A NO-CONTEST DISCHARGE FOR UNCOLLECTIBLE STUDENT LOANS

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Over forty-four million Americans owe more than $1.6 trillion in student loan debt. This debt is nearly impossible to discharge in bankruptcy. Attempting to do so may require costly and contentious litigation with the Department of Education. And because the Department typically fights every case, even initial success can be followed by years of appeals. As a result, few student loan borrowers attempt to discharge their student loan debt in bankruptcy.

In this Article, we call on the Department of Education to develop a set of ten easily ascertainable and verifiable circumstances in which it will not contest a debtor's attempt to discharge their student loan debt. Nearly every category of no-contest discharge we recommend represents a circumstance where the debtor would clearly suffer an undue hardship if forced to continue to attempt repayment. In those circumstances, the Department of Education should conserve taxpayer dollars by consenting to discharge. Specifically, we urge the Department of Education to allow a no-contest discharge when the debtor's income is less than 150 percent of

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the federal poverty level and at least one of the following:

(1) the debtor's household income has been at or below the federal poverty level for the last four years;

(2) the debtor receives disability benefits under the Social Security Act;

(3) the debtor receives disability benefits because of military service;

(4) the debtor's income is derived solely from retirement benefits;

(5) the debtor is a caregiver of an adult or child as defined in the Lifetime Respite Care Act;

(6) the debtor is a family caregiver of an eligible veteran;

(7) the debtor did not receive a degree from the institution, or the institution closed;

(8) the debtor's student loan balance is less than $5,000;

(9) the debtor made at least three hundred monthly payments (twenty-five years' worth) towards their student loans, regardless of whether those payments were made continuously; or

(10) the debtor is over the age of sixty-seven.

Our proposal will not solve every problem, but it would go a long way toward resolving many of the grosser inequities currently associated with student loans and their treatment in bankruptcy.

INTRODUCTION

Keldric Dante Mosley was homeless and surviving on food stamps and disability benefits from the United States Department of Veterans Affairs when he asked the bankruptcy court to relieve him of his $45,000 student loan burden.[1] He suffered from an array of ailments, including depression, anxiety, chronic back pain, swelling, and high blood pressure.[2] He never obtained his degree because he dropped out to care for his ailing mother.[3] He attempted to return to school, but was unable to obtain financial aid due to his unpaid student loans.[4] He looked for work but was unable to find a job.[5] In the years before he sought relief from his student loans, his annual earnings from Social Security and Medicare ranged from $1,287 to $7,700.[6]

In 1999, filing *pro se*, Mr. Mosley obtained a bankruptcy discharge, pursuant to which the bankruptcy court issued an injunction against creditors' future attempts to collect.[7] However, Mr. Mosley's student loans were not included in the injunction, as such debts are only dischargeable if the debtor proves in court that repaying the loans would constitute an undue hardship.[8] In 2004, Mr. Mosley sought to prove just that. Following his bankruptcy, his student loan servicer (first USA Funds, and then the Educational Credit Management Corporation (ECMC)) had continued its efforts to collect on the outstanding student loans, despite his obvious financial difficulty.[9] ECMC, acting on behalf of the U.S. Department of Education (ED),[10] objected to Mr. Mosley's student loan discharge on the

1. CMC v. Mosley (*In re* Mosley), 494 F.3d 1320, 1323–24 (11th Cir. 2007).

2. *Id.* at 1323 (noting that some of Mr. Mosley's injuries were related to his military service).

3. *Id.*

4. *Id.*

5. *Id.* ("Mosley had brief stints at several jobs, including jobs at Bruno's Supermarket, United Parcel Service, City Sanitation, and a moving company.").

6. *Id.*

7. "A bankruptcy discharge renders the debt uncollectible from the individual and protects the debtor from future attempts at collection, making it a violation of a court order to do so. But not all debts are dischargeable . . . ." Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 611–12 (2018).

8. "[S]tudent loan debts are only dischargeable in bankruptcy if the debtor files a separate lawsuit within the bankruptcy case in which she is able to prove that it would be an 'undue hardship' to repay her student loans." *Id.* at 631 (quoting 11 U.S.C. § 523(a)(8) (2012)).

9. *Mosley*, 494 F.3d at 1323.

10. ECMC is the contractual assignee of federally guaranteed student loans owed by a borrower to the ED when that borrower has filed for bankruptcy relief. *See* Rafael Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2143 (2014) [hereinafter Pardo, *Undue Hardship*] (also noting that ECMC is a guaranty agency in four states). In these instances, the ED "has chosen ECMC to

grounds that he had provided insufficient corroborating evidence of his medical issues.[11] Although Mr. Mosley provided doctors' notes, ECMC successfully argued that they were not properly authenticated, and the bankruptcy court reluctantly excluded them.[12] Nevertheless, the bankruptcy court found that Mr. Mosley had met the burden of proving undue hardship through his credible testimony.[13] ECMC appealed to the district court, which affirmed,[14] and then to the Eleventh Circuit, which also affirmed the bankruptcy court's decision to discharge Mr. Mosley's student loan debt.[15] While Mr. Mosley ultimately obtained relief from his student loan debt, the three-year legal battle necessitated by ECMC's aggressive litigation deprived him of resources that could have been used to improve his health and economic stability.[16]

Because student loans, unlike other debt, are not automatically discharged in bankruptcy, Mr. Mosley was required to bring a separate lawsuit to discharge his student loans, to provide additional documentation of his otherwise uncontested poverty and medical issues, and to defend his suit against ECMC's repeated attacks.[17] Medical debt, credit card debt, and even gambling debt are presumptively dischargeable in bankruptcy. But to discharge student loans requires costly litigation,[18] with cost and fee estimates running as high as

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represent the federal interest in bankruptcy litigation involving FFELP loans." *Id.* at 2144. ECMC does not have a contractually specified role regarding student loans originated under the Direct Loan Program, which constitutes the bulk of the outstanding balance of student loan debt, and the program under which all new student loans have been made since July 1, 2010. *See* U.S. DEP'T OF EDUC., FISCAL YEAR 2020 BUDGET SUMMARY 36 (2019), https://www2.ed.gov/about/overview/budget/budget20/summary/20summary.pdf [https://perma.cc/C9FK-EWCB]. In 2019 the outstanding FFEL program loan portfolio was approximately $248 billion, compared with $1,084 billion in Direct Loans. *Id.* at 30, nn.4–5.

11. *Mosley*, 494 F.3d at 1323–24.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1328. The cost of effectively litigating a student loan adversary proceeding can range from $4,000 to $10,000. *See* Pardo, *Undue Hardship*, *supra* note 10, at 2137–39, 2141. From an access to justice perspective, it is highly problematic to require a bankrupt debtor—indeed, one that may be suffering an undue hardship as a result of their student loans—to bear the costs of litigating an adversary proceeding.

17. 11 U.S.C. § 523(a)(8) (2018).

18. Student loans are nondischargeable unless the debtor can prove that the loans impose an undue hardship, and this is not an easy hurdle to clear. The

$10,000.[19] Those who do seek to discharge their student loan debt often face overly aggressive litigation tactics[20] by the ED and its agents.[21] Even when debtors clearly face undue hardship, they risk opposition in court and could face years of appeals before obtaining relief. As a result, few student loan borrowers attempt to discharge their student loan debt, even in the face of significant financial hardship.[22]

Addressing student loan issues is important. Roughly

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undue hardship standard is notoriously subjective and can create harsh results. *See, e.g.*, Rafael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 183 (2009) [hereinafter Pardo & Lacey, *Real Student Loan Scandal*] ("[T]he legal doctrine suggests that the law targets debtors who do not deserve to be targeted, and, to make matters worse, those debtors face inconsistent application of the law."); Kevin J. Smith, *Defining the Brunner Test's Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 261 (2013). Some courts go so far as to insist the debtor show a "certainty of hopelessness" to receive a discharge. *See* discussion *infra* Section II.B.1. A majority of circuits have also read a good faith requirement into the statute, which has resulted in denials of discharge even in cases of severe hardship. *Id.* Additionally, debtors often must offer expert testimony to succeed in obtaining a discharge. *See Mosley*, 494 F.3d at 1324–25 (rejecting ECMC's argument that corroborating evidence is required but noting that several bankruptcy and appellate cases did require corroborating evidence).

19. *See supra* note 16.

20. Under the ED's own guidelines, its contractors should not oppose undue hardship motions when the cost of doing so would exceed one-third the amount of the loan, but it is unclear as to whether ED, its servicers, and guaranty agencies routinely undertake this analysis. *See* 34 C.F.R. §§ 682.402(i)(1), 674.49(c)(4) (2019); discussion *infra* Section III.C.

21. Throughout this piece, servicers, lenders, or loan holders operating as affiliates of the ED will be collectively referred to as "the ED" or "the ED and its agents."

22. In one controversial study, only 0.1 percent of debtors challenged the nondischargeability of their student loans. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 505 (2012); *but see* Pardo, *Undue Hardship*, *supra* note 10, at 2124–35, 2129 n.176 (pointing out errors in methodology and arguing that the Iuliano study undercounted student loan proceedings). Of those who pursue an undue hardship discharge, debtors with medical conditions, debtors who are unemployed, and debtors who have very low incomes are more likely to receive a discharge of their student loans. Iuliano, *supra*, at 518; *see also* Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505 (2008) [hereinafter Pardo, *Illness and Inability*]; Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18, at 226; *but see* Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1159, 1185 tbl.A5 (2016) [hereinafter Pardo, *Taking Bankruptcy*] (observing that in the study sampled there was no statistically significant relationship between the debtor's financial circumstances and the likelihood of litigation success).

forty-five million Americans owe over $1.5 trillion in student loan debt.[23] Only about 60 percent of these loans are in active repayment.[24] More than one million students default on almost $20 billion worth of federal student loans each year.[25]

Student loans are also increasingly important in the bankruptcy system. More debtors have student loans, and those loans are larger than ever. In 2005, only 5.4 percent of bankruptcy filers had student loan debt that totaled more than 50 percent of their annual income.[26] By 2014, however, 16 percent of filers—triple the rate of 2005 filers—had student loan debt totaling more than 50 percent of their annual income.[27] Many have decried the current treatment of student loan debt in bankruptcy as unworkable[28] and have argued that a dramatic overhaul of the law is necessary.[29] Debtors who have little hope

23. Zack Friedman, *Student Loan Debt In 2019: A $1.5 Trillion Crisis*, FORBES: INVESTING (Feb. 25, 2019), https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/#69ed6dc7133f [https://perma.cc/PK44-W23G]; *Consumer Credit – G.19 Consumer Credit Outstanding (Levels)*, BOARD OF GOVERNORS FED. RES. SYS., https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html (last updated June 7, 2019) [https://perma.cc/KF8D-9YRF].

