

# SIDE STEPPING THE *BRUNNER* TEST: AN EASIER PATH TO STUDENT LOAN DISCHARGE

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## I. INTRODUCTION

As of June 2019, the federal student loan debt had reached \$1.6 trillion.<sup>1</sup> If the current trend continues, this debt will reach \$2 trillion by 2023.<sup>2</sup> Studies show that student loan debt is delaying marriage and family formation, hampering the growth of small businesses, and negatively affecting the housing market.<sup>3</sup> Contributing to this ballooning debt is the inability of students to discharge their loans through bankruptcy. Unlike consumer debts, such as debt incurred through credit cards, student loan debt cannot be readily discharged through bankruptcy.<sup>4</sup> While filing for bankruptcy has many detrimental effects, such as greatly reducing an individual’s credit score and making it considerably harder for them to receive credit going forward, it can also provide certain debtors with substantial benefits. Filing for bankruptcy can allow financially destitute debtors, who would otherwise likely never be able to clear all their debt, a “fresh start.”<sup>5</sup> Unencumbered with debt, former debtors who have filed for bankruptcy can become economically active, help stimulate the economy, and move on from their past mistakes.

Acknowledging these potential benefits, some politicians, lobbyists, and nonprofits have begun pressuring the courts to ease the process of discharging student loans through bankruptcy.<sup>6</sup> However, there are also vocal proponents for the existing strict process that severely limits debtors’

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<sup>1</sup> Christopher Ingraham, *7 Ways \$1.6 Trillion in Student Loan Debt Affects the U.S. Economy*, WASH. POST, June 25, 2019, <https://www.washingtonpost.com/business/2019/06/25/heres-what-trillion-student-loan-debt-is-doing-us-economy/> [<https://perma.cc/6QFP-VMUZ>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Richard Pallardy, *History of Student Loans: Bankruptcy Discharge*, SAVINGFORCOLLEGE.COM (Feb. 21, 2019), <https://www.savingforcollege.com/article/history-of-student-loans-bankruptcy-discharge> [<https://perma.cc/5PNW-UPSF>].

<sup>5</sup> *See What Is Chapter 7 Bankruptcy and How Will It Give Me a Fresh Start?*, CHARLES JUNTIKKA & ASSOCIATES LLP, <https://cjalaw.com/chapter-7-bankruptcy-a-fresh-start/> [<https://perma.cc/N7QW-EYWM>].

<sup>6</sup> Ryan Boysen, *Bankruptcy Institute Wants to Relax Student Loan Debt Rules*, LAW360 (Apr. 11, 2019), <https://www-law360-com.libproxy1.usc.edu/articles/1148991/bankruptcy-institute-wants-to-relax-student-loan-debt-rules> [<https://perma.cc/HV78-FGTR>].

ability to discharge student debt.<sup>7</sup> In support of the current process, proponents highlight the general concerns that were present when the bankruptcy code was first amended to prevent the discharge of student loan debt.<sup>8</sup> They fear that graduates who are fully capable of paying off their loans will file for bankruptcy as a means of absconding their obligation to repay outstanding loans.<sup>9</sup> To these supporters, this wanton discharge of loans is a moral failing because federal student loans are funded through taxpayers' dollars; thus graduates have an obligation to repay and finance the program going forward.<sup>10</sup> Acknowledging these arguments, many courts have declined to widen the scope of student loan discharge. According to the U.S. Court of Appeals for the Fifth Circuit, these policy issues "are for Congress, not the courts . . . ; the role of this court is to interpret the laws passed by Congress, not to set bankruptcy policy."<sup>11</sup> The federal courts are beholden to the Federal Bankruptcy Code, specifically § 523(a)(8), the section governing student loan discharged.<sup>12</sup>

Currently, § 523(a)(8) of the bankruptcy code only allows for the discharge of student loans in limited circumstances.<sup>13</sup> In order to discharge student loan debt, a debtor must appear in court for an adversarial proceeding between themselves and the creditor that issued their loan.<sup>14</sup> In order to succeed at the proceeding, the debtor must pass the "*Brunner Test*."<sup>15</sup> The *Brunner Test* requires debtors to show that if they were forced to repay their loans, they would be subject to "undue hardship."<sup>16</sup> In practice, passing the *Brunner Test* is no easy feat, and student debtors, aware that they are subjected to an adversarial proceeding with slim chances of success, are often dissuaded from even attempting to discharge their loans.<sup>17</sup>

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<sup>7</sup> Thomas v. Dep't of Educ., 931 F.3d 449, 455 (5th Cir. 2019); see also Mike Curley, 5th Circ. Defends Difficulty of Discharging Student Loans, LAW360 (July 31, 2019), <https://www-law360-com.libproxy1.usc.edu/articles/1183745/5th-circ-defends-difficulty-of-discharging-student-loans> [<https://perma.cc/YM6E-PNHQ>].

<sup>8</sup> See *id.*

<sup>9</sup> Thad Collins, Note, *Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8)*, 75 IOWA L. REV. 733, 740 (1990).

<sup>10</sup> *Id.*

<sup>11</sup> Curley, *supra* note 7.

<sup>12</sup> *Id.*; 11 U.S.C. § 523(a)(8) (2018).

<sup>13</sup> See *id.* § 523; Curly, *supra* note 7

<sup>14</sup> Steven Werth, *How to Discharge Student Debt: A Look at the Brunner Test*, LAW360 (June 11, 2019), <https://www-law360-com.libproxy1.usc.edu/articles/1168039/how-to-discharge-student-debt-a-look-at-the-brunner-test> [<https://perma.cc/TG2J-HK57>].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *id.*

History shows, however, that courts are not incapable of expanding the scope of student loan discharge, despite the strict requirements of the bankruptcy code.<sup>18</sup> In 2016, a new interpretation of § 523(a)(8) allowed for a wide array of student loans to be discharged.<sup>19</sup> Prior to this new interpretation, educational loans essentially could only be discharged upon a showing of undue hardship.<sup>20</sup> The watershed interpretation allowed for certain non-federal educational loans to be discharged freely and without proof of undue hardship.<sup>21</sup>

Reinterpreting parts of § 523(a)(8) to reduce its scope would create a middle ground between those who believe that student loan discharge should be nearly impossible and those who believe that there should be no prohibition on discharge whatsoever. Reinterpretation of § 523(a)(8) would not allow for any student debtor to discharge their loans freely, but it may allow certain financially destitute debtors to discharge their loans without having to convince courts of undue hardship.

Specifically, this Note suggests a reinterpretation of § 523(a)(8) that will allow students who attended schools that did not provide them with gainful employment opportunities to discharge their loans without the burden of showing undue hardship. This is an adequate compromise between those advocating for feasible discharge of student loan debt and those advocating for stricter discharge requirements. This interpretation will not apply to all debtors: only those who are incapable of paying off their loans due to the poor quality of their education would qualify under this proposal. It will expand the scope of what types of loans can be discharged, while preventing graduates who can pay off their loans from discharging them freely. However, before such an interpretation can be properly analyzed, some understanding is necessary of Chapter 7 bankruptcy, § 523(a)(8), its history, and the policy behind the law.

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<sup>18</sup> See *McDaniel v. Navient Solutions*, 590 B.R. 537, 547 (Bankr. D. Colo. 2018).

<sup>19</sup> See *Campbell v. Citibank*, 547 B.R. 49, 55 (Bankr. E. D. N.Y. 2016).

<sup>20</sup> *Id.*

<sup>21</sup> See *id.*

## II. HISTORY AND BACKGROUND

### A. CHAPTER 7 BANKRUPTCY

#### 1. Initiating the Proceeding

Chapter 7 bankruptcy is the most common bankruptcy proceeding.<sup>22</sup> Chapter 7 refers to Chapter 7 of Title 11 of the U.S. Code. This section details liquidation bankruptcies in which a debtor's assets will be sold to pay off their existing debts.<sup>23</sup> If there is an outstanding balance owed after the sale of the debtor's assets, the debtor will no longer be personally liable for those debts barring certain exceptions.<sup>24</sup> To initiate a Chapter 7 bankruptcy, a debtor must file a petition with a bankruptcy court and be deemed eligible.<sup>25</sup>

The first step in determining eligibility is a means test.<sup>26</sup> First, debtors must calculate their household monthly income. If the debtor's household income is less than the median income for a household of their size in their state, they pass the means test.<sup>27</sup> If their income is more than the median income, then a deeper inquiry is required to determine eligibility.<sup>28</sup> If their income is more than the median, debtors then must calculate their disposable income by deducting specific monthly expenses from their current monthly income.<sup>29</sup> Subsequently, they must determine whether they have enough disposable income after monthly expenses to pay a portion of unsecured debts.<sup>30</sup> If debtors have enough disposable income, they are expected to use that income to pay off those debts, and thus are ineligible for discharge of debt through bankruptcy.<sup>31</sup>

After a debtor is deemed eligible through the means test, the debtor must file additional forms that contain (1) a list of all of their creditors and

