of repayment, yet fail to give this context any weight in the analysis.[148] Regardless of the intra-circuit criticism of the requirement as "without textual foundation," the weight given to the "good faith" requirement can still be dispositive.[149] Instead, the weight given to the "good faith" requirement must be lessened to account for the discrepancies at the administrative level and the fact that one of the understandings in adopting the requirement was its limited temporal scope, which no longer exists today.[150]

Instead of requiring an affirmative showing of good faith efforts at repayment, courts should instead merely rely on any attempt to repay as relevant to the "undue hardship" analysis, but not dispositive. Any attempt to repay should be construed broadly to reflect the complexity of obtaining access to IDRPs and the administrative issues associated with their implementation.[151] If any effort at repayment is shown, it should function as a safe harbor for litigants, and, upon satisfaction of the other requirements, should weigh heavily in favor of discharge. In supplanting the affirmative "good faith" requirement with a non-

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[145] DOJ Memorandum, *supra* note 13, at 11–12.

[146] *Id.* at 12.

[147] *Id.* at 11.

[148] *See* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1306 (10th Cir. 2004).

[149] *See In re* Bronsdon, 435 B.R. 791, 799–800 (B.A.P. 1st Cir. 2010); *see also In re* Long, 322 F.3d 549, 554 (8th Cir. 2003) ("[I]f the bankruptcy court finds against the debtor on any of the three prongs of the test, the inquiry ends and the student loan is not dischargeable.").

[150] Hunt, *supra* note 132.

[151] DOJ Memorandum, *supra* note 13, at 12.

dispositive factor, this new approach does not undermine the relevance of efforts at repayment.[152] Instead, the requirement would find a balance between the affirmative showing of "good faith" under *Brunner* and the lack of any "good faith" requirement under the "totality-of-the-circumstances" approach. Specifically, a debtor's showing of efforts at repayment, such as through an IDRP, would weigh heavily in favor of discharge, as would a debtor who has made attempts at repayment but was unable to achieve an equitable outcome due to administrative discrepancies. However, a student debtor who lacks knowledge of the complexities of student loan repayment and dischargeability options will not face the punitive nature of the third *Brunner* prong. Only when a debtor has intentionally evaded repayment will this factor weigh in favor of nondischargeability. Thus, under a non-dispositive "good faith" standard, only when Congress's initial fears are actually brought to fruition will student loans be nondischargeable.[153]

In lessening the burden on student debtors, the standard would emphasize both the fact that the five-year limitation no longer exists in Section 523(a)(8) and the fact that there is no specific textual basis for such a stringent requirement.[154] A less burdensome standard is also reflective of the practical realities of administrative error and misinformation.[155] Additionally, empirical evidence demonstrates that student debtors as a class have not disproportionately sought bankruptcy discharge;[156] thus, if "good faith" does not function as a dispositive requirement, it would give effect to both the limited validity behind fears of bankruptcy abuse and an understanding that systemic abuse is not the weighty dilemma Congress initially portrayed.[157]

C. The New "Undue Hardship"

What is this practical and equitable standard? By attempting to strike a balance between the dangers of subjectivity and the need for discretion in such a fact-sensitive legal context, this Note argues for the adoption of a test that fits squarely between both the *Brunner* and "totality-of-the-circumstances" tests and seeks to harmonize bankruptcy law with the evolving nature of policy on student loan

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[152] *See id.* at 10–13 (discussing the relevance of repayment efforts with a more lenient "good faith" standard).

[153] *See* Hunt, *supra* note 132 and accompanying text.

[154] *In re* Brunner, 46 B.R. 752, 755 (S.D.N.Y. 1985), *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[155] *See* DOJ Memorandum, *supra* note 155, at 12.

[156] *See* Holden, *supra* note 19, at 86.

[157] *See* Miles, *supra* 115 and accompanying text.

forgiveness. By incorporating the Guidance from the DOJ and reworking the "good faith" requirement, we arrive at the following test.

Student loans may be discharged in bankruptcy under Section 523(a)(8) only when: (1) "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";[158] and (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."[159] There is a presumption of a future inability to repay if the debtor can show one of the following:

> (1) the debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential; (3) the debtor has been unemployed for at least five of the last ten years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than "in-school" for at least ten years.[160]

These presumptions are non-exhaustive, and any relevant facts and circumstances should be analyzed. While rebuttal of these presumptions is likely uncommon, they can be rebutted by adequate evidence. Lastly, (3) good faith efforts at repayment are relevant, yet not dispositive. If a debtor shows *any* attempt at repayment—including solely reaching out to the DOE to discuss repayment plans, regardless of eligibility—it functions as a "safe harbor" under the good-faith prong and should weigh heavily in favor of discharge.

IV. CONCLUSION

The criticism of both the *Brunner* and "totality-of-the-circumstances" approaches reveals that the flawed reliance on legislative history—which has been contradicted by empirical evidence and underscores the *Brunner* test[161]—calls for evolution in the approach. In light of the student loan crisis in this country, it is paramount that the bankruptcy system provides practical means to obtain relief for those who relied on federal student aid to their demise. Given that the bankruptcy courts have been given significant discretion in crafting an approach to the "undue hardship" analysis, it is imperative that the standard is informed by the practical approach promulgated by the DOE and DOJ, the intra-circuit criticism of the *Brunner* test, and the need for harmony with evolving student loan policy. Through adopting

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158 Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).
159 *Id.*
160 DOJ Memorandum, *supra* note 13, at 9.
161 *See* Holden, *supra* note 19, at 86.

rebuttable presumptions of a future inability to repay that are reflective of other law in this area, this new standard takes into account the need for the balance of administrability and discretion. By altering the affirmative "good faith" standard to be broadly construed and non-dispositive, the test honors the legislative amendments to Section 523(a)(8) and centers the issues faced by many student debtors who are misguided in the process of repayment. Although courts uplift the *Brunner* test for its relative administrability,[162] adherence to a standard—which lacks both empirical and textual support and is characterized as "draconian"[163]—flies in the face of the Bankruptcy Code's purpose: "to let the honest debtor begin his financial life anew."[164]

[162] *See In re* Faish, 72 F.3d 298, 306 (3d Cir. 1995) ("The *Brunner* test is the most logical and workable of the established tests.").

[163] *In re* Brunner, 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd sub nom.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[164] Bruning v. United States, 376 U.S. 358, 361 (1964).