24. The other 40 percent of loans are either not in active repayment because the student is still in school or recently graduated (in-school, grace, or deferment status), or they are in forbearance or default. Authors' calculations of the first quarter of 2019 from *Federal Student Loan Portfolio*, FED. STUDENT AID, https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited July 5, 2019) (follow "Portfolio by Loan Status" hyperlink) [https://perma.cc/K4BX-4N5A] ($1,446.7 billion in outstanding loans of which only $872.4 billion are in repayment).

25. This figure understates the magnitude of the problem, as student loans are only in default after 270–360 days of non-payment, suggesting that many more borrowers are seriously behind on their payments, although not yet in default. Further, this figure does not include loans in forbearance. Even with these depressed figures, the student loan default rate is higher than the default rate for auto loans, of which only 8.5 percent are at least thirty days delinquent. Ben Miller, *Who Are Student Loan Defaulters?*, CTR. AM. PROGRESS (Dec. 14, 2017, 12:01 AM), https://www.americanprogress.org/issues/education-postsecondary/reports/2017/12/14/444011/student-loan-defaulters/ [https://perma.cc/T76V-L73L] (citing *Default Rates*, FED. STUDENT AID, https://studentaid.ed.gov/sa/about/data-center/student/default (last visited Aug. 22, 2019) [https://perma.cc/6JK3-RBQS]).

26. Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y TIMES (July 17, 2015), https://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html [https://perma.cc/LHJ8-WHAN].

27. Daniel Austin, *Student Loan Debt in Bankruptcy: An Empirical Assessment*, 48 SUFFOLK U. L. REV. 577, 588 (2015).

28. *See* discussion *infra* Section II.B.

29. While student loan debt is almost never discharged, some have suggested

of repaying their student loans should be able to receive a discharge without the difficulty and expense of litigation.[30]

In an effort to patch this unworkable system, we have identified ten categories of debtors who we argue should be deemed to meet the undue hardship standard without litigating the issue.[31] It is essential to promptly provide these debtors with the relief they require.[32] Not only would a no-contest discharge be more effective in providing relief to struggling debtors, but it would also be cheaper and less burdensome for the government to administer.

Recognizing the difficulties associated with obtaining a legislative change or convincing the courts to adopt a uniform approach, we propose that the ED streamline the process of discharging student loans in bankruptcy.[33] Specifically, we urge the ED to ease the path to discharge when a debtor's income is less than 150 percent of the federal poverty level,[34] *and*:

(1) the debtor's household income has been at or below the federal poverty level for the last four years;

(2) the debtor receives disability benefits under the Social

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that is because debtors rarely challenge their student loan debt obligations rather than because the debt is "essentially nondischargeable." *See* Iuliano, *supra* note 22; *see also* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of Educational Debt*, 74 U. CIN. L. REV. 405, 479 (2005) [hereinafter Pardo & Lacey, *Undue Hardship in Bankruptcy Courts*] ("Our data therefore suggest that, contrary to prevailing opinion, the situation for student loan debtors might not be as stark as it has been portrayed—that is, that an undue hardship discharge is the exception.").

30. Most student loan adversary proceedings do not go to trial, but pretrial and trial preparation costs are often incurred to reach a settlement with the ED or its agents. *See* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1146 (reporting a 6.8 percent trial rate).

31. Our proposal was inspired by a letter to the ED signed by U.S. Representatives Steve Cohen (TN-09), John Conyers (D-MI), Elijah Cummings (D-MD), and Hank Johnson (D-GA) and by Senators Dick Durbin (D-IL), Jack Reed (D-RI), and Elizabeth Warren (D-MA). *See Cohen, 6 Members of Congress Urge Education Secretary to Bring More Fairness to Struggling Students*, CONGRESSMAN STEVE COHEN (Mar. 16, 2014) [hereinafter Cohen Letter], https://cohen.house.gov/ press-release/cohen-6-members-congress-urge-education-secretary-bring-more-fairness-struggling [https://perma.cc/CQK3-6F4J].

32. *See* Pardo, *Illness and Inability*, *supra* note 22, at 518–23.

33. *See infra* Part III.

34. *See infra* note 274 (explaining why we chose 150 percent of the federal poverty level as our criteria).

Security Act;

(3) the debtor receives disability benefits because of military service;

(4) the debtor's income is derived solely from retirement benefits;

(5) the debtor is a caregiver of an adult or child as defined in the Lifetime Respite Care Act;

(6) the debtor is a family caregiver of an eligible veteran;

(7) the debtor did not receive a degree from the institution, or the institution closed;

(8) the debtor's student loan balance is less than $5,000;

(9) the debtor made at least three hundred monthly payments (twenty-five years' worth) towards their student loans, regardless of whether those payments were made continuously; *or*

(10) the debtor is over the age of sixty-seven.

In such cases, we encourage the ED to settle quickly with debtors, stipulating to the discharge of their student loans without procedural hassle. Settling with debtors—rather than raising objections to discharge in these circumstances—would be more cost-effective for the taxpayer.[35]

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35. Our proposal saves money by avoiding objections to discharge when the debtor qualifies for a no-contest discharge. We hope our proposal encourages more student loan borrowers to discharge their student loan debt and thereby further Congress's intent to discharge student loan debt absent undue hardship. We recognize that this could increase the burden on the federal treasury by increasing the overall amount of discharged debt—debt which is either directly issued or guaranteed by the federal government. But we are skeptical that the cost savings from our proposal would be offset by increased numbers of borrowers seeking a discharge. We cannot predict the future of course, but previous studies have found no evidence that student loan borrowers act strategically. Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, EDUC. FIN. & POL'Y (2019). In any event, we believe that taxpayer dollars are well spent if they are used to discharge student loans for those whom repayment would be an undue hardship, and poorly

This proposal offers several virtues. First, taxpayer money would not be wasted defending against adversary proceedings that are unlikely to result in meaningful repayment. Second, the proposal is consistent with the statutory requirement that student loans should only be discharged in cases of undue hardship. Third, the use of categories removes excessive subjectivity and uneven application of the legal standard, creating a more predictable legal environment.[36] And fourth, the clarity of standards increases access to justice because borrowers can more easily prove that they meet the criteria.[37]

Our proposal alone cannot be a complete solution to the student loan crisis and is intended to be a floor, not a ceiling, for student loan discharge. Furthermore, because our proposal is an administrative solution applying to the ED, it cannot address loans not issued or guaranteed by the federal government—this would require an act of Congress.[38] It also does not encompass all borrowers suffering an undue hardship; additional statutory and judicial measures are needed to provide relief to every struggling debtor.[39] Nevertheless, our proposal would provide relief to the most deserving debtors while other solutions are debated.[40] It may also be useful to judges searching for a framework to resolve these matters.[41]

This paper proceeds as follows. First, we discuss the chal-

spent in deterring discharge by making specious objections in deserving cases.

36. Without a predictable legal environment with a shared understanding of the rules that will be applied, litigants are often unwilling to settle their disputes. *See infra* text accompanying note 225.

37. While we believe this proposal will improve the administration of justice for the worst-off debtors, those who file *pro se* are likely to continue to struggle more than debtors represented by counsel. *See* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1160–61.

38. This includes private loans. *See* H.R. 885, 116th Cong. (2019).

39. *See, e.g.*, H.R. 2648, 116th Cong. (2019); H.R. 770, 116th Cong. (2019); S. 1414, 116th Cong. (2019) (removing the provision of the Bankruptcy Code that treats student loans differently, so that they would be dischargeable automatically); discussion *infra* Section IV.B.

40. House Judiciary, *Oversight of Bankruptcy Law and Legislative Proposals*, U.S. HOUSE COMMITTEE JUDICIARY (Jun. 25, 2019), https://judiciary.house.gov/legislation/hearings/oversight-bankruptcy-law-and-legislative-proposals [https://perma.cc/H6WE-KUCA] (depicting a recorded hearing before the Subcommittee on Antitrust, Commercial, and Administrative Law of the House Committee on the Judiciary, 116th Congress).

41. *See* Katy Stech Ferek, *Judges Wouldn't Consider Forgiving Crippling Student Loans—Until Now*, WALL ST. J. (June 14, 2018, 7:00 AM), https://www.wsj.com/articles/judges-wouldnt-consider-forgiving-crippling-student-loans-until-now-1528974001 [https://perma.cc/U3D3-KAZK].

lenges facing debtors seeking discharge of their student loans in bankruptcy court. We discuss the wide variation in the case law interpreting the undue hardship standard, including how some courts applying this standard have strayed sharply from the statutory language. Second, we explain the details of our proposal and how it could be implemented. We also set forth some of the virtues of our proposal, including the conservation of taxpayer dollars. Third, we contrast our proposal with many existing proposals to ameliorate student debtors' burden, including statutory reform, judicial reform, and administrative or executive reform.

Perhaps recognizing the status quo's untenable nature, the ED issued a Request for Information regarding adversary proceedings seeking discharge of student loans in bankruptcy cases.[42] Thus, we hope that our proposal will be well received on an administrative level.

I. CURRENT BARRIERS TO STUDENT LOAN DISCHARGES IN BANKRUPTCY

Debtors who file for bankruptcy in hopes of reducing their student debt burden face substantial barriers to relief. Under the Bankruptcy Code, student loans are presumed nondischargeable.[43] A debtor can only overcome that presumption by proving that they would suffer an undue hardship if the loans were not discharged.[44] To prove undue hardship, a debtor must initiate a separate lawsuit, known as an adversary proceeding,

42. *Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge Bankruptcy Proceedings*, REGULATIONS (Feb. 15, 2018), https://www.regulations.gov/document?D=ED-2017-OPE-0085-0001 [https://perma.cc/A45U-XBKQ]. The authors, along with Pamela Foohey and eighteen other academics, provided a response to the ED's RFI. *See* Letter from Dalié Jiménez, Professor of Law, Univ. of Cal. Irvine Sch. of Law, et al. to Jean-Didier Gaina, U.S. Dep't of Educ. 21 (May 22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183893 [https://perma.cc/PS2W-JT5G]. That letter formed the backbone of this Article.