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<sup>22</sup> *Chapter 7 Bankruptcy Basic*, UNITED STATES COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> [<https://perma.cc/3U2T-EF9J>].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Cara O'Neill, *The Bankruptcy Means Test: Are You Eligible for Chapter 7 Bankruptcy*, NOLO, <https://www.nolo.com/legal-encyclopedia/chapter-7-bankruptcy-means-test-eligibility-29907.html> [<https://perma.cc/Q48R-8KQ4>].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

the amount and nature of their claims; (2) the source, amount, and frequency of the debtor's income; (3) a list of all of the debtor's property; and (4) a detailed list of the debtor's monthly living expenses, such as food, clothing, shelter, utilities, taxes, transportation, and medicine.<sup>32</sup> In regard to the debtor's property, the debtor must identify "exempt" property.<sup>33</sup> Exempt property is property that the state is not allowed to liquidate pursuant to federal bankruptcy law.<sup>34</sup> Typically, homes, primary vehicles, and equipment for work are covered under this provision.<sup>35</sup> Nonexempt property is collected by the state and liquidated to pay off the debtor's creditors.<sup>36</sup> However, given the low income of the typical debtor filing for Chapter 7 bankruptcy, the majority of Chapter 7 cases are "no asset cases," meaning debtors do not give up any of their possessions.<sup>37</sup>

Once eligibility is determined and a petition is filed, a court-appointed trustee is assigned to administer the case and liquidate the debtor's nonexempt assets.<sup>38</sup> At this junction in time, the court "automatic[ally] stay[s]" most collections against the debtor, meaning creditors may not initiate or continue lawsuits, wage garnishments, or contact the debtor demanding payment.<sup>39</sup>

## 2. Effects of Bankruptcy

After the debtor's nonexempt assets are liquidated and applied to their outstanding debts, the court then determines which debts are discharged, thereby releasing the debtor from any personal liability in repaying them.<sup>40</sup> However, this discharge of debt comes at a high price. After filing for Chapter 7 bankruptcy, a debtor's credit score will typically plummet between 130 and 200 points<sup>41</sup> and the bankruptcy will remain on their credit

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *What Is Chapter 7 Bankruptcy?*, DEBT.ORG, <https://www.debt.org/bankruptcy/chapter-7/> [<https://perma.cc/QV44-3P76>].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Thomas Reuters, *Advantages and Disadvantage of Chapter 7 Bankruptcy*, FINDLAW, <https://bankruptcy.findlaw.com/chapter-7/pros-and-cons-of-declaring-bankruptcy-under-chapter-7.html> [<https://perma.cc/FH88-BUAW>].

<sup>41</sup> Clint Proctor, *A Bankruptcy Will Stay on Your Credit Report for 7 to 10 Years, but There Are Ways to Rebuild Your Credit*, BUSINESS INSIDER (June 3, 2020, 2:27 PM), <https://www.businessinsider.com/personal-finance/how-long-does-bankruptcy-stay-on-your-credit-report> [<https://perma.cc/X7J5-T8FT>].

reports for up to ten years.<sup>42</sup> As a result, the debtor will lose their credit cards, lose any nonexempt assets, and find it difficult to get a mortgage on a home.<sup>43</sup> Considering these highly detrimental effects, Chapter 7 bankruptcy should not be utilized by those who may have other options to help climb out of debt. However, for many, these detrimental effects may be well worth the fresh start granted after bankruptcy; most debts will be discharged, and credit scores can be rebuilt over time.

### 3. Exceptions to Discharge

While most debts are discharged through a Chapter 7 proceeding, there are some exceptions. These exceptions are detailed in § 523 of the federal bankruptcy code.<sup>44</sup> There is a moral underpinning to the policy behind preventing the discharge of most of these exceptions. For example, a debtor is prevented from discharging debts for alimony and child support,<sup>45</sup> debts for willful and malicious injury to an entity or property of another entity,<sup>46</sup> and certain taxes.<sup>47</sup> An argument can be made for these exceptions: a debtor should not be able to leave their former spouse and child financially destitute; a debtor should not be able to physically harm someone and sidestep the punishment through a mechanism of the court; and a debtor should not be able to shirk off their societal obligation to pay taxes with a lower credit score as their only punishment.

Curiously however, included in these exceptions is § 523(a)(8)—the provision preventing a debtor from discharging their student loans absent undue hardship.<sup>48</sup> Unlike the aforementioned exceptions, the policy rationale for not allowing a debtor to discharge their student loans is not as clear. While an argument can be made for the responsibility of a student to pay off their loans, this exception does not carry the punitive implications of the other exceptions. If one assaults someone else, for example, the inability to discharge the financial penalty incurred from that assault may serve as a necessary deterrent against future bad acts. There is no precipitant immoral act, however, when it comes to student loans—the debtor decided to better his or herself through education, harming no other party in the process. The policy rationale behind student loans is not the same as the other exceptions,

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See generally* 11 U.S.C. § 523 (2018)).

<sup>45</sup> *Id.* § 523(a)(5).

<sup>46</sup> *Id.* § 523(a)(6).

<sup>47</sup> *Id.* § 523(a)(1).

<sup>48</sup> *Id.* § 523(a)(8).

but one still exists. In order to understand the rationale behind this policy, an understanding of the student loan market and a history of the § 523(a)(8) student loan exception is required.

## B. STUDENT LOANS

Student loans can be obtained through the federal government or the private sector.<sup>49</sup> Today, and historically, federal student loans are more widely distributed than private loans.<sup>50</sup> In the last two decades, federal student loans comprised between 70 and 90 percent of the student loan market.<sup>51</sup> There are three types of federal student loans: Stafford loans, Perkins loans, and PLUS loans.<sup>52</sup>

Stafford loans, the most commonly used student loan, offer below-market interest rates and are subject to certain restrictions on eligibility and borrowing limits.<sup>53</sup> Stafford loans can be either subsidized or unsubsidized.<sup>54</sup> The difference between the two variants is that subsidized loans do not accrue interest during certain periods.<sup>55</sup> To qualify for a subsidized loan, the borrower must be an undergraduate student, be enrolled at least half-time, and demonstrate financial need.<sup>56</sup> To qualify for an unsubsidized loan, however, a borrower need only show that they are enrolled at least half-time.<sup>57</sup> Perkins loans are offered to students demonstrating financial need.<sup>58</sup> A Perkins loan's interest is deferred while the student is in school. After that, the interest rate is set at 5 percent.<sup>59</sup> PLUS loans are offered to parents of undergraduate or graduate students and, unlike the other loans, require risk assessment of the borrower.<sup>60</sup> This assessment typically only prevents parents with an adverse credit history from receiving a loan.<sup>61</sup> If approved, all borrowers will be subject to the

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<sup>49</sup> Alexander Yi, *Reforming the Student Debt Market: Income-Related Repayment Plans or Risk-Based Loans?*, 21 VA. J. SOC. POL'Y & L. 511, 516 (2014).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 517.

<sup>53</sup> *Id.* at 518.

<sup>54</sup> *Id.*

<sup>55</sup> Yi, *supra* note 49, at 518.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 519.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Yi, *supra* note 49, at 519.



same fixed interest rate<sup>62</sup>; for example, the interest rate for Direct PLUS loans disbursed from July 2020 to July 2021 is 5.30 percent.<sup>63</sup>

Non-federal student loans can be issued by for-profit organizations or non-profit organizations.<sup>64</sup> The vast majority are issued by for-profit organizations. In the 2011–12 academic year, \$6.4 billion was issued by the private sector while only \$1.7 billion was issued by state and nonprofit organizations.<sup>65</sup> The key difference between federal and nonfederal loans is the stricter issuance requirements and higher interest rates.<sup>66</sup> In order to qualify for a non-federal loan, a borrower is typically subject to a stricter form of risk assessment.<sup>67</sup> Banks will look at current employment, credit score, and debt-to-income ratio.<sup>68</sup> Unlike federal loans, this risk assessment will result in different interest rates for different borrowers, with riskier borrowers receiving less favorable rates.<sup>69</sup> Some non-federal loans do offer fixed interest rates, but those rates are typically higher than those of federal loans.<sup>70</sup>

Outside of the interest rates and borrower requirements, federal and non-federal loans are distinct from one another in how they are treated in a bankruptcy proceeding.<sup>71</sup> Historically, non-federal loans have been much easier to discharge, but today, both federal and non-federal loans are near-equally difficult to discharge.<sup>72</sup> However, there are more carveouts in the federal bankruptcy code allowing for the discharge of non-federal loans.<sup>73</sup>

## C. EVOLUTION OF § 523(a)(8)

### 1. Introduction of the Exception

Prior to 1976, federal bankruptcy law treated all student loans like any other non-exempt debt.<sup>74</sup> Student loans were not excepted from discharge,

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<sup>62</sup> *Federal Interest Rates and Fees*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/loans/interest-rates> [https://perma.cc/HPR7-ANW9]

<sup>63</sup> *Id.*

<sup>64</sup> Yi, *supra* note 49, at 520.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Yi, *supra* note 49, at 521.

<sup>71</sup> See 11 U.S.C. § 523(a)(8) (2018).

<sup>72</sup> See Pallardy, *supra* note 4.