43. Initially, only government student loans were presumed nondischargeable. That category was expanded to include "any funds received as an educational benefit, scholarship, or stipend." There is considerable confusion regarding programs that can be considered an "educational benefit." *See, e.g.*, Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L. R. 277 (2019).

44. 11 U.S.C. § 528 (a)(8) (2018). This section provides that student loans are not discharged unless discharging them "would impose an undue hardship on the debtor and the debtor's dependents."

pursuant to the Federal Rules of Bankruptcy Procedure.[45] The adversary proceeding functions much like a typical lawsuit.[46] Like other lawsuits, it can be costly and complicated, frequently requiring debtors to hire an attorney even if the underlying bankruptcy case could be accomplished pro se.[47] These expenses, and related obstacles, may discourage many borrowers from attempting to discharge their student debts under the current system.

A. Courts Disagree on the Appropriate Standard to Define Undue Hardship

Debtors who bring an adversary proceeding in the good faith belief that they can prove undue hardship may be disappointed due to the law's inconsistent application. In making dischargeability determinations, courts have largely used judicially crafted definitions of undue hardship, with two tests being the most prominent.[48] The bankruptcy courts have gener-

45. *See* FED. R. BANKR. P. 7001(6).

46. *See* Matthew A. Bruckner, *Improving Bankruptcy Sales by Raising the Bar: Imposing a Preliminary Injunction Standard for Objections to § 363 Sales*, 62 CATH. U. L. REV. 1, 14 (2012) (citing SLW Capital, LLC v. Janica Mansaray-Ruffin (*In re* Mansaray-Ruffin), 530 F.3d 230, 234 (3d Cir. 2008) ("An adversary proceeding is essentially a self-contained trial—still within the original bankruptcy case—in which a panoply of additional procedures apply.")). An adversary proceeding employs essentially the same rules of procedure as a federal civil action, but it is tried in the federal bankruptcy court instead. Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure that Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35 (2001) (outlining both adversary proceedings and contested matters generally). Like a federal civil case, the filing of a complaint and the serving of a summons, which defendants must answer, initiate adversary proceedings. *In re* Beard, 112 B.R. 951, 955 (Bankr. N.D. Ind. 1990). After the defendant responds, pretrial procedure begins, followed by discovery and formal trial. An adversary proceeding concludes with judgment or with dismissal. *See also* Klein, *supra*.

47. *See* Pardo, *Undue Hardship*, *supra* note 10, at 2138 (estimating costs of $4,000 to $10,000 to properly litigate a student loan adversary proceeding); Pardo, *Taking Bankruptcy*, *supra* note 22, at 1148–50 (estimating via a statistical model "that, holding all other variables constant, the odds of litigation success decrease by 68.9% [45.5, 82.3] if the debtor is self-represented."). *But see* Iuliano, *supra* note 22, at 501 (arguing that his empirical evidence demonstrates that attorneys are not necessary to increase the chance of success).

48. Congress did not define "undue hardship" in the section of the Code making student loans presumptively nondischargeable, although they define it elsewhere. 11 U.S.C. § 524(m) (a section regarding reaffirmation of debts which states that "it shall be presumed that such agreement is an *undue hardship* on the debtor if the debtor's monthly income less the debtor's monthly expenses . . . is less than the scheduled payments on the reaffirmed debt."). *See* Pardo & Lacey,

ally coalesced around the *Brunner* test,[49] though some use the "totality of the circumstances" test instead.[50]

The three-pronged *Brunner* test requires that debtors demonstrate that they (1) "cannot maintain, based on current income and expenses, a 'minimal' standard of living" for themselves and dependents if required to repay their 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 they have made "good faith efforts to repay the loans."[51] By contrast, under *Long*'s totality of the circumstances test, a court evaluates "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and their dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[52]

Regardless of the test, court opinions are inconsistent re-

Undue Hardship in Bankruptcy Courts, *supra* note 29, at 510–14; *see also* Pardo, *Illness and Inability*, *supra* note 22, at 518; Pardo, *Taking Bankruptcy*, *supra* note 22, at 1177–79; G. Michael Bedinger VI, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1838 (2014) (citing Michaela White, *Student Loan Discharge*, NACTT ACAD. FOR CONSUMER BANKR. EDUC. (Aug. 21, 2011) at 2, http://considerchapter13.org/2011/08/21/student-loan-discharge-2/ [https://perma.cc/TX3C-YEY8]); Brief for Professor Rafael I. Pardo as Amicus Curiae in Support of Appellant and Urging Reversal, Murphy v. United States, No. 14-1691 (1st Cir. July 29, 2015), 2015 WL 4985562.

49. Bankruptcy courts have generally been forced to use the *Brunner* test because the test has been widely adopted by the courts of appeals, thereby making it binding precedent that must be followed by bankruptcy courts in the adopting circuits. *See* Pardo, *Undue Hardship*, *supra* note 10, 2121. *See* Brunner v. N.Y. Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395 (2d Cir. 1987); *see also In re* Frushour 433 F.3d 393, 400 (4th Cir. 2005) ("An overwhelming majority of circuits has now adopted the Second Circuit's three-part *Brunner* test"); Steven Frederick Werth & Sulmeyer Kupetz, *Student Loan Debt Dischargeability – Courts Discuss Limits of Brunner Test*, Bankruptcy Law News on Bloomberg Law, Feb. 2, 2016 (noting that every circuit follows the *Brunner* test except the First and Eighth, which follow *Long*'s totality of the circumstances test).

50. *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003); *see also* Pardo & Lacey, *Undue Hardship in Bankruptcy Courts*, *supra* note 29, at 488 n.348 (providing a more complicated origin story for the totality of the circumstances test).

51. *See* U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003) (citing *Brunner*, 831 F.2d at 396).

52. *Long*, 322 F.3d at 554 (citing Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981); Andresen v. Neb. Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 132 (8th Cir. B.A.P. 1999)).

garding the circumstances that constitute an undue hardship. In *Brunner* evaluations, courts tend to disagree on what constitutes a "minimal standard of living." In *Long* evaluations, there is variation in what expenses courts view as "reasonably necessary."[53] Courts also vary substantially in determining what evidence debtors are required to show to establish that their situation will persist.[54]

B. Courts Apply the Same Standard Inconsistently Across Cases

In *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, Professors Pardo and Lacey analyzed 261 undue hardship opinions issued by bankruptcy courts during a ten-year period beginning in 1993.[55] They concluded that "Congress'[s] failure to define undue hardship, the requisite condition for discharge of educational debt, has resulted in a fragmentation of debtor relief—that is, inconsistent and unprincipled application of the standard by bankruptcy courts."[56] Courts have, in Pardo and Lacey's telling, continued to offer "differing judicial perceptions of how the same standard applies to similarly situated debtors."[57] The "eely notion" of undue hardship has resulted in "haphazard" decision-making, such that "no significant differences exist between" debtors whose student loans are discharged and those whose discharges are denied.[58]

While some disparity in outcome with respect to successfully obtaining a student loan discharge can be attributable to differences in the severity of the debtor's distress,[59] a review of the case law suggests that there is also significant variation from court to court with respect to what circumstances qualify

53. Neither test appears to be more forgiving than the other. *See* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1189 tb.A8.

54. See *infra* notes 89–91 and accompanying text.

55. Pardo & Lacey, *Undue Hardship in Bankruptcy Courts*, *supra* note 29, at 410. Writing separately, Professor Pardo has also criticized the *Brunner* test for "fractionating"—and thereby dramatically increasing—"the Debtor's Burden of Proof." Pardo, *Undue Hardship*, *supra* note 10, at 2119–20.

56. Pardo & Lacey, *Undue Hardship in Bankruptcy Courts*, *supra* note 29, at 411.

57. *Id.* at 406.

58. *Id.* at 405, 478, 480–81.

59. *See, e.g.*, Iuliano, *supra* note 22, at 518.

as undue hardship.[60] Specifically, there is a lack of consistency around questions such as: What standard of living is minimal? How can a debtor establish that undue hardship will persist? And what is indicative of a lack of good faith?

1. Proving a "Minimal Standard of Living"

In assessing what qualifies as a "minimal standard of living," some bankruptcy courts have gone further than what *Brunner* requires and arguably further than what section 523(a)(8) permits.[61] At least two courts have held, "the federal poverty guideline is a useful yardstick for determining what is a minimal standard of living" and essentially require student debtors to live at or near the poverty level.[62] At the same time, other courts have stated that "[t]he Bankruptcy Code does not require that the debtor live in abject poverty before a student loan may be discharged."[63]

60. Indeed, there is some debate as to whether the primary cause in variation is attributable to difference in debtors or differences in judicial opinion. *Compare* Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18, *with* Iuliano, *supra* note 22. Courts themselves articulate vastly different views with respect to what circumstances qualify as undue hardship, and there are examples of cases with similar facts resulting in opposite outcomes. But this does not mean that variation in debtor characteristics are irrelevant.

61. Under section 707 of the Bankruptcy Code, individuals must pass the "means test" to be eligible to file for bankruptcy under chapter 7. 11 U.S.C. § 707(b) (2018); *Census Bureau, IRS Data and Administrative Expense Multipliers*, U.S. DEP'T JUST., https://www.justice.gov/ust/means-testing, (last updated Apr. 12, 2019) [https://perma.cc/KL8B-RFCB]. Individuals earning less than or equal to the median income pass the means test without further scrutiny of expenses, whereas individuals earning more than the median income only qualify for chapter 7 if their disposable income is sufficiently low such that meaningful debt repayment is not feasible. This determination is made with very specific calculations of allowed expenses, including housing, food, healthcare, childcare, clothing, and other required living expenses according to federal or local standards as directed. Individuals can also deduct all secured debt expenses for mortgages and automobile payments, as well as life insurance and health insurance payments. The means test form available on the DOJ website explains what expenses may be deducted in determining the debtor's disposable income. OFFICIAL FORM 122A–2, https:// www.uscourts.gov/sites/default/files/form_b_122a-2.pdf [https://perma.cc/ZU8K-WXUA].

62. Justice v. Educ. Credit Mgmt. Corp. (*In re* Justice), No. 14-13684-JDW, 2016 Bankr. LEXIS 4100, at 9 (Bankr. N.D. Miss. Nov. 28, 2016); Knox v. Sallie Mae (*In re* Knox), No. 0506951EE, 2007 Bankr. LEXIS 3873, at 5. (Bankr. S.D. Miss. Nov. 6, 2007).

63. O'Donohoe v. Panhandle-Plains Higher Educ. Auth. (*In re* O'Donohoe), No. 12-33870, 2013 Bankr. LEXIS 2415, at *9 (Bankr. S.D. Tex. June 13, 2013); *see also* Demmons v. R3 Educ., Inc. (*In re* Demmons), No. 14-11638, 2016 Bankr.

Some courts have used the means test tables—the primarily IRS-based expenses allowed in determining whether a debtor is eligible for chapter 7 and how much they would have to repay in a chapter 13—in assessing what qualifies as a minimal standard of living.[64] In other cases, judges inject their personal preferences as to the debtor's spending choices.[65] As noted by the National Consumer Law Center and National Association of Consumer Bankruptcy Attorneys,[66] this has led to situations in which lenders challenging discharge have chided debtors for having too many children;[67] taking prescription drugs;[68] taking custody of two grandchildren, one of whom was a victim of physical abuse;[69] and leaving college without earning a degree to care for elderly parents.[70]

Courts also have different views about how to determine

LEXIS 3659, at 13 (Bankr. E.D. La. Oct. 7, 2016); *In re* Justice, 2016 Bankr. LEXIS 4100, at 10.

64. *See In re* Demmons, 2016 Bankr. LEXIS 3659, at 18. Data from the means test tables are used when completing certain forms related to filing for bankruptcy. They include data on median family income and certain allowable expenses such as food, housing, and transportation. The tables are updated regularly, some several times a year. The means test tables are updated monthly; an example can be accessed here: *Means Testing*, U.S. DEP'T JUST., https://www.justice.gov/ust/means-testing/20190501 (last updated Apr. 12, 2019) [https://perma.cc/2M4G-2XCW].

65. As noted in one study:

> Among the most troubling aspects regarding the implementation of undue hardship is the notion that a judge, in making the determination of whether to discharge educational debt, will invariably impose his or her personal views on the proper role of bankruptcy, on the proper role of the fresh start, and on the type of debtor who is worthy of relief embodied in the Bankruptcy Code. If the meaning of undue hardship ultimately rests on the particularized ideals held by the judge, legislative enactment becomes permeated with an impermissible judicial gloss.

Pardo & Lacey, *Undue Hardship in Bankruptcy Courts*, *supra* note 29, at 520 (footnote omitted).

66. Brief for National Consumer Law Center and National Association of Consumer Bankruptcy Attorneys in Support of Appellant at 19, Acosta-Conniff v. ECMC (*In re* Acosta-Conniff), 536 B.R. 326 (Bankr. M.D. Ala. 2015) (No. 16-12884).

67. *In re* Walker, 406 B.R. 840, 863 (Bankr. D. Minn. 2009); Ivory v. United States, (*In re* Ivory) 269 B.R. 890, 911 (Bankr. N.D. Ala. 2001).

68. Renville v. Mont. Guaranteed Student Loans (*In re* Renville), No. 04-61899-7, 2006 Bankr. LEXIS 3211 (Bankr. D. Mont. Jan. 5, 2006).

69. Mitcham v. U.S. Dep't of Educ. (*In re* Mitcham), 293 B.R. 138, 141 (Bankr. N.D. Ohio 2003).

70. Bene v. Educ. Credit Mgmt. Corp. (*In re* Bene), 474 B.R. 56, 58 (Bankr. W.D.N.Y. 2012).

whether a debtor has only a minimal standard of living. In *In re Justice*, a low-income debtor was denied a discharge on the basis that he was able to meet a minimal standard of living.[71] There, the debtor's monthly expenses, including a $389.25 car payment for an eight-year-old BMW, exceeded his income by $787.25 per month.[72] That the debtor drove a BMW seemed to bother the court, which denied the debtor a discharge because the debtor "has not shown that his expenses have been minimized."[73] But even if the debtor had given up owning a vehicle altogether, the debtor in *Justice* would have been unable to cover his monthly expenses. By contrast, in *In re Demmons*,[74] the court used the means test tables to consider what constituted a minimal standard of living.[75] By doing so, the *Demmons* court removed its own personal and subjective views about the appropriateness of the debtor's expenses from the equation.

Regardless of whether courts use the *Long* test or the *Brunner* test, there are many other examples of disagreement about whether an expense is necessary for the debtor's survival (thus not exceeding a minimal standard of living).[76] Expenses

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71. Justice v. Educ. Credit Mgmt. Corp. (*In re* Justice), No. 14-13684-JDW, 2016 Bankr. LEXIS 4100, at 3 (Bankr. N.D. Miss. Nov. 28, 2016).

72. *Id.* at 2–3.

73. *Id.* at 10–11.

74. Demmons v. R3 Educ., Inc. (*In re* Demmons), No. 14-11638, 2016 Bankr. LEXIS 3659, at 18 (Bankr. E.D. La. Oct. 7, 2016).

75. *See id.*

76. In *In re* Hicks, the court rephrased the test as whether the debtor can "now, and in the foreseeable future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?" Hicks v. Educ. Credit Mgmt. Corp. (*In re* Hicks), 331 B.R. 18, 31 (Bankr. D. Mass. 2005). But what is a "reasonable" standard of living? In *In re* Hurst, the appellate panel affirmed a bankruptcy court's finding of no undue hardship in the case of a sixty-six-year-old debtor who was set to retire in four years and who had vision, hearing, and ankle ailments. Hurst v. S. Ark. Univ. (*In re* Hurst), 553 B.R. 133 (B.A.P. 8th Cir. 2016). In *In re* Kemp, a debtor earning between $250 and $600 per week at Lowe's was denied a discharge—the court suggested that she would have sufficient income to contribute to her loans if she did not take her daughter on any vacations, avoided overdraft fees, used less expensive health care coverage, and used regular gas instead of non-ethanol gas. Kemp v. U.S. Dep't of Educ. (*In re* Kemp), 580 B.R. 879 (Bankr. W.D. Ark. 2017). By contrast, in *In re* Fern the bankruptcy court granted a discharge to a thirty-five-year-old single mother of three under the *Long* test. Fern v. FedLoan Servicing (In re Fern), 553 B.R. 362, 369–71 (Bankr. N.D. Iowa 2016). Although the debtor did not have any medical ailments, she was only able to work part time and the court found she made sufficient efforts to maximize her earning and minimize her expenses (though the ED suggested that her cell

such as vacations, cigarettes, or cable and internet service may or may not be considered reasonable depending on the particular judge assigned to a debtor's case.[77] For example, in *In re Mosko* the court concluded that internet, cell phones, satellite TV, and a YMCA membership were not permissible expenses.[78] Similarly, in *In re Bott* the court found the forty dollar per month TV subscription to be impermissible.[79] By contrast, other courts have allowed debtors to have such things as basic internet and phone service and even "frugal" vacations.[80] Additionally, courts are split as to whether charitable expenses[81] and contributions to adult children are reasonable.[82]

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phone and internet expenses were unjustified). *Id.*

77. *See* Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 215, 281 (2014) (comparing cases that allowed or disallowed various expenses in determining whether the debtor could maintain a minimal standard of living).

78. Educ. Credit Mgmt. Corp. v. Mosko (*In re* Mosko), 515 F.3d 319, 325 (4th Cir. 2008) ("Such items [as internet, cell phones, satellite TV, and a YMCA membership] are generally unnecessary to maintain a minimum standard of living[.]").

79. Rendleman & Weingart, *supra* note 77, at 280 (citing Bott v. Educ. Mgmt. Corp. (*In re* Bott), 324 B.R. 771, 777 (Bankr. E.D. Mo. 2005)) ("Plaintiff should not be allowed to have such luxuries [as a forty dollar per month cable TV subscription] if she cannot afford to make payments to ECMC.").

80. *Id.* (citing *In re* Frushour, 433 F.3d at 400–01) ("In short, the mere fact of Frushour's Internet and cable expenses would not disqualify her from an undue hardship discharge."); Nixon v. Key Educ. Res. (*In re* Nixon), 453 B.R. 311, 329 (Bankr. S.D. Ohio 2011) (allowing expenses of $126 for internet, $67 for cell phones, and $68 for landline telephones "because they permit the Plaintiffs to have a source of entertainment and allow Elisabeth to apply for employment online."); Innes v. Kan. (*In re* Innes), 284 B.R. 496, 505 (Bankr. D. Kan. 2002) (granting discharge to debtors who spent most of their tax refund on "a single frugal summer vacation").

81. Rendleman & Weingart, *supra* note 77, at 281. *Compare* Educ. Credit Mgmt. Corp. v. Rhodes, 464 B.R. 918, 924 (W.D. Wash. 2012) ("Without concluding that all religious or charitable contributions are per se unreasonable under § 523(a)(8), this Court grants far less deference to such voluntary contributions than to a debtor's contract-based obligations to his creditors."), *and* Bush v. United States Dep't of Educ. (*In re* Bush), 450 B.R. 235, 244 (Bankr. M.D. Ga. 2011) (concluding a $320 monthly charitable contribution is excessive), *and* Simone v. United States (*In re* Simone), 375 B.R. 481, 504 (Bankr. C.D. Ill. 2007) (no discharge for debtor who made over $7,000 in charitable donations), *with* Cumberworth v. U.S. Dep't of Educ., 2005 WL 1387981, at 4 (Bankr. N.D. Iowa June 7, 2005) (concluding debtor's charitable spending was not unreasonable although it was unnecessary).

82. Rendleman & Weingart, *supra* note 77, at 281. (citing Gill v. Nelnet Loan Servs. (*In re* Gill), 326 B.R. 611, 631–34 (Bankr. E.D. Va. 2005)) (reviewing the various views courts have taken with respect to whether debtors should be permitted to spend funds on adult children as part of a minimal standard of living).