<sup>73</sup> *Id.*

<sup>74</sup> Pallardy, *supra* note 4.

and they could be easily discharged through a Chapter 7 bankruptcy without an adversarial proceeding.<sup>75</sup> However, after a wave of highly publicized cases in which law and medical students discharged their loans immediately after graduation, lobbyists began to petition Congress to make the discharge requirements more stringent.<sup>76</sup> In response to the mounting pressure, Congress enacted the first restriction on the discharge of student loan debt in the Educational Amendment of 1976.<sup>77</sup> This amendment to the federal bankruptcy code dictated that federally insured student loans could not be discharged prior to five years after the loan was first due.<sup>78</sup> Considering later amendments to the code, this change was relatively nonrestrictive—it did not apply to loans issued by non-governmental institutions, for-profit or nonprofit, and treated federally insured student loans like any other dischargeable debt after five years.<sup>79</sup>

The code was once again amended in the Bankruptcy Reform Act of 1978.<sup>80</sup> Lobbyists and certain politicians felt that the 1976 revisions did not prevent enough unscrupulous students from discharging their loans with little to no consequence.<sup>81</sup> In 1978, a debate erupted between those who wanted to maintain a limited bar to discharge and those who felt that stricter requirements were necessary.<sup>82</sup> In a letter to the U.S. House of Representatives, U.S. Congressman John N. Erlenborn wrote:

Perhaps the most important factor motivating the action of the Education and Labor Committee was our belief that a student loan is a fundamentally different type of obligation from that involving loans for ‘material’ reasons . . . the resources purchased with the proceeds of a student loan are clearly not tangible and, in the vast majority of cases, they contribute to an asset which appreciate[d] in value through the years.<sup>83</sup>

Congressman Erlenborn implies that student loans should be treated differently than non-exempt debts, because an education is an appreciable asset—just because a recent graduate may struggle financially now, does

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Higher Education Act of 1965, Pub. L. No. 94-482, 90 Stat. 2081, 2106–08.

<sup>78</sup> *Id.*

<sup>79</sup> Compare *id.*, with 11 U.S.C. § 523(a)(8) (2018).

<sup>80</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2638.

<sup>81</sup> See, e.g., H.R. REP. NO. 95-595, at 158–59 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6119 (statement of Exec. Dir. Ronald J. Iverson).

<sup>82</sup> Compare *id.*, with *id.* H.R. REP. NO. 95-595, at 536–39 (statement of Rep. Allen E. Ertel).

<sup>83</sup> H.R. REP. NO. 95-595, at 156 (statement of Rep. John N. Erlenborn).

not mean that they will in the future. Additionally, Erlenborn feared that allowing student debtors to easily discharge their loans would incentivize students who were otherwise able to pay their loans to discharge them instead. Erlenborn backed up his assertion, citing a New York Times article reporting one such egregious discharge.<sup>84</sup> The article reported that student loan discharge had “become a fast-accelerating trend,” noting that, “[a]bout 12,000 former students filed claims of bankruptcy on about \$21 million in loans from programs underwritten by Federal and state governments between 1974 and 1976.<sup>85</sup> In the 15 years before that, 9,000 former students filed claims on a total of \$17 million.”<sup>86</sup>

Additionally, around this time, government expenditures on student loan funding increased dramatically.<sup>87</sup> In the 1970s there were two federal student loan programs: The National Direct Student Loan (NDSL) program and the Guaranteed Student Loan (GSL) program.<sup>88</sup> Between 1960 and 1975, NDSL expenditures rose from \$40 million to \$345 million, and between 1968 to 1975, GSL expenditures increased from \$29 million to \$339 million.<sup>89</sup> As these programs expanded and more students relied on these funds, many viewed student loans as taxpayer investments.<sup>90</sup> The student loans, guaranteed by tax dollars, would be repaid with interest, helping refinance the program for future generations.<sup>91</sup> Under this view, allowing debtors to freely discharge their debt would be highly detrimental to the program and an affront to taxpayers at large.

Another plausible reason for constructing barriers to bankruptcy discharge is that federal student loans are significantly easier to obtain and enjoy lower interest rates than private loans.<sup>92</sup> Thus, the advantages associated with federal student loans should come at the expense of more protection for taxpayer investment in the form of stringent discharge requirements. For those in support of this policy, strict discharge

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<sup>84</sup> *Many Students Avoiding Payment of Loans by Filing for Bankruptcy*, N.Y. TIMES, Nov. 21, 1976, at 1, <https://timesmachine.nytimes.com/timesmachine/1976/11/21/355523162.pdf> [<https://perma.cc/E722-6WZ9>].

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Collins, *supra* note 9, at 738.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Cf. John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the “Debt” Paradigm*, 109 GEO. L.J. 5, 18 (2020); Johnathon D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. ON LEGIS., 99, 110, 114–15 (2016).

requirements were necessary to counterbalance the benefits associated with federal student loans compared to non-federal loans.

On the other side of debate stood lobbyist groups such as the National Student Lobby (“NSL”). NSL believed that the restrictions on discharge were “a punitive measure which unfairly discriminates against every student who relies on loans to help pay the cost of education.”<sup>93</sup> In support, NSL presented evidence that the amount of student loans discharged had been overestimated and that discharge was not the epidemic it was widely perceived to be.<sup>94</sup>

With both these arguments in mind, Congress seemingly aligned with the advocates for stricter requirements for discharge when enacting the Bankruptcy Reform Act of 1978.<sup>95</sup> In the Act, Congress added § 523(a)(8) to the U.S. Bankruptcy Code:

§ 523. Exceptions to Discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

....

(8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless—

(A) such loan first became due before five years before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor’s dependents.

....<sup>96</sup>

A House Report notes that “[t]his provision is broader than current law which is limited to federally insured loans. Only educational loans owing to a governmental unit or a nonprofit institution of higher education are made nondischargeable under this paragraph.”<sup>97</sup> In other words, the change

<sup>93</sup> H.R. REP. No. 95-595, at 160 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6121.

<sup>94</sup> *Id.*

<sup>95</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590–91 (codified at 11 U.S.C. § 523).

<sup>96</sup> *Id.* at 2638.

<sup>97</sup> H.R. REP. 95-595, at 549.

in the code prohibited the discharge of student loans issued by a nongovernmental, nonprofit institution prior to five years after the loan was due absent undue hardship. Significantly, the revised code excluded student loans issued by for-profit institutions,<sup>98</sup> meaning that these loans can be discharged through bankruptcy similar to other non-exempt debts.

## 2. Defining Undue Hardship

The Bankruptcy Reform Act of 1978 merely laid the groundwork for student loan discharge through § 523. Implementation by bankruptcy courts across the country was necessary to give the provision teeth. With this implementation came the courts statutory interpretation of § 523. Quickly after the amendment was implemented, courts began to grapple with one phrase in the code: “undue hardship.” In 1987, a New York District Court in *Brunner v. New York State Higher Education Services Corporation* created a test to provide a working definition for “undue hardship.”<sup>99</sup>

In *Brunner.*, New York State Higher Education Services (“NYSHE”) appealed to the U.S. District Court of the Southern District of New York after the bankruptcy court discharged educational loans issued by NYSHE to Marie Brunner.<sup>100</sup> Brunner had previously requested loans from NYSHE in order to help pay for her undergraduate and master’s degrees.<sup>101</sup> Nine months after receiving her master’s degree in social work, Brunner filed for bankruptcy and initiated an adversarial proceeding against NYSHE to discharge her student loans.<sup>102</sup> The bankruptcy court granted her request pursuant to § 523(a)(8)(B), which allows debtors to discharge student loans through bankruptcy upon proof that repayment would result in “undue hardship.”<sup>103</sup> The court believed that Brunner, having little economic resources, would be unable to continue to pay her loans without experiencing undue hardship, so the discharge was appropriate.<sup>104</sup>

This decision was overturned by the district court.<sup>105</sup> The district court used this case to clarify the definition of the term “undue hardship” in

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<sup>98</sup> See § 523, 92 Stat. at 2590–91.

<sup>99</sup> See *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752 (S.D.N.Y. 1985).

<sup>100</sup> *Id.* at 753.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See *Brunner*, 46 B.R. at 754.

<sup>105</sup> See *id.*

§ 523(a)(8)(B).<sup>106</sup> Given that “undue hardship” had not been defined in the U.S. Bankruptcy Code, the court was responsible for defining the term according to congressional intent.<sup>107</sup> The court found that the phrase “undue hardship” originated from a draft bill proposed by the Commission on the Bankruptcy Laws of the United States (the “Commission”).<sup>108</sup> The court looked to the language of the 1973 Report<sup>109</sup> prepared by the Commission, which stated that the provision was drafted in response to “rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts.”<sup>110</sup> The report stated that this increased use of bankruptcy to discharge student loans was contrary to the general policy that, “a loan . . . that enables a person to earn substantially greater income over his working life should not . . . be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt.”<sup>111</sup> In 1985, when this case was decided, a debtor was able to discharge his student loans freely after a five-year period.<sup>112</sup> It was only before that period had elapsed that a debtor had to show “undue hardship” to discharge student loans.<sup>113</sup>

The district court, using this policy information, reasoned that Congress intended to make it difficult to discharge student loan debt and that a showing of “undue hardship” must consider more than just current finances.<sup>114</sup> Assuming that a recent graduate is likely at the lowest point of their earning potential, it is unlikely that they have “demonstrated that for any reason he is able to earn sufficient income” to pay for the loan by only showing that they have limited funds at the moment.<sup>115</sup> Adopting this logic, the court formulated a test that incorporates future earning potential.

The court determined that a showing of undue hardship requires:

- (1) That the debtor cannot, based on current income and expenses, maintain a “minimal” standard of

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<sup>106</sup> *Id.* at 753–54.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> H.R. Doc. No. 93-137, Pt. I, 93d Cong., 1st Sess. (1973), as reprinted in B. COLLIER ON BANKRUPTCY app. pt. 4(c) (16th ed. 2021).

<sup>110</sup> Brunner, 46 B.R. at 754 (quoting *id.*).

<sup>111</sup> *Id.* (quoting H.R. Doc. No. 93-137).

<sup>112</sup> See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590–91, abrogated by Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837 (1998).

<sup>113</sup> See *id.*

<sup>114</sup> Brunner, 46 B.R. at 755.

<sup>115</sup> *Id.* (quoting H.R. Doc. No. 93-137).

- living for himself or herself and his or her dependents if forced to repay the loans,
- (2) That this state of affairs is likely to persist for a significant portion of the repayment period of the student loan, and
  - (3) That the debtor has made good faith efforts to repay the loans.<sup>116</sup>

The court rationalized that in order to determine whether the loan can be repaid, a court must consider the future earnings of the debtor.<sup>117</sup> Considering that educational loans are sought to increase one's earning potential over the course of years, it is rational to assume that even if a debtor is struggling financially now, that may not be the case in the future. In order to fulfill the second condition, the debtor must show a "certainty of hopelessness" that suggests their financial turmoil will persist indefinitely.<sup>118</sup>

The court found that Brunner had failed all three prongs of the new test.<sup>119</sup> In regard to the first prong, Brunner presented inadequate evidence evincing that her expenses were such that her current income was not providing a "minimal standard of living."<sup>120</sup> As evidence for the second prong, Brunner stated that she had sent out "over a hundred" resumes to jobs within her field and received no offers.<sup>121</sup> Additionally, Brunner claimed that her ability to work was impaired by depression and anxiety.<sup>122</sup> The court found that, despite these claims, Brunner still failed this prong because she could still seek employment outside her field and there was no evidence that her anxiety and depression affected her capacity to work.<sup>123</sup> Finally, Brunner failed the third prong because she sought to discharge her loans within a month of her loan payment being due and had not made any payments towards it.<sup>124</sup>

After losing her case in the district court, Brunner appealed.<sup>125</sup> The Second Circuit heard her case and affirmed the decision of the lower

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<sup>116</sup> Brunner, 46 B.R. at 756.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 755.

<sup>119</sup> *Id.* at 758.

<sup>120</sup> Brunner, 46 B.R. at 757.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *See Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

court.<sup>126</sup> In affirming the decision of the lower court, the Second Circuit, acknowledged that little authority existed on what constitutes “undue hardship,” before adopting the district court’s test.<sup>127</sup> With this decision, the newly coined “*Brunner Test*,” was enshrined in common law and has persisted relatively unchallenged by appellate courts ever since.<sup>128</sup> As it stands, eleven appellate circuits have adopted the *Brunner Test*.<sup>129</sup>

### 3. The Code Evolves: The *Brunner Test* Remains Unchanged

While the *Brunner Test* has remained unchanged since its inception in 1987, the student loan discharge provision in the bankruptcy code has continued to evolve. Section 523 was amended in the Bankruptcy Amendments and Federal Judgeship Act of 1984.<sup>130</sup> The amendment removed “of higher education” from § 523(a)(8), thus changing the section to, “[a] discharge under section 727, 1141, or 1328(b) does not discharge an individual debtor from any debt . . . to a governmental unit, or a nonprofit institution, for an educational loan unless[.]”<sup>131</sup> In effect, this broadened the exception to discharge to educational loans distributed from any nonprofit institution, not just nonprofit organizations of higher education.

The next change occurred in the Crime Control Act of 1990.<sup>132</sup> The Act increased the period for which a student had to wait before being able to discharge their student loans without a showing of undue hardship from five years to seven years after the loan first became due.<sup>133</sup> This timeframe was once again amended in the Higher Education Amendments of 1998,<sup>134</sup> which rewrote the Statute to prevent a debtor from freely discharging student loans after a certain time frame:

#### §523. Exceptions to Discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Werth, *supra* note 14.

<sup>129</sup> See *id.*

<sup>130</sup> Bankruptcy Amendments and Federal Judgeship Act of 1981, Pub. L. No. 98-353, § 523(a)(8), 98 Stat. 333, 374 (1984).

<sup>131</sup> *Id.*

<sup>132</sup> Crime Control Act of 1990 Pub. L. No. 101-647, § 361, 104 Stat. 4789, 4964–65 (1990).

<sup>133</sup> *Id.*

<sup>134</sup> Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837 (1998).



....

(8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

....<sup>135</sup>

After this amendment, students could no longer discharge their loans freely after a designated time frame. The only avenue left for a student to discharge their loans was by a showing of undue hardship. However, the tightening of restrictions did not end there. The final change to § 523(a)(8) occurred in the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005.<sup>136</sup> This amended 523(a)(8) to state:

§523. Exceptions to Discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

....

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as

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<sup>135</sup> *Id.*

<sup>136</sup> Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, § 224(c), 119 Stat. 23, 64–65 (2005).

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

...<sup>137</sup>

Private student loans no longer needed to be issued by a nonprofit institution to be exempted from discharge.<sup>138</sup> While there is some dispute,<sup>139</sup> this section is generally read to mean that if a student takes out a loan from a private bank and uses some of those funds to help them pay for their education, those loans cannot be discharged without a showing of undue hardship.<sup>140</sup> This rang the death knell for the vast majority of student debtors' ability to discharge their student loans. The expansive list of loan types covered under this section, coupled with the high standards of the *Brunner Test*, reduced the number of debtors seeking discharge of student loans drastically.<sup>141</sup>

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., Crocker v. Navient Sols., LLC (*In re Crocker*), 941 F.3d 206, 223 (5th Cir. 2019) (“... [T]he [2005] amendment’s purpose was to make qualified private student loans harder to discharge, prohibiting discharge in all cases, unless repayment would create ‘undue hardship’ for the debtor.” (quotation marks omitted)).

<sup>139</sup> For example, the court in *Essangui v. SLF V-2015 Trust*, described the debate as follows:

In what appears to be a majority of the decisions, courts have focused on the stated, overarching policy objectives underlying section 523(a)(8) and BAPCPA, and have taken a broad and somewhat liberal approach to interpreting the statutory language. . . . This line of cases basically includes any loan used at least in part for educational purposes—whether a public or a private loan—within the purview of section 523(a)(8). . . . More recent decisions have questioned this result. These courts tend to focus more on the precise language and structure of the statute and, through that prism, express several concerns with the majority’s approach.

*Essangui v. SLF V-2015 Tr.* (*In re Essangui*), 573 B.R. 614, 621 (Bankr. D. Md. 2017) (footnotes omitted) (adopting the latter approach).

<sup>140</sup> See, e.g., Thomas v. Dep’t of Educ. (*In re Thomas*), 931 F.3d 449, 453 (5th Cir. 2019) (“Section 523(a)(8) as it stands today excepts virtually all student loans from discharge unless requiring repayment would impose an undue hardship . . . .” (quotation marks omitted)); Brown v. Citibank, N.A. (*In re Brown*), 539 B.R. 853, 859 (Bankr. S.D. Cal. 2015); Beesley v. Royal Bank of Can. (*In re Beesley*), 2013 Bankr. LEXIS 3811, at \*5 (Bankr. W.D. Pa. Sept. 13, 2013).

<sup>141</sup> See, e.g., Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 399 (2013) (“My review of bankruptcy cases also revealed that debtors overwhelmingly self-select to not discharge student loan debt in bankruptcy. Of the 814 cases with student loan debt, only two Chapter 7 debtors and one 13 Chapter debtor filed adversary proceedings to have their student loans discharged.”); Matthew Bruckner et al., *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. COLO. L. REV. 183, 188 (2020) (“... [F]ew student loan borrowers attempt to discharge their student loan debt, even in the face of significant financial hardship.”).

### III. BRUNNER TEST IN PRACTICE

#### A. SUCCESS RATES

As of 2012, less than 0.1 percent of student borrowers had successfully fully or partially discharged their student loans.<sup>142</sup> Jason Iuliano calculated this number in a study published in the *American Bankruptcy Law Journal*, though it requires context. Iuliano notes that only 0.1 percent of the approximately 240,000 student borrowers filing for bankruptcy filed an adversary proceeding to discharge their student loans.<sup>143</sup> In other words, 99.9 percent of the individuals who have student loans and file for bankruptcy only file to discharge their other non-educational debts. Iuliano states that, contrary to popular belief, the 0.1 percent who proceed with the adversarial process to discharge their student loans were relatively successful in obtaining some form of relief.<sup>144</sup> Specifically, 51 of the 213 people that attempted discharge (25 percent) received a full discharge, whereas 30 (14 percent) received a partial discharge.<sup>145</sup>

At first glance, this may suggest that the *Brunner* Test is not as strict as it is suggested to be. However, there is a host of factors that must be considered before reaching this conclusion.