In sum, there is wide variation among courts in terms of what standard of living constitutes a "minimal" standard of living. Thus, whether a debtor meets this prong is likely to depend in large part on the happenstance of the location in which they file.[83] Debtors in two different districts—or even two different courtrooms—with the exact same income and expenses may have opposite outcomes with respect to the question of whether they are able to meet a minimal standard of living. This makes the law seem arbitrary and, therefore, unfair. Although our proposal will not remove this discretion and variation in all cases, we propose clear categories to capture many of the neediest debtors so that weaknesses in the existing system do not bar them from access to relief.

2. Establishing That Undue Hardship Will Persist

Both the *Long* and *Brunner* tests require that the debtor prove their hardship will persist for a significant portion of the repayment period.[84] Unfortunately, courts vary with respect to what the debtor must prove to establish that their undue hardship will persist if they are forced to repay their student loans. This variation has three major axes. On the first axis, some courts have required a "certainty of hopelessness."[85] On the

83. *See* Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18 (considering the signaling function bankruptcy court doctrine serves regarding undue hardship); *see also* Pardo & Lacey, *Undue Hardship in Bankruptcy Courts*, supra note 29, at 499–502 (finding some consistency between certain debtor financial characteristics and a bankruptcy court's determination regarding a debtor's current inability to repay).

84. *Brunner* requires that the debtor demonstrate 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 *Long* requires that the debtor provide a reasonably reliable forecast of future financial resources. *See supra* notes 50–51 and accompanying text.

85. *See, e.g.*, White v. Educ. Credit Mgmt. Corp. (*In re* White), No. 07-41509, 2008 Bankr. LEXIS 4617, at *14 (Bankr. E.D. Tex. Dec. 17, 2008); Mulherin v. Sallie Mae Servicing Corp. (*In re* Mulherin), 297 B.R. 559, 566 (Bankr. N.D. Iowa 2003) (concluding that a showing of "a certainty of hopelessness" is required before an undue hardship discharge can be granted); *In re* Frushour, 433 F.3d at 401 (incorporating "certainty of hopelessness" into undue hardship evaluation). Many have criticized the notion that a debtor must prove a certainty of hopelessness. *See, e.g.*, Richard Fossey, *"The Certainty of Hopelessness": Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J. L. & EDUC. 29, 31 (1997); Katheryn E. Hancock, *A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans*, 33 L. & PSY. REV. 151, 165 (2009). We share in this criticism.

second, others have stated explicitly that a showing of "certainty of hopelessness" is not required.[86] The Fifth Circuit recently held that "student loans are not to be discharged unless requiring repayment would impose intolerable difficulties on the debtor."[87] On still a third axis, some courts have granted a discharge upon a showing that it is just "unlikely" that the debtor's prospects for increasing repayment will improve in the future.[88] Accordingly, a debtor's likelihood of receiving a discharge is affected by the random assignment of a particular judge to their case.

Courts are also inconsistent in the amount and type of proof they will accept as sufficient to satisfy the debtor's burden of proving their hardship will persist for a significant portion of the repayment period. Some courts may allow a debtor to rely on their own testimony for evidence of medical impair-

86. Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884–85 (7th Cir. 2013); *see also* Demmons v. R3 Educ., Inc. (*In re* Demmons), No. 14-11638, 2016 Bankr. LEXIS 3659, at 17 (Bankr. E.D. La. Oct. 7, 2016). For example, the *In re* O' Donohoe court stated that "utter hopelessness" is not required to satisfy the first prong. O'Donohoe v. Panhandle-Plains Higher Educ. Auth. (*In re* O'Donohoe), No. 12-33870, 2013 Bankr. LEXIS 2415, at 9 (Bankr. S.D. Tex. June 13, 2013) (citing Nary v. The Complete Source (*In re* Nary), 253 B.R. 752, 761 (N.D. Tex. 2000) (quoting Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 437 (6th Cir. 1998))). Although this statement occurred in the first prong and not the second, if "utter hopelessness" is not required to establish that the debtor cannot meet a minimal standard of living, a "certainty of hopelessness" could not be required to meet the second prong, as long as the debtor's situation is shown to persist for a significant portion of the repayment period.

87. Thomas v. Dep't of Educ. (*In re* Thomas) 931 F.3d 449, 454 (5th Cir. 2019). The debtor was denied discharge of her student loans on the basis that she could not prove that her undue hardship would persist, even though she had diabetic neuropathy, was over sixty years old, and was unemployed. Her disability forced her to leave jobs in the retail and restaurant industries, and a job at UPS. The court reasoned that because she had held jobs at a call center and admitted that she was capable of "sedentary work," she did not prove that her situation would persist for a significant portion of the repayment period. In upholding *Brunner* and *Gerhardt*, the court ignored that this exacting standard for discharge was developed when student loans were automatically dischargeable after seven years. As Professor Bob Lawless pointed out, the court also did not explain "[h]ow one set of ambiguous words—'undue hardship'—can have a plain meaning but need to be explained through another set of ambiguous words—'intolerable difficulties[.]'" See Robert M. Lawless, *The Fifth Circuit Finds a Way to Make it Even Harder to Discharge Loans in Bankruptcy*, CREDIT SLIPS BLOG (Aug. 2, 2019, 5:39 am), https://www.creditslips.org/creditslips/2019/08/the-fifth-circuit-finds-a-way-to-make-it-even-harder-to-discharge-student-loans-in-bankruptcy .html [https://perma.cc/7BJJ-MBQ8].

88. Fern v. FedLoan Servicing (*In re* Fern), 553 B.R. 362, 368 (Bankr. N.D. Iowa 2016).

ments and inability to obtain adequately compensatory work.[89] However, other courts may require the debtor to produce additional evidence of continued incapacity—such as expert testimony—even when their own testimony is unrebutted.[90] Requiring expert testimony can significantly increase the costs associated with seeking the discharge.[91]

Finally, many judges and scholars believe that a debtor's ability to repay their student loans without suffering an undue hardship should be measured against the repayment period of the original loan term.[92] However, a few courts have held otherwise and measured the debtor's ability to repay against the loan term, as modified by an income-driven repayment (IDR) plan.[93] Evaluating the debtor's ability to repay against a

89. *See, e.g.*, *In re* White, 2008 Bankr. LEXIS 4617, at 5, 14; *In re* O' Donohoe, 2013 Bankr. LEXIS 2415, at 11.

90. *See In re* White, 2008 Bankr. LEXIS 4617, at 14. *Compare In re* O'Donohoe, 2013 Bankr. LEXIS 2415, at 11 (citing Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 359–60 (6th Cir. 2007)) ("[A] debtor is not required to present expert testimony to corroborate his own testimony about his health."), *with* CMC v. Mosley (*In re* Mosley), 494 F.3d 1320, 1325 (11th Cir. 2007).

91. Daugherty v. First Tenn. Bank (*In re* Daugherty), 175 B.R. 953, 959. (Bankr. E.D. Tenn. 1994); *see also Mosley*, 494 F.3d at 1325. For further discussion on this topic, see Pardo, *Illness and Inability*, *supra* note 22, at 517 n.52.

92. *See, e.g.*, *In re* O'Donohoe, 2013 Bankr. LEXIS 2415, at 17 ("The Court further finds that in this case, an income-contingent plan would serve no useful purpose. The Debtor has demonstrated that he has taken his loan obligations seriously and has made significant payments toward the Loan."); Walker v. Sallie Mae Serv. Corp. (*In re* Walker) 650 F.3d 1227, 1234 (8th Cir. 2011); Halverson v. U.S. Dep't of Educ. (*In re* Halverson), 401 B.R. 378, 390 (Bankr. D. Minn. 2009) (finding the Income Contingent Repayment Plan unaffordable and granting discharge); Educ. Credit Mgmt. Corp. v. Curiston, 351 B.R. 22, 33 (D. Conn. 2006) (where debtor could not afford minimum IDR payment so participation would have been "futile"); Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 506 (Bankr. N.D. Ill. 2004), *aff'd*, 320 B.R. 357 (N.D. Ill. 2005) (finding IDR repayments not "realistic" and so granting discharge); John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1325–35 (2018).

93. *See* Price v. Devos (*In re* Price), 573 B.R. 579, 604 (Bankr. E.D. Pa. 2017) ("One might fairly characterize the initial, contractual loan term of a federally guaranteed student loan as a 'conditional' repayment period, subject to modification based on subsequent events."); *see also* Jones v. Bank One Texas, 376 B.R. 130, 135 (W.D. Tex. 2007); Parker v. Gen. Revenue Corp. (*In re* Parker) 328 B.R. 548, 553 (B.A.P. 8th Cir. 2005) (reversing the bankruptcy court's finding of undue hardship, concluding that the availability of IDR resulted in the debtor's ability to make payments on their student loans). *Cf.* Krieger, 713 F.3d at 886 (Manion, J., concurring) ("A good and expensive education is no longer a guarantee that a good job will ensue. The Wall Street Journal recently featured an article headlined, 'College Grads May Be Stuck in Low-Skill Jobs.' Ben

longer repayment period makes it more difficult for a debtor to establish that their hardship will persist for a significant portion of the remaining repayment period.

3. Showing "Good Faith"

There is no "per se" requirement that debtors enter into an IDR plan to demonstrate their good faith and receive a discharge.[94] The Seventh Circuit, for example, has held that it is inappropriate to withhold discharge based on the debtor's unwillingness to enter into an extended IDR plan.[95] Various other courts have likewise excused debtors from participating in IDR plans when they could not afford the plans.[96] By contrast, other courts have denied relief to debtors who did not participate in such programs. A debtor's failure to enter an IDR program has been described as "probative of her intent to repay her loans" though "not a *per se* indication of a lack of good faith."[97] For example, in *In re Fields*, the Sixth Circuit reversed the bankruptcy appellate panel's granting of partial discharge on the grounds that the debtor "did not use all realistically available resources to repay her loans, inasmuch as she had not even ap-

Casselman, Wall St. J., Mar. 26, 2013, at A5. While college tuition continues to rise, job opportunities appear to be contracting. Hope remains that an eventually improving economy will generate more job opportunities. But for those who perceive that their employment-seeking efforts are at a dead end, bankruptcy should not be the answer. Rather than challenging the nondischargeability barrier in bankruptcy, those who have concluded that there is no way they can pay off the debt should be required to enroll in the William D. Ford Income-Based Repayment Plan."); Fields v. Sallie Mae Srvcs. Corp. (*In re* Fields), 286 F. App'x 246, 250 (6th Cir. 2007).

94. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1311 (10th Cir. 2004); Coats v. N.J. Higher Educ. Assistance Auth. (*In re* Coats)*,* 214 B.R. 397, 405 (Bankr. N.D. Okla. 1997); Shoberg v. Minn. Higher Educ. Coordinating Council, 41 B.R. 684 (Bankr. D. Minn. 1984).

95. Krieger, 713 F.3d at 884.

96. *See In re* Walker, 650 F.3d at 1234; *see, e.g.*, *In re* O'Donohoe, 2013 Bankr. LEXIS 2415, at 17 ("The Court further finds that in this case, an income-contingent plan would serve no useful purpose. The Debtor has demonstrated that he has taken his loan obligations seriously and has made significant payments toward the Loan."); *In re* Halverson, 401 B.R. at 390 (finding the Income Contingent Repayment Plan unaffordable and granting discharge); Curiston, 351 B.R. at 33 (where debtor could not afford minimum IDR payment so participation would have been "futile"); *In re* Durrani, 311 B.R. at 506, (finding IDR repayments not "realistic" and so granting discharge).

97. *See* Jones v. Bank One Tex., 376 B.R. 130, 142 (W.D. Tex. 2007); *see also In re* Tirch, 409 F.3d 677 (6th Cir. 2005); Polleys, 356 F.3d at 1311.

plied for [IDR] relief."[98]

C. Inconsistency and Unpredictability in the Courts Create Barriers to Rightful Discharge of Student Loans

There are a number of issues that arise in undue hardship cases that lead to inconsistencies and even lack of adherence to the Bankruptcy Code. It is extremely difficult for debtors to ascertain what precisely they must show and what kind of evidence courts require to grant a discharge. It is also difficult for a debtor to know whether to attempt an IDR plan. There are serious issues with requiring debtors to hire expert witnesses and legal counsel to establish undue hardship, while also requiring that debtors' potential for repaying these debts be hopeless.[99] If debtors have the means to pay counsel and expert witnesses, they are better off than most debtors, who, as Angela Littwin, Katie Porter, and Ronald Mann have noted, often lack the means to even pay the filing fee for bankruptcy and must save up to file.[100]

II. AN ADMINISTRATIVE APPROACH TO UNDUE HARDSHIP REFORM

Numerous proposals for reforming the current treatment of student loans in bankruptcy already exist. The most direct method of reform would be to revise the Bankruptcy Code itself, but legislative changes, while often proposed, have not yet been successful.[101] We continue to hope for future

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98. *In re* Fields, 286 F. App'x at 250; *see also In re* Parker, 328 B.R. at 553 (reversing a bankruptcy court's finding of undue hardship, concluding that the availability of IDR resulted in the debtor's ability to make student loan payments); *In re* Tirch, 409 F.3d 677.

99. For a discussion, see Pardo, *Taking Bankruptcy*, *supra* note 22, 1155 n.164.

100. *See, e.g.*, Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933 (2011); Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 290, 323–24 (2010).

101. There were four separate proposals to amend bankruptcy provisions regarding student loans in the 115th Congress alone. *See* Discharge Student Loans in Bankruptcy Act of 2017, H.R. 2366, 115th Cong. (2017); Private Student Loan Bankruptcy Fairness Act of 2017, H.R. 2527, 115th Cong. (2017); Higher Ed Act, H.R. 5549, 115th Cong. (2018); Students Over Special Interests Act, H.R. 5928, 115th Cong. (2018). *See* discussion *supra* Section III.B.

congressional action on student loans. In the absence of such reform, we have looked to alternative venues in which to influence the treatment of student loans in bankruptcy for the better.

A. *Clarify the Undue Hardship Standard*

Our proposal seeks primarily to establish clear, noncontroversial categories of undue hardship that would inform the ED's use of resources in challenging student loan discharge. Our proposal to create certain explicit standards for undue hardship offers significant advantages to individual borrowers, the ED, and, by extension, all American taxpayers, whether or not they borrow student loans or ever file for bankruptcy. As an initial matter, borrowers are far more likely to experience uniform treatment when a statutory term is explicitly defined.[102] Carefully defined standards enable debtors and lenders to better predict how a court would rule, which can facilitate the discharge of student loans without the need for extensive judicial intervention.[103] Clearly defined standards can also inform borrowers regarding their likelihood of success, and thereby encourage the filing of more meritorious cases and fewer frivolous ones. Because this will result in conserved resources, the ED will be better suited to challenge those cases where discharge would not be appropriate under the standards.

Our proposal seeks to maximize the potential benefits of explicit rules regarding undue hardship by identifying circumstances that would be easy to verify, thereby obviating the need for a trial, an evidentiary hearing, or even formal discovery.[104] Bankruptcy proceedings are characterized by financial disclosure on the part of the filing debtor—most financial infor-

102. *See* discussion *supra* Section I.B.

103. *See* Pardo, *Undue Hardship*, *supra* note 10, at 2108–09 (arguing for greater clarity because of the need for increased predictability and discussing the "pollutive litigation" that results without such clarity).

104. Adversary proceedings function similarly to a typical lawsuit filed in federal court pursuant to the Federal Rules of Civil Procedure. *See* FED. R. BANKR. P. 7001–87. In fact, the Federal Rules of Civil Procedure are extensively cross-referenced regarding discovery in adversary proceedings. *See, e.g.*, FED. R. BANKR. P. 7027, 7033, 7036. Accordingly, in typical proceedings to discharge student loans, a debtor may be required to propound discovery and respond to discovery requests. Our proposal would incorporate a more streamlined and less cumbersome method of establishing necessary proofs.

mation is voluntarily produced even before the debtor files an adversary proceeding seeking to discharge their student loans.[105] Accordingly, factual issues—such as the borrower's current income—are easily discernible, being produced upon penalty of perjury as a matter of course.[106] Additional factual issues could also be proven by referring to certified documents, or even to the federal government's own records, particularly regarding disability connected with military service or disability pursuant to the Social Security Act. Explicit categories will also help borrowers determine whether their circumstances are likely to satisfy the undue hardship standard and, accordingly, whether it would be worth their time and effort to bring an adversary proceeding seeking discharge.

Greater clarity and transparency for borrowers will translate into cost savings for the government and consequently for taxpayers. Under the current legal landscape, the uncertainty regarding what constitutes an undue hardship and the widespread understanding that the burden is exceptionally high create the underlying presumption that all adversary proceedings should be defended vigorously.[107] Those tasked with responding to adversary proceedings, typically servicers or their

105. *See* 11 U.S.C. § 521(a) (2018).

106. *See* Bronston v. United States, 409 U.S. 352, 357 (1973) (noting that general federal perjury provisions apply to federal bankruptcy proceedings). In addition, debtors who file false statements may be subject to criminal prosecution for bankruptcy fraud pursuant to 18 U.S.C. § 157 (2018). Further, debtors who are not forthcoming regarding their property may run the risk of being denied any discharge in bankruptcy. *See* 11 U.S.C. §§ 523(a), 727, 1328(e) (2018). Moreover, the United States Trustee is intended to be a "watchdog" over the bankruptcy process. U.S. DEP'T JUST., OFFICE OF THE INSPECTOR GENERAL, THE U.S. TRUSTEE PROGRAM'S EFFORTS TO PREVENT BANKRUPTCY FRAUD AND ABUSE, REPORT NO. 03-17 (2003) https://oig.justice.gov/reports/OBD/a0317/exec.htm [https://perma.cc/XXA7-2DEN]. In fulfillment of the program goals to "protect the integrity of the Nation's bankruptcy system," the U.S. Trustee performs oversight that may include periodic audits of individual cases and reporting material misstatements to the court. *See* 28 U.S.C. § 586(f) (2018); *Strategic Plan & Mission*, U.S. DEP'T JUST., https://www.justice.gov/ust/strategic-plan-mission (last updated May 8, 2015) [https://perma.cc/X7ME-QDK5]. Accordingly, debtors are highly motivated to be honest in their filings with the bankruptcy court, and policing measures are already in place. For a high-profile example of a debtor being jailed for bankruptcy fraud, see *What You Need to Know About Teresa Giudice's Criminal* Case, APP (May 25, 2016, 2:13 PM), https://www.app.com/story/entertainment/2016/05/25/teresa-giudice-criminal-case-timeline/84901790/ [https://perma.cc/C4TD-G9KS].

107. *See* Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18, at 190–91 (arguing that the perception of uncertain outcomes produces a climate that encourages parties to litigate).

representatives, are incentivized to oppose a student loan discharge no matter how sympathetic the circumstances.[108] This was apparent in ECMC's response to the case of Mr. Mosley, described in the introduction.[109] Clear, transparent limitations on when the ED and its agents should consent to the discharge of student loans will decrease unnecessary collection attempts, reducing costs to the American taxpayer and opening the benefits of discharge to appropriate categories of borrowers.

Some may object to concrete, verifiable categories on the argument that individual debtors may be incentivized to game the system and manipulate their situation to come within one of the no-contest categories. As described in depth below, while we do not suggest that such an occurrence could not happen, we find it highly unlikely that rational individuals would choose to do so. Furthermore, all bankruptcy filings are overseen by a court tasked with "prevent[ing] an abuse of process" and granted the authority to "tak[e] any action or mak[e] any determination necessary or appropriate" to do so.[110] Instances of clear fraud would also result in a denial of discharge for the debtor.[111]

B. *Verifiable Categories of Borrower Circumstances Amounting to Undue Hardship*

Our proposal seeks to facilitate the minimum appropriate discharge of student loans in circumstances of undue hardship by establishing straightforward categories. The ED should not oppose student loan discharges in adversary proceedings where the borrower's circumstances fall within one of the designated categories. Each of these no-contest categories are easily calculable and verifiable. For example, Mr. Mosley would have likely benefited from at least three of the no-contest categories we propose (four years of poverty, military service-connected

108. *See id.* at 191; Pardo, *Undue Hardship*, *supra* note 10, at 2108–09 (noting that the high trial rate of adversary proceedings suggest student loan creditors may be waging attrition litigation on debtors).

109. *See* Pardo, *Taking Bankruptcy*, *supra* note 22, 1152, 1156 (estimating via a statistical model "that, holding all other variables constant, the odds of litigation success decrease by 70.1% [50.0, 82.1] if ECMC appears as a litigant in the adversary proceeding").