On average, debtors who seek student loan discharge (“Discharge Seekers”) are more financially destitute than student debtors who do not attempt to discharge their student loans when filing for bankruptcy (“Non-Discharge Seekers”). The chart below indicates that Discharge Seekers have a \$329 deficit between their monthly income and expenses while Non-Discharge Seekers have a \$29 surplus:

Characteristic	Discharge Seekers			Non-Discharge Seekers		
	Median	Mean	Std. Dev.	Median	Mean	Std. Dev.
Monthly Income	1,704	1,932	1,242	2,423	2,796	2,346
Monthly Expenses	1,997	2,268	1,440	2,451	2,775	2,299
Disposable Income	-49	-329	864	2	29	1,118
Prior Year Income	21,754	23,850	25,705	25,345	30,132	28,092
Total Assets	13,211	79,969	290,534	39,235	103,107	159,410
Total Liabilities	129,966	214,445	460,796	98,965	149,516	187,131
Educational Debt	47,610	80,746	89,327	9,252	20,538	28,380

Iuliano, *supra* note 142, at 510.

<sup>142</sup> Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L. J. 495, 505 (2012).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 510.

Even more drastic is the discrepancy between the two groups' educational debt. Discharge Seekers have a mean educational debt of \$80,746, whereas Non-Discharge Seekers have an average of \$20,538. Despite the notable success rate for those that proceed with student loan discharge, this data suggests that discharge seekers are in much more dire financial straits than the typical debtor. If the Non-Discharge Seekers sought discharge of student loans and maintained the same income, expenses, and debt, their 34-percent success rate of partial or full discharge would certainly decrease.

While it may be unknown how many Non-Discharge Seekers would successfully acquire a discharge, it is known that less than 0.01 percent of student debtors have successfully discharged any portion of their loans as of 2012. This extremely low figure is due to both the difficulty of the *Brunner* Test and the unwillingness of debtors to even attempt to discharge the loans in the first place.<sup>146</sup>

### B. PASSING THE *BRUNNER* TEST

Passing the *Brunner* Test is a tall order. In *re Nascimento* explained that “the first prong of the *Brunner* Test requires more than a showing of tight finances. In defining undue hardship, courts require more than temporary financial adversity but typically stop short of utter hopelessness.”<sup>147</sup> The question remains: How does the court decide that someone's financial situation lies somewhere between “temporary financial adversity” and “utter hopelessness”? In essence, this question asks the judge to look into the future and decide whether the debtor will be able to escape from a financial rut. Using limited facts, Iuliano's data posits that the following factors are indicative of future inability to pay: the debtor (1) claims a medical hardship, (2) is employed, (3) is sixty years or older, (4) has dependents, (5) is married, or (6) has graduated from the school for which the loans were borrowed.<sup>148</sup>

Most of these factors are not permanent statuses, with the exception of being older than sixty years of age or having a terminal illness. This makes it difficult for courts to determine whether or not these factors will persist in the future. This uncertainty places a sizeable amount of discretion in the hands of the court, risking discrepant outcomes. This discrepancy is apparent when comparing *In re Neal* and *Thomas v. Department of*

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<sup>146</sup> See also Bruckner et al., *supra* note 141, at 188.

<sup>147</sup> U.S. Aid Funds, Inc. v. Nascimento (*In re Nascimento*), 241 B.R. 440, 445 (B.A.P. 9th Cir. 1999).

<sup>148</sup> Iuliano, *supra* note 142, at 513–14.

*Education*.<sup>149</sup> In *Neal*, the court found that a married debtor would have been subject to “undue hardship” under the *Brunner* Test, due to her husband’s inability to find work because of his “diabetes, depression, obesity, and chronic back pain.”<sup>150</sup> However, in *Thomas*, the court concluded that a debtor with “diabetic neuropathy” causing “muscle weakness, numbness, and pain in her legs and feet after prolonged standing,” who “frequently [took] unpaid leave from work . . . to manage her symptoms and [incurred] significant medical expenses,” was ineligible for the exception because she could still find work in “sedentary work environments.”<sup>151</sup> Courts’ inconsistent application of the *Brunner* Test, alongside other factors, may dissuade debtors from even attempting to discharge their loans.

### C. DEBTORS DISSUADED FROM ATTEMPTING TO DISCHARGE

In 2007, of the 169,774 individuals who filed for bankruptcy who had student loans, only 213 attempted to discharge their educational debt.<sup>152</sup> These low numbers are likely attributed to three factors. First, there are other avenues to discharge private student loans outside of bankruptcy.<sup>153</sup> While federal loans can only be discharged through bankruptcy, private loans can be discharged by the institutions that granted them.<sup>154</sup> Whether or not the lender is able to do this depends on a private institution’s procedures. However, as one would imagine, this is likely an uncommon occurrence given the little incentive private institutions have to discharge such loans.<sup>155</sup>

The second factor contributing to lower student loan discharge filing rates is the existence of administrative remedies outside of bankruptcy, such as the William D. Ford Income Contingent Repayment Plan. This plan, with no hardship requirement, allows a debtor to opt into a reduced payment plan requiring considerably smaller payments over a longer time frame.<sup>156</sup> The drawback to this option is that the debtor will pay more over time due to the interest that accrues over this extended repayment period.<sup>157</sup>

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<sup>149</sup> *Neal v. N.H. Higher Educ. Assistance Found. (In re Neal)*, 354 B.R. 583 (Bankr. D.N.H. 2006); *Thomas v. Dep’t of Educ.*, 931 F.3d 449, 452 (5th Cir. 2019).

<sup>150</sup> *Neal*, 931 F.3d at 587.

<sup>151</sup> *Thomas*, 931 F.3d at 450, 452.

<sup>152</sup> *Iuliano*, *supra* note 142, at 505.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *See id.* at 506.

<sup>156</sup> *Id.* at 505.

<sup>157</sup> *Id.*

The third factor is that debtors may be discouraged from pursuing discharges because they perceive low chances of success. A host of reasons contributes to this sentiment. Both the media and lawyers alike establish a narrative surrounding student loan discharge which purports that discharge is nearly impossible to obtain.<sup>158</sup> Additionally, filing for bankruptcy to discharge other types of debts does not require an adversarial proceeding.<sup>159</sup> These debtors are likely dissuaded from the procedural hurdles that accompany adversarial proceedings, such as hiring a lawyer and appearing in court.<sup>160</sup>

Iuliano argues that the *Brunner* Test is not as restrictive as people have been led to believe,<sup>161</sup> but even if Iuliano's analysis is correct, the vast majority of debtors will not be able to discharge their student loans. As it stands, it is mere speculation to assume that Non-Discharge Seekers would find success if they were to subject themselves to the *Brunner* Test.<sup>162</sup> On the other hand, court data shows that *Brunner* Test application is nonuniform and highly discretionary.<sup>163</sup> This likely has a chilling effect on student debtors who qualify for a discharge but do not dare attempt to discharge their student loans. Unsurprisingly, many debtors and jurists are dissatisfied with the *Brunner* Test.<sup>164</sup> Politicians, academics, and judges have since advocated for a new test as to whether educational debt can be discharged.<sup>165</sup>

#### IV. DISSATISFACTION WITH THE *BRUNNER* TEST

##### A. WITHIN THE COURT

As national student loan debt has ballooned, some circuits have taken it upon themselves to employ new tests to make it easier for student debtors to discharge their educational debts. The Eighth Circuit, for example, has

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<sup>158</sup> See *id.* at 506, 522s.

<sup>159</sup> See Austin, *supra* note 141, at 360–362.

<sup>160</sup> See, e.g., Iuliano, *supra* note 142, at 523; Bruckner et al., *supra* note 141, at 188.

<sup>161</sup> See Iuliano, *supra* note 142, at 522–24.

<sup>162</sup> See, e.g., Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1159, 1185 tbl.A5 (2016) (reporting no statistically significant relationship between the debtor's financial circumstances and the likelihood of litigation success in study's sample).

<sup>163</sup> See Bruckner et al., *supra* note 141, at 196–205.

<sup>164</sup> See Iuliano, *supra* note 142, at 522 (“From academics and judges to consumer advocates and journalists, much of the bankruptcy community has mounted a two-pronged attack against the undue hardship standard, arguing that it is too burdensome and applied inconsistently.”).

<sup>165</sup> See, e.g., Bruckner et al., *supra* note 141, at 237–248.

employed a “totality of circumstances” test to determine what constitutes “undue hardship.”<sup>166</sup>

### 1. Eighth Circuit’s “Totality of Circumstances” Test

The Eighth Circuit applies a totality of circumstances test to decide whether a debtor will face “undue hardship” in repaying a student loan.<sup>167</sup> Under this test, the court considers (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.<sup>168</sup>

While both this test and the *Brunner* Test consider the debtor’s past and future financial resources, the totality of circumstances test is broader than the *Brunner* test. First, the totality of circumstances is a factor test in which every element need not be met. On the other hand, under the *Brunner* Test, if one element is not satisfied, the debtor is deemed not to be subject to “undue hardship.”<sup>169</sup> Second, the totality of circumstances test eliminates the third prong of the *Brunner* Test that requires the debtor to show a good faith effort to repay the loan. However, if the totality of circumstances test were to include the good faith effort element, this would likely be to the debtor’s advantage.