110. *See* 11 U.S.C. § 105(a) (2018).

111. *See, e.g.*, 11 U.S.C. §§ 523(a), 727(a), 1328(e) (2018).

disability, or uncredentialed student).[112]

Proof of qualification would not require a trial, merely the production of corroborating evidence. In some instances, proof might already be available in the form of documents previously filed in the bankruptcy proceedings. If proof is not already included in the record, we recommend that the ED accept a borrower's written and sworn statements made under penalty of perjury.

The starting point for each category of presumptive dischargeability is the debtor's income. Individuals require a certain level of financial assistance to support their lives day-today. Guidelines on poverty generally assume that the amount is the same, or nearly the same, for all individuals.[113] The federal poverty level for 2019 is $12,490 for a single-member household, $16,910 for a two-person household, and so on, with an additional $4,420 for each additional person in the household.[114]

Unfortunately, the federal formula for poverty—like any other measure of poverty—suffers from fundamental imprecision, and likely inaccuracies, because of how it is calculated.[115] The federal poverty level was first developed based on the cost of healthy food required to support households of varying sizes.[116] In the 1960s, economist Mollie Orshansky determined, based on analysis of data from 1955, that the average household spent about one-third of its income on food.[117] Accordingly, poverty was determined to be anything less than three times the cost of a healthy diet. Put another way, individuals with income less than this amount should be presumed, based on the

112. It was shown at trial that Mr. Mosley's earnings had been below the poverty level for the previous ten years, satisfying our first category. *See* CMC v. Mosley (*In re* Mosley), 494 F.3d 1320, 1325 (11th Cir. 2007). The kind of disability rating he received from the VA is unclear, but he was also receiving meager disability benefits for service-connected disabilities, potentially qualifying under our third no-contest category. *Id.* He also never graduated from his program, which would qualify him as an uncredentialed student in our sixth category. *Id.*

113. Although this assumption is probably fundamentally flawed, particularly with regards to health costs, it remains a useful tool for operating federal programs across a wide swath of populace.

114. *See Poverty Guidelines*, U.S. DEP'T HEALTH & HUM. SERVS. (Jan. 11, 2019), https://aspe.hhs.gov/poverty-guidelines [https://perma.cc/2QSN-EQGX].

115. *See* Angus Deaton, *Measuring Poverty*, *in* UNDERSTANDING POVERTY 3 (Abhijit Vinayak Banergee, Roland Benabou & Dilip Mookherjee eds., 2006).

116. *See* Mollie Orshansky, *How Poverty Is Measured*, 92 MONTHLY LABOR REV. 37, 38 (1969).

117. *Id.* at 38.

assumptions in federal law, to be skimping on some of the essentials.

The assumption that individuals and families operating at the poverty level must be going without basic essentials is even more likely to be true today than when Orshansky developed her model. In the 1950s, food was proportionately a much larger part of household expenses.[118] Were Orshansky to conduct the same analysis on 2012 data, she would find that the average share of household income spent on food was 12.8 percent.[119] Accordingly, tripling the average cost of food will no longer amount to a rough estimate of 100 percent of an individual's or family's needs but instead to a mere 38.4 percent of basic needs. Because the poverty guidelines are still calculated on the cost of food, families now must be even more destitute than earlier generations to be considered "poor" and are even more likely to be going without necessities such as health care, housing, or transportation.[120]

Recognizing the weaknesses inherent in using the federal poverty level, we nevertheless adopt this measurement in an effort to facilitate calculation of eligibility for a no-contest discharge and to ensure consistency with other federal programs outside of bankruptcy. Pursuant to our proposal, all borrowers must have a current monthly income below 150 percent of the federal poverty level to fall within a no-contest category.[121]

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118. *See* John Cook, *How We Measure Poverty: Catching Up with Mollie Orshansky*, TALK POVERTY (May 23, 2014), https://talkpoverty.org/2014/05/23/cook/ [https://perma.cc/WX3Q-DM48].

119. *See id.*; Jennifer Brooks & Diana Pearce, *Meeting Needs, Measuring Outcomes: The Self-Sufficiency Standard as a Tool for Policy-Making, Evaluation, and Client Counseling*, 34 CLEARINGHOUSE REV. 34, 34 (2000) (calculating the income necessary to meet basic needs without subsidies).

120. At least one study has identified transportation costs as a particular challenge for impoverished families, especially in areas where affordable housing is located far from employment opportunities. *See, e.g.*, FED. HIGHWAY ADMIN., FHWA NHTS BRIEF: MOBILITY CHALLENGES FOR HOUSEHOLDS IN POVERTY 2 (2014), https://nhts.ornl.gov/briefs/PovertyBrief.pdf [https://perma.cc/H5FT-PEN5].

121. The federal poverty guidelines are the same across most of the United States (except Alaska and Hawaii) but vary based on household size. In 2018, a one-person household earning less than $12,140 was considered below poverty. For a two-person household the 2018 poverty level was $16,460; a three-person $20,780; and a four-person $25,100. *See Poverty Guidelines*, *supra* note 114. By comparison, the median income for a one-person household in Mississippi was $39,231 in 2018. *Census Bureau Median Family Income by Family Size (Cases Filed Between November 1, 2017 and March 31, 2018, Inclusive)*, U.S. DEP'T JUST., https://www.justice.gov/ust/eo/bapcpa/20171101/bci_data/median_income_table.ht

Lower income borrowers struggle to meet their basic needs; frequently, they qualify for programs such as Supplemental Nutritional Assistance Program (i.e., food stamps), assistance with heating and cooling energy costs,[122] and Medicaid (both with and without the expansion under the Affordable Care Act).[123] Families with minor children whose incomes fall below 150 percent of the federal poverty level qualify for free or reduced-price meals at school.[124]

Proof of poverty level income will not require debtors to produce any additional paperwork because current monthly income must already be calculated for all consumer bankruptcy cases.[125] Debtors need not be required to produce additional evidence of their income.[126]

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m (last visited July 23, 2019) [https://perma.cc/VX4M-3HDA].

122. *See Low Income Home Energy Assistance Program*, BENEFITS.GOV, https://www.benefits.gov/benefit/623 (last visited July 23, 2019) [https://perma.cc/YV2B-NETG] (maximum income for eligibility is 146.7 percent of poverty level).

123. *See SNAP Eligibility*, U.S. DEP'T AGRIC., https://www.fns.usda.gov/snap/recipient/eligibility (last updated Sept. 4, 2013) [https://perma.cc/Y92K-H9VL] (maximum income level is 130 percent of poverty level); *Eligibility*, CTRS. MEDICARE & MEDICAID SERVS., https://www.medicaid.gov/medicaid/eligibility/index.html (last visited July 23, 2019) [https://perma.cc/UAW9-V5VQ].

124. U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., THE NATIONAL SCHOOL LUNCH PROGRAM (2017), https://fns-prod.azureedge.net/sites/default/files/resource-files/NSLPFactSheet.pdf [https://perma.cc/W6MY-NGUM].

125. ADMIN. OFFICE OF U.S. COURTS, BANKRUPTCY FORM 122A-1, at line 11 (2015), https://www.uscourts.gov/sites/default/files/form_b122a-1.pdf [https://perma.cc/XH4Y-F8WN]; ADMIN. OFFICE OF U.S. COURTS, BANKRUPTCY FORM 122C-1, at line 11 (2015), https://www.uscourts.gov/sites/default/files/form_b122c-1.pdf [https://perma.cc/76ZG-JB7C]. A possible alternative to using the federal poverty level as a qualifier for the no-contest discharge would be to use the median household income of a state, which all debtors must list in their bankruptcy schedules. *See* BANKRUPTCY FORM 122A-1, *supra*, at line 13; BANKRUPTCY FORM 122C-1, *supra*, at line 16. Indeed, others have recommended legislative and administrative proposals that use this figure. National Association of Consumer Bankruptcy Attorneys, Comment Letter on Evaluating Undue Hardship Claims (May 18, 2018) [hereinafter NACBA Response], https://www.regulations.gov/document?D=ED-2017-OPE-0085-0366 [https://perma.cc/T6DA-GGPM]. Given that median household income varies by state, this number is better tailored than the federal poverty guidelines to the differences in income across states. However, as a significant number of filers are below the median income for their respective states, we felt that a more limited figure would be more politically feasible. *See* Robert M. Lawless, Angela K. Littwin, Katherine M. Porter & John A.E. Pottow, *Did Bankruptcy Reform Fail: An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L. J. 349, 363 (2008) (noting that the median income of bankrupt households in 2007 was a full 45 percent below the median income for the general population).

126. The Bankruptcy Code has a somewhat idiosyncratic method for defining income. It does not rely on federal income tax returns; rather, the Code defines

In addition to satisfying the income requirement, debtors would need to fall within one of the following categories to qualify for a no-contest discharge:

1. Four Years of Poverty

The ED should not object to student loan discharges for borrowers whose household income has been at or below the federal poverty level for four years prior to filing. Such individuals have demonstrated the kind of sustained income struggles that signify an inability to repay student loans. Furthermore, the period of time in which a person would need to demonstrate income at or below the poverty level would remove concerns regarding potential gamesmanship. In theory, it is possible that individuals could temporarily depress their income levels in an effort to discharge themselves of debt. However, it is both unlikely and unreasonable to suspect that an individual with income at or below the poverty level for a period of years is deliberately earning less in an effort to facilitate the future discharge of student loans.[127] The hardships associated with poverty are just too great for any rational individual to voluntarily impoverish themselves for that long.[128]

Individuals who are sustaining themselves and their families at the poverty level for any significant period of time are undoubtedly poor enough that any repayment of debt consti-

"current monthly income" as an average of all income received during the six-month period preceding bankruptcy. *See* 11 U.S.C. § 101(10A) (2018); discussion *infra* notes 140, 152.

127. Scholars have documented disturbingly high rates of food and housing insecurity, as well as homelessness, for current students. *See, e.g.*, Katharine Broton & Sara Goldrick-Rab, *The Dark Side of College (Un)Affordability: Food and Housing Insecurity in Higher Education*, 48 CHANGE: MAG. HIGHER LEARNING, Jan./Feb. 2016, at 16–19, https://www.tandfonline.com/doi/full/10.1080/00091383.2016.1121081 [https://perma.cc/KU3G-Y8EQ]; SARA GOLDRICK-RAB, JED RICHARDSON & ANTHONY HERNANDEZ, WIS. HOPE LAB, ASS'N OF CMTY. COLL. TRS., HUNGRY AND HOMELESS IN COLLEGE (2017), http://www.acct.org/files/Publications/2017/Homeless_and_Hungry_2017.pdf [https://perma.cc/W3ZA-7K7Z].