In *In re Long*, the Eighth Circuit explained the policy rationale behind the totality of circumstances test.<sup>170</sup> The court found that the strict requirements of the *Brunner* Test are not appropriate given the discretionary nature of § 523(a)(8)(B). More specifically, it emphasized “that requiring our bankruptcy courts to adhere to the strict parameters of [the *Brunner*] test would diminish the inherent discretion contained in §523(a)(8)(B) . . . . [F]airness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.”<sup>171</sup> The Eighth Circuit’s conclusion that courts should approach the question of undue hardship from the standpoint of

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<sup>166</sup> *Educ. Credit Mgmt. Corp. v. Jespersion*, 571 F.3d 775, 779, 779 (8th Cir. 2009); *see also Student Loans Discharges under Totality-of-Circumstances Test*, NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER (May 29, 2018), <https://www.ncbr.org/blog/2018/05/29/student-loans-discharged-under-totality-of-circumstances-test/> [<https://perma.cc/ZRB4-9DJA>].

<sup>167</sup> *See, e.g., Educ. Credit Mgmt. Corp.*, 571 F.3d at 779.

<sup>168</sup> *Id.*

<sup>169</sup> *See Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

<sup>170</sup> *See Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003).

<sup>171</sup> *Id.* at 554.

“fairness and equity” highlights the inflexibility afforded to courts by the *Brunner Test*’s unbending factors.

Consider a hypothetical: A debtor owes \$100,000 in student loan debt after receiving a degree in civil engineering. The day after graduation, the debtor is struck by a car and left crippled. Due to the nature of her degree, her profession would frequently require her to be on construction sites that are not suitable for people with certain physical disabilities. For sake of the hypothetical, assume that her disability bars her from working in this field. Though the debtor can no longer work in her preferred field, she is able to find a much lower paying desk job elsewhere. The debtor might make a decent living, however, at the end of the month she has no money after paying her essential bills (rent, electricity, water). Three years after graduation, she has not made a single payment on her student loans because doing so would not allow her to pay her essential bills.

While this hypothetical is an oversimplification and speculative, it is likely that she would not be able to discharge her loans under the *Brunner Test* because of the final factor—a good faith effort to repay the loan. She may be able to overcome this factor if she could show that she attempted to apply for a reduced payment plan, but if she had not, she would be most likely barred from discharge.<sup>172</sup>

In a “totality of circumstances” jurisdiction, however, her chances of success would be seemingly enhanced. Given the breadth of the third prong—“(3) any other relevant facts and circumstances surrounding each particular bankruptcy case”<sup>173</sup>—she likely would have a compelling equity argument to seek discharge from her debt. A possible argument could turn on the debtor’s inability to pay off debt due to circumstances out of her control that deprive her of any chance to reap the benefits of her degree. The debtor’s story is sympathetic because she was robbed of her chance to work in her field of choice and subsequently is left impoverished. This type of scenario was not considered when § 523(a)(8) was drafted—the debtor here is not an unscrupulous law or medical student who discharged her student debts shortly after graduation to evade repayment despite the ability to do so.

In theory, this hypothetical debtor would have a greater chance of discharge in a “totality of circumstances” jurisdiction, but data suggests that this test has made little difference in the rate at which discharges were

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<sup>172</sup> See, e.g., *Alderete v. Educ. Credit Mgmt. Corp.* (*In re Alderete*), 412 F.3d 1200, 1206 (10th Cir. 2005).

<sup>173</sup> *Id.*



granted.<sup>174</sup> A study reported in Rafael Pardo and Michelle Lacey’s article, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, indicates that 49 percent of debtors who claimed undue hardship under the *Brunner* Test received a discharge, while 46 percent of debtors who claimed undue hardship under the totality of circumstances test received a discharge.<sup>175</sup> Though it is uncertain whether or not the surveyed debtors subjected to the *Brunner* Test would have passed the totality of circumstances test or vice-versa, these numbers are alarming given the judicial intent behind the totality of circumstances test.

Returning to *In re Long*, the case that created the test, the court explicitly stated, “[t]hat requiring our bankruptcy courts to adhere to the strict parameters of [the *Brunner*] test would diminish the inherent discretion contained in § 523(a)(8)(B) . . . fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.”<sup>176</sup> Thus, the court suggested that it created this test with the intent of having more discharges granted over the *Brunner* Test. The similar discharge rates could possibly be attributed to extrajudicial factors, such as the surveyed debtors being unlikely candidates for discharge regardless, or the fact that strict judges are still allowed to use their discretion in totality of circumstances jurisdictions. The fact remains, however, that the totality of circumstances test has not made its intended impact.

## 2. Evading the *Brunner* Test Entirely

The failure of the totality of circumstances method highlights that, even with a more lenient test, requiring proof of “undue hardship” most likely will always stand between some struggling student debtors and discharges. Acknowledging this, certain resourceful district courts have looked back at the plain language of § 523(a)(8)(A)(ii) to experiment with new interpretations that allow for easier discharge for certain classes of students.

In 2018, in *In re McDaniel*, a bankruptcy court in Colorado turned its eyes to § 523(a)(8)(A)(ii).<sup>177</sup> This section dictates that a debtor is not entitled to a discharge of “an obligation to repay funds received as an

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<sup>174</sup> Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 487 (2005).

<sup>175</sup> *Id.* at 487.

<sup>176</sup> *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003).

<sup>177</sup> *McDaniel v. Navient Sols. Inc. (In re McDaniel)*, 590 B.R. 537, 544–45 (Bankr. D. Colo. 2018).

educational benefit, scholarship, or stipend” without a showing of undue hardship.<sup>178</sup> Prior to this point, courts had interpreted this section broadly to include any non-federally issued loan.<sup>179</sup> Using a textualist approach, the court in *McDaniel* compared the language of this provision with the plain language of the sections above and below it.<sup>180</sup> Section 523(a)(8)(A)(i) dictates that a debtor is not able to discharge “an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit or nonprofit institution” without a showing of undue hardship.<sup>181</sup> Section 523 (a)(8)(B) states that a debtor cannot discharge “any other educational *loan* that is a qualified education loan as defined in § 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual” without a showing of undue hardship.<sup>182</sup>

Comparing § 523(a)(8)(A)(ii) to § 523(a)(8)(A)(i) and § 523(a)(8)(B), the court noted the intentional omission of the word loan. In its place was “educational benefit, scholarship, or stipend.”<sup>183</sup> The court noted that “when ‘Congress includes particular language in one section of a statute but omits it in another’—*let alone in the very next provision*—this Court ‘presume[s]’ that Congress intended a difference in meaning.”<sup>184</sup> The intended meaning for educational benefits, scholarships, or stipends, thus, was “funds which are not generally required to be repaid by the recipient . . . they are forms of conditional grants, *not* loans.”<sup>185</sup> An example of this category of grants could include a stipend issued by a non-governmental agency that would not require repayment unless certain conditions failed to be met, such as dropping out of school prior to graduation.

This new interpretation of § 528(a)(8)(A)(ii) is important because certain courts are actively butting against the Fifth Circuits assumption that “it is up to Congress, not the courts, to change the rules for discharging student debt in bankruptcy[.]”<sup>186</sup> While a wholesale repudiation of the *Brunner* Test is unlikely given its longstanding judicial precedent, appellate courts are now realizing that a slight ambiguity in the statute can be utilized

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<sup>178</sup> 11 U.S.C. § 523(a)(8)(A)(ii) (2020).

<sup>179</sup> See *McDaniel*, 590 B.R. at 546–46.

<sup>180</sup> *Id.* at 546–47.

<sup>181</sup> *Id.* at 547.

<sup>182</sup> I.R.C. § 221(d)(1).

<sup>183</sup> 11 U.S.C. § 523(a)(8)(A)(ii).

<sup>184</sup> *McDaniel*, 590 B.R. at 547.

<sup>185</sup> *Id.* at 549.

<sup>186</sup> Curley, *supra* note 7.

to circumvent the test entirely. This loophole is unavailable to the vast majority of student debtors—it only opens the doors to those who have conditional grants not encompassed by the other sections. However, it is not its effect that is most important, it is the message that it sends. The loophole signals that certain courts believe that the availability of student loan discharge should be expanded and that they are willing to actively participate in that expansion.

## B. OUTSIDE THE COURT

It may be the case that the judicial reinterpretation of the statute is due to pressure being applied outside the court. A large swath of politicians, lobbyists, and lawyers have voiced concerns over the current state of affairs of student loan discharge.<sup>187</sup> Most notably, a commission of the American Bankruptcy Institute (“ABI”) issued a 274-page report addressing a wide array of deficiencies in the bankruptcy process, including student loans.<sup>188</sup> The commission did not support making student loans freely dischargeable, but it did advocate amending the governing statute to relaxed the discharge standard.<sup>189</sup> One suggested amendment was to return to the seven-year rule that once allowed a debtor to freely discharge student loans after seven years had elapsed from the payment’s first due date.<sup>190</sup> It also advocated for the removal of any protection for nongovernmental loans in the statute, effectively making private loans freely dischargeable.<sup>191</sup>

In addition to statutory amendments, the commission suggested a host of regulatory measures designed to prevent certain debtors from being subject to the *Brunner Test*.<sup>192</sup> The Commission suggested that “the Department of Education through regulation or interpretive guidance provide that student loan creditors should not oppose the dischargeability of student loans of persons (i) who are eligible for Social Security or veterans disability benefits or (ii) who fall below certain poverty-level thresholds.”<sup>193</sup>

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<sup>187</sup> See Ryan Boysen, *Bankruptcy Institute Wants to Relax Student Loan Debt Rules*, LAW360 (Apr. 11, 2019, 5:35 PM), <https://www-law360-com.libproxy1.usc.edu/articles/1148991/bankruptcy-institute-wants-to-relax-student-loan-debt-rules> [<https://perma.cc/66RX-F6YF>].

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> AMERICAN BANKRUPTCY INSTITUTE, FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 9 (2019), <https://www.nclc.org/images/pdf/bankruptcy/rpt-abi-commission-on-consumer-bankruptcy.pdf> [<https://perma.cc/Q98Z-3B4H>].

This regulatory change would provide an assurance to bankruptcy courts that a debtor who satisfies these characteristics is one deserving of a discharge and not one of proverbial bad-faith.

The Commission makes it clear that it still supports the *Brunner* Test, albeit in its purer form.<sup>194</sup> The Commission (and the Seventh Circuit<sup>195</sup>) note that over time, the test has gained unnecessary judicial “glosses” transforming it into something that does “not always track the language of the statute.”<sup>196</sup> The Commission points to the fact that the second prong of the *Brunner* Test—whether or not the debtor’s current “state of affairs is likely to persist for a significant portion of time”—has effectively required “a certainty of hopelessness.”<sup>197</sup> The Commission concludes based on language in § 523(a)(8) that undue hardship was intended to mean “[preventing] the debtor from paying reasonable living expenses, rather than requiring living at a poverty level.”<sup>198</sup> In sum, the Commission still sees the *Brunner* Test as a useful preventative tool that provides a necessary check on potential abuse of the bankruptcy system. However, the tool’s current iteration has exceeded its intended function and more closely resembles an impenetrable barrier than an instrument of review that allows for judicial discretion.

While some progress has been made in reanalyzing § 523(a)(8), such as the aforementioned re-reading of § 523(a)(8)(A)(ii) to no longer include non-federal for-profit loans, § 523(a)(8) is still fertile ground for textual reinterpretation. In particular, a closer look at § 523(a)(8)(B) reveals ambiguity still exists that, under a court’s discretion, could further expand the pool of student loan debtors who would be able to discharge their loans without such an onerous showing of undue hardship.

## V. PROPOSAL FOR AN ALTERNATIVE TO *BRUNNER* TEST

### A. REVISITING § 523(a)(8)(A)(II)

Compared to preceding sections 523(a)(8)(A)(i) and 523(a)(8)(A)(ii), § 523 (a)(8)(B) is much more difficult to parse through given its cross

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<sup>194</sup> *Id.* at 12 (“The Commission recommends that courts properly understand the *Brunner* test by hewing closely to the statute, as appropriate judicial interpretive techniques require.”).

<sup>195</sup> *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884 (7th Cir. 2013).

<sup>196</sup> *Id.* at 11.

<sup>197</sup> *Id.* at 12.

<sup>198</sup> *Id.*

references to other codes. In order to appropriately analyze § 523(a)(8)(B), one is required to traverse down a statutory rabbit hole.<sup>199</sup>

Beginning with § 523(a)(8)(B), a loan that is defined as a “qualified education loan” cannot be discharged without a showing of undue hardship by the debtor.<sup>200</sup> A “qualified education loan” as defined in § 221(d)(1) of the Internal Revenue Code is any indebtedness incurred to pay “qualified higher education expenses,” incurred as the cost of attendance at an “eligible educational institution.”<sup>201</sup> “Eligible educational institution” is defined in § 25A(f)(2) of the Internal Revenue Code as an institution that is eligible to participate in a program under Title IV of the Higher Education Act of 1965 and fits the description listed in § 1088 of Title 20 of the U.S. Code.<sup>202</sup> There, “eligible program” is defined as a program of at least 600 hours of instruction, 16 semester hours, or 24 hours, offered during a minimum of 15 weeks that (1) provides a program of training to prepare students for *gainful employment* in a recognized profession and (2) admits students who have not completed the equivalent of an associate degree.<sup>203</sup> The term “gainful employment” is left undefined. In sum, for a loan to be a qualified educational loan, amongst other criteria, it must be applied to a school that qualifies for the Title IV program and prepares its students for gainful employment post-graduation.

President Biden has pledged to restore the Obama Administration’s higher education regulations that required programs show that they supplied gainful employment opportunities to alumni in order to receive title IV federal funding.<sup>204</sup> Under the Obama-era regulation, a program would fail this requirement if (1) its graduates have annual loan payments greater than 12 percent of total earnings and greater than 30 percent of discretionary income for two out of three consecutive years or (2) if its graduates have annual loan payments between 8% and 12 percent of total earnings or between 20 percent and 30 percent of discretionary earning for four consecutive years.<sup>205</sup>

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<sup>199</sup> The statutes are included in the appendix for easier cross reference.

<sup>200</sup> 11 U.S.C. § 523(a)(8)(B) (2018).

<sup>201</sup> I.R.C. § 221(d)(1).

<sup>202</sup> I.R.C. § 25A(f)(2).

<sup>203</sup> 20 U.S.C. § 1088.

<sup>204</sup> See, e.g., *The Biden Plan for Education Beyond High School*, BIDEN HARRIS, <https://joebiden.com/beyondhs> [<https://perma.cc/GUZ2-NASZ>]; Mark Kantrowitz, *How the Biden Administration Will Make College More Affordable*, FORBES, Nov. 8, 2020, <https://www.forbes.com/sites/markkantrowitz/2020/11/08/how-the-biden-administration-will-make-college-more-affordable> [<https://perma.cc/3P5K-TBJ6>].

<sup>205</sup> See *Fact Sheet on Final Gainful Employment Regulations*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/gainful-employment-fact-sheet->

While digging through statutory code is undeniably tedious, it is a necessary exercise when deciding whether or not a loan is applicable to 523(a)(8)(B). Similar to how the courts glossed over the intent of § 523(a)(8)(A)(ii) for many years and applied it broadly to all loans, courts today are seemingly granting § 523(a)(8)(B) a similarly unwarranted breadth.<sup>206</sup> In particular, little to no case law addresses the ambiguity of “gainful employment.”<sup>207</sup> Typically, when applying § 523(a)(8)(B), courts will conclude their analysis on whether or not the program is providing “gainful employment,” a necessary element of § 523(a)(8)(D) by examining whether or not it receives Title IV funding.<sup>208</sup> Savvy attorneys who recognize this ambiguity could potentially use it as an opportunity to sidestep the *Brunner* Test completely.

### B. WHY FOCUS ON “GAINFUL EMPLOYMENT”

If courts begin scrutinizing the phrase “gainful employment,” a new, more lenient understanding of § 523(a)(8)(B) could emerge. A new interpretation of the language of § 523(a)(8) in modern times is not unheard of—§ 523(a)(8)(A)(ii), for example, has been recently reinterpreted by some to not apply to all private loans.<sup>209</sup> Much like the reinterpretation of § 523(a)(8)(A)(ii), a diligent court could cast new light on what types of loans are included in § 523(a)(8)(B).

As it stands, many courts superficially gloss over § 523(a)(8)(B)’s actual language of § 523(a)(8)(B) and its subsequently referenced statutes.<sup>210</sup> An example of the short shrift given to § 523(a)(8)(B) can be observed in *Miller v. Gomez*, in which an Oregon Bankruptcy Court rejected a debtor’s argument that a student loan issued by Sallie Mae Educational Trust, a for-profit non-federal lending agency, was not a “qualified

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10302014.pdf [https://perma.cc/PUL3-Z9E9] (defining discretionary earnings as a student’s annual income above 150% of the federal poverty level of a single individual).

<sup>206</sup> See, e.g., *Noland v. Iowa Student Loan Liquidity Corp.* (*In re Noland*), No. BK09-80873-TJM, 2010 Bankr. LEXIS 1188, at \*6–8 (Bankr. D. Neb. Mar. 30, 2010) (defining then applying without extrapolation the aforementioned code sections).

<sup>207</sup> See, e.g., *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 640 F. App’x 5, 7 (D.C. Cir. 2016) (describing “gainful employment” as used in 20 U.S.C. § 1088 as an “undefined, ambiguous clause”).

<sup>208</sup> See, e.g., *Quintanilla v. Nelnet Servicing LLC* (*In re Quintanilla*), No. 8:17-bk-09345-RCT, 2020 Bankr. LEXIS 3514, at \*11–12 (Bankr. M.D. Fla. Nov. 20, 2020); *Wiley v. Wells Fargo Bank, N.A.* (*In re Wiley*), 579 B.R. 1, 11 (Bankr. D. Me. 2017).

<sup>209</sup> See, e.g., *Homaidan v. SLM Corp.* (*In re Homaidan*), 596 B.R. 86, 102–06 (Bankr. E.D.N.Y. 2019); see also *supra* Pt.IV.A.

<sup>210</sup> See, e.g., *Carow v. Chase Loan Serv.* (*In re Carow*), No. 10-30264, 2011 Bankr. LEXIS 823, at \*9–11 (Bankr. D.N.D. Mar. 2, 2011).

educational loan,” pursuant to § 523(a)(8)(B).<sup>211</sup> The court, in coming to this conclusion, looked to § 221(d)(1) of the Internal Revenue Code to determine that a “qualified education loan” referred to a loan, “incurred ‘solely to pay higher education expenses . . . incurred on behalf of the taxpayer . . . with a reasonable period of time before or after the indebtedness is incurred, and . . . which are attributable to education furnished during which the recipient was an eligible student.’”<sup>212</sup> Without continuing further down the statutory path, the court concluded that the loan fit this definition because, “the loan documents governing the original Sallie Mae Loan stated that the loan was a qualified educational loan under this statute.”<sup>213</sup>

The issue with the court’s reasoning here is not whether the loan was in fact a “qualified educational loan,” but instead how it arrived at this conclusion. The *Miller* court, as in many other cases that implicate § 523(a)(8)(B),<sup>214</sup> does not carefully parse through all the necessary statutes to give meaning to “qualified educational loan.” Here, the court went no further than evaluating § 221(d)(1) to determine what constitutes a “qualified educational loan.”<sup>215</sup> Simply referring to § 221(d)(1) leaves “qualified higher expenses” undefined, thus requiring the reader to evaluate § 221(d)(2) and the subsequently referenced code to get a complete definition.

Had the court here looked at all of the referenced codes, it would have seen that for something to be a “qualified education loan” it would have to be applied to a “program of training to prepare students for gainful employment in a recognized profession.”<sup>216</sup> While very few facts are supplied in *Miller* regarding the debtor’s school,<sup>217</sup> it is possible that the school was a program that failed to provide an opportunity for “gainful employment.”

### C. HOW TO SHOW “GAINFUL EMPLOYMENT”

Ultimately, it is not the court’s responsibility to account for every argument that could be made, but rather the responsibility of the parties to

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<sup>211</sup> *Miller v. Gomez*, No. 17-6048, 2017 WL 5952682, at \*2 (Bankr. D. Or. Nov. 29, 2017).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See, e.g., Mader v. Experian Info. Sols., LLC*, 2020 U.S. Dist. LEXIS 132073, at \*4–5 (S.D.N.Y. July 24, 2020).

<sup>215</sup> *See Miller*, 2017 WL 5952682, at \*2.

<sup>216</sup> 20 U.S.C. § 1088 (b)(1)(A)(i) (2018).

<sup>217</sup> *See Miller*, 2017 WL 5952682, at \*1.

raise these arguments. The debtor still is responsible for bringing the theoretical burden of proof to bear on the creditor that the education program provided gainful employment opportunities, and thus, within the purview of § 523(a)(8)(B).<sup>218</sup>

A test that was adopted by the Obama administration provides a possible solution.<sup>219</sup> Outlined in the chart below, under this test a program is considered to provide gainful employment opportunity so long as its graduates have annual loan payments less than 8 percent of their total earnings or less than 20 percent of discretionary earnings.<sup>220</sup> If a program's graduates have annual loan payments between 8 percent and 12 percent of total earnings or between 20 percent and 30 percent of discretionary earnings for four consecutive years, then the program does not provide gainful employment opportunities.<sup>221</sup> Additionally, if a program's graduates have annual loan payments greater than 12 percent of total earnings and greater than 30 percent of discretionary earnings for two out of three consecutive years, then the program is not providing gainful employment.<sup>222</sup>

<b>Accountability</b>	
<b>Certifications:</b> Institutions must certify that each of their gainful employment programs meet state and federal licensure, certification, and accreditation requirements.	
<b>Metric:</b> To maintain title IV eligibility, gainful employment programs will be required to meet minimum standards for the debt vs earnings of their graduates.	
<b>Pass</b>	Programs whose graduates have annual loan payments less than 8% of total earnings <u>OR</u> less than 20% of discretionary earnings.
<b>Zone</b>	Programs whose graduates have annual loan payments between 8% and 12% of total earnings <u>OR</u> between 20% and 30% of discretionary earnings.
<b>Fail</b>	Programs whose graduates have annual loan payments greater than 12% of total earnings <u>AND</u> greater than 30% of discretionary earnings.
<b>Ineligible</b>	Programs that fail in 2 out of any 3 consecutive years <u>OR</u> are in the zone for 4 consecutive years.

*Fact Sheet on Final Gainful Employment Regulations, supra note 205.*

<sup>218</sup> See Plumbers Joint Apprenticeship & Journeyman Training Comm. v. Rosen (*In re Rosen*), 179 B.R. 935, 938 (Bankr. D. Or. 1995) (citing *In re Raymond*, 169 Bankr. 67, 69 (Bankr. W.D. Wash. 1994)).

<sup>219</sup> *Fact Sheet on Final Gainful Employment Regulations, supra note 205.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*



The Trump Administration's repeal of the Obama-era regulation caused gainful-employment data not to be updated in over five years—data is publicly available only for the years 2011 and 2015.<sup>223</sup> But this test turns on the availability of recent gainful employment data to accurately represent debtors' employment prospects. However, if these numbers were again annually reported, this prior metric could be readopted to allow debtors to mount a convincing showing vis-à-vis lack of gainful employment opportunity.

Without these annual numbers in the public domain, debtors will likely have a more difficult time challenging proof that a particular program does not offer gainful employment opportunity. Yet, this alone should not dissuade a debtor from advancing this argument. Employment rates, median salary of graduates, or licensing test passage rate, if available, could also be used to buttress a lack of gainful employment opportunity claim. Given the wide discretion judges wield when reviewing § 523(a)(8)(B) claims, even evidence of poor reputation within a particular field of employment may present some substantive value. While issues of “gainful employment” typically arise in the context of for-profit institutions, this argument could still be advanced against a traditional four-year university if its numbers reveal substandard outcomes for students post-graduation. Ultimately however, it is purely speculative what type of evidence would be most probative in showing gainful employment opportunity—or lack thereof. Hopefully, this will be further developed with future litigation and subsequent caselaw.

## VI. CONCLUSION

It remains unseen whether or not a reinterpretation of § 523(a)(8)(B) would significantly affect the rate of successful student loan discharges, let alone in making a dent in the \$1.6 trillion in federal student loan debt. However, if implemented, it would help disprove that it “is up to Congress, not the courts, to change the rules for discharging student debt in bankruptcy.”<sup>224</sup> Although this is a marginal change, it nonetheless sends a message to Congress that the courts are willing to assist student debtors discharge their loans, which, in turn, may prompt the legislature to make more sweeping changes.

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<sup>223</sup> See *Gainful Employment Information*, FED. STUDENT AID, <https://studentaid.gov/data-center/school/ge> [https://perma.cc/QP6T-QTVZ].

<sup>224</sup> Curley, *supra* note 7.

## APPENDIX

United States Code  
Title 11. Bankruptcy

§ 523 – Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge any individual debtor from any debt –

(8) unless excepting such debt from discharge under paragraph would impose an undue hardship on the debtor and the debtor's dependents, for —

(B) any other educational loan that is a **qualified education loan**, as defined in **section 221(d)(1) of the Internal Revenue Code of 1986**, incurred by a debtor who is an individual

United States Code  
Title 26. Internal Revenue Code

§ 221 — Interest on educational loans

(d) (1) **Qualified education loan** – The term “qualified education loan” means any indebtedness incurred by the taxpayer solely to pay **qualified higher education expenses** —

(A) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,

(B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and

(C) Which are attributable to education furnished during a period which the recipient was an eligible student.

United States Code  
Title 26. Internal Revenue Code

§ 221 — Interest on educational loans

(d)(2) **Qualified higher education expenses** — The term “qualified higher education expenses” means the cost of attendance...at an **eligible educational institution**...

For the purposes of the preceding sentence, the term “**eligible educational institution**” has the same meaning given such term by **section 25A(f)(2)**

United States Code  
Title 26. Internal Revenue Code

§ 25A — American Opportunity and Lifetime Learning Credits

(2) **Eligible educational institution** — the term “eligible educational institution” means an institution—

(A) which is described in **section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088)**, as in effect on the date of the enactment of this section, and

(B) which is eligible to participate in a program under title IV of such Act.

United States Code  
Title 20. Education

§ 1088. Definitions

(b) Eligible program

(1) For purposes of this subchapter, the term “**eligible program**” means a program of at least—

(A) 600 clock hours of instruction, 16 semester hours, or 24 quarter hours, offered during a minimum of 15 weeks, in the case of a program that—

(i) provides a program of training to prepare students for **gainful employment** in a recognized profession; and

(ii) admits students who have not completed the equivalent of an associate degree...