128. *See, e.g.*, ARLOC SHERMAN, CTR. ON BUDGET & POLICY PRIORITIES, HARDSHIPS ARE WIDESPREAD AMONG FAMILIES IN POVERTY (2004), https://www.cbpp.org/sites/default/files/atoms/files/12-20-04pov.pdf [https://perma.cc/DFJ4-QHN5] (describing hunger, severe crowding, having utilities cut off, going without medical care, and unsafe living conditions among poor families); Colleen M. Heflin & John Iceland, *Poverty, Material Hardship, and Depression*, 90 SOC. SCI. Q. 1051 (2009) (detailing the association between mental health disorders and poverty); DAVID CAPLOVITZ, THE POOR PAY MORE (1967).

tutes an undue hardship. As noted above, the poverty level is calculated on the basis of the cost of healthy food. Therefore, individuals earning less than the federal poverty level are assumed to already be going hungry. Requiring individuals to repay past debt would require them to skimp on even more of life's essentials. Going without food or other staples to repay student loans should be considered an undue hardship. Surviving on such little income year after year is a feat in itself; it seems self-evident that such individuals will not be capable of repaying debt incurred as student loans.

Proof of long-term poverty could be demonstrated by attaching past years' tax returns to the adversary proceeding complaint. Debtors filing under chapter 13 are already required to file the previous four years' worth of tax returns before their section 341(a) meeting.[129] This requirement serves as the basis for our proposed timeline; a longer period would impose additional requirements on debtors, and a shorter period could potentially allow gamesmanship (even if rational individuals are unlikely to cause themselves to be deliberately impoverished for any significant period of time). The IRS makes it easy to request transcripts of past filed returns,[130] but because there is not a current requirement for debtors in chapter 7 to file tax returns, debtors in chapter 7 should be permitted to provide an alternative form of proof.

2. Social Security Disability

Our proposal would also grant a no-contest discharge of student loans to individuals receiving disability benefits under the Social Security Act. Although initially conceived only to pay retirement benefits to workers over sixty-five, the Social Security Act was expanded in 1956 to provide early retirement insurance for the "totally and permanently disabled."[131] To ob-

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129. *See* 11 U.S.C. § 1308(a); *see also* 11 U.S.C. § 521(e)(2)(A)(i) (requiring that all debtors provide to the trustee a copy of their return for the "most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed").

130. *Welcome to Get Transcript*, INTERNAL REVENUE SERV., https://www.irs.gov/individuals/get-transcript (last updated July 10, 2019) [https://perma.cc/F7CR-VAL5].

131. *See* David H. Autor & Mark G. Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, J. ECON. PERSP., Summer 2006, at 71, 74 (citing the 1950 grant-in-aid program for state public assistance on which the

tain disability benefits under the Social Security Act today, an individual must establish "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[132] An individual must further demonstrate "a severe impairment" that would make it impossible to work in the national economy. An inability to work naturally precedes an inability to obtain the income necessary to support oneself and any dependents, much less repay student loans.

Recipients of Social Security benefits receive amounts that vary based on average lifetime earnings. The maximum monthly benefit amount in 2019 is $3,030.50 a month or $36,366.00 a year,[133] although the average recipient receives only $1,197 a month, or $14,364 a year.[134] These benefits are currently excluded from the calculation of a debtor's current monthly income under the Bankruptcy Code.[135] However, even if a legislative proposal determined that such amounts should be included for purposes of establishing undue hardship, most recipients of disability benefits under the Social Security Act would satisfy the additional requirement of having a current income below 150 percent of the federal poverty standard.

Proof of eligibility for Social Security disability benefits is relatively easy to procure and present in court, as recipients need only download a letter from the Social Security website.[136] Accordingly, we recommend that the ED accept such letters as proof when attached to an adversary complaint seeking discharge of student loans. Under our proposal, this would be sufficient for the ED to stipulate to a discharge.

A no-contest discharge for individuals experiencing such disability should not be controversial as these individuals are already afforded relief outside of the bankruptcy context.[137]

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program was based).

132. 20 C.F.R. § 416.905(a) (2019).

133. *See Social Security Benefit Amounts*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/cola/Benefits.html (last visited July 23, 2019) [https://perma.cc/EK5T-6MMH].

134. *See id.*

135. *See* 11 U.S.C. § 101(10A)–(B) (2018).

136. *See supra* note 133.

137. *See* 28 U.S.C. § 1087(a) (2018); 34 C.F.R. §§ 674.61, 682.402(c), 685.213 (2019).

Recognition of the need for relief outside bankruptcy proceedings should clearly signal that further litigation on the issue is unnecessary.[138] Any individual who has a permanent disability may apply directly to loan servicers for loan forgiveness.[139] This process is not without its problems, as the Consumer Financial Protection Bureau has documented.[140] If the borrower is already in bankruptcy proceedings it is more efficient for the ED to simply stipulate to a bankruptcy discharge. There is no need for the borrower and the ED to waste time and resources on duplicitous applications for relief. Stipulation of discharge in these cases would also avoid documented issues caused by servicer noncompliance.[141]

3. Military-Service-Connected Disability

Our proposal would also grant a no-contest discharge of student loans to borrowers who have been determined to be unemployable because of a disability incurred in the course of military duty. Pursuant to federal law, individuals may receive compensation for disability from personal injury that occurred

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138. *See* 28 U.S.C. § 1087(a) (2018); 34 C.F.R. §§ 674.61, 682.402(c), 685.213 (2019).

139. *Total and Permanent Disability Discharge*, FED. STUDENT AID, https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/disability-discharge (last visited Aug. 22, 2019) [https://perma.cc/5GXD-JWS5]. Of course, individuals who only have student loans and no other debt may prefer to simply apply for relief directly from the ED rather than file for bankruptcy.

140. CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 15 (2017), https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf [https://perma.cc/W86M-ZD9B] (noting that "borrowers complain to the Bureau about issues related to many stages of the TPD discharge process, from knowing how or when to apply, to providing sufficient proof of their disability."); Consumer Fin. Prot. Bureau, *CFPB Sues Nation's Largest Student Loan Company, Navient, for Failing Borrowers at Every Stage of Repayment* (Jan 18, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/ [https://perma.cc/6UEE-WJD8] (suing Navient, the nation's largest student loan servicer, for reporting loans discharged due to disability as delinquent to credit bureaus).

141. *Written Testimony of Dalié Jiménez, Professor of Law at University of California, Irvine School of Law, Before the H. Comm. on the Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law*, 116th Cong. (2019), https://docs.house.gov/meetings/JU/JU05/20190625/109657/HHRG-116-JU05-Wstate-JimnezD-20190625.pdf [https://perma.cc/GMJ2-SXXM] (arguing that because student loans are presumptively nondischargeable in bankruptcy, servicers lack market incentives to improve their processes towards students, which increases the likelihood of consumer protection issues).

in the line of duty in the active services during a period of war.[142] Compensation is permitted for physical disabilities or mental health conditions, such as post-traumatic stress disorder.[143] The VA provides a benefit amount graduated according to the degree of a veteran's disability, as measured on a scale from 10–100 percent at 10 percent increments.[144] Veterans with a service-connected disability rated at least 60 percent, or with two or more service-connected disabilities with a combined rating of at least 70 percent, and who are found to be unable to maintain substantially gainful employment may receive compensation up to 100 percent of benefits available based on individual unemployability.[145] In other words, to receive full compensation, an individual must have demonstrated that he is unable to "hold down a steady job that supports [him] financially."[146] Thus, an inability to work equates to an inability to provide for oneself and any dependents moving forward, and inability to provide basic needs presupposes that repaying student loans would constitute an undue hardship.

Pursuant to a recent act of Congress, the HAVEN Act, veterans' disability benefits are included in the definition of current monthly income under the Bankruptcy Code, much like Social Security benefits.[147] This change came about in part due to extensive lobbying by academics and practitioner groups.[148] As a consequence, an otherwise eligible borrower would not be put outside the scope of relief based on income from his veter-

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142. 38 U.S.C. § 1110 (2018).

143. *See VA Disability Compensation for PTSD*, U.S. DEP'T VETERANS AFF., https://www.va.gov/disability/eligibility/ptsd/ (last visited Aug. 22, 2019) [https://perma.cc/WF67-LW2P].

144. *Benefit Rates*, U.S. DEP'T VETERANS AFF., https://www.benefits.va.gov/compensation/rates-index.asp (last visited July 23, 2019) [https://perma.cc/QTM2-P4T2].

145. *VA Individual Unemployability (Veterans Who Can't Work Due to A Disability)*, U.S. DEP'T VETERANS AFF., https://www.va.gov/disability/eligibility/special-claims/unemployability/ (last visited July 23, 2019) [https://perma.cc/7296-5227].

146. *Id.*

147. *See* Honoring American Veterans in Extreme Need Act of 2019 (HAVEN Act), H.R. 2938, 116th Cong. (2019).

148. *See* Nancy Rapoport & Mary Langsner, Opinion, *Why Does the Bankruptcy Code Discriminate Against Disabled Veterans?*, THE HILL (Jan. 24, 2019), https://thehill.com/opinion/finance/426854-why-does-the-bankruptcy-code-discriminate-against-disabled-veterans [https://perma.cc/246V-SYE6]; Jay Bender, Elizabeth L. Gunn & John H. Thompson, *Defending Our Veterans*, ABI J., Nov. 2018, at 12 (discussing efforts to exclude veterans' benefits from the definition of current monthly income).

ans' disability benefits. As with Social Security disability benefits, proof of individual unemployability would be easy for the borrower to produce and attach to the petition for discharge of student loans. A decision notice from the VA could be produced by the debtor and status could be confirmed through that agency. Accordingly, there is no need for an evidentiary hearing or trial upon a substantiated allegation that a debtor satisfies this category.

The no-contest approach to this category of borrowers is consistent with current law outside of bankruptcy. Borrowers with service-connected disabilities are already eligible for debt relief through direct petition to the applicable lender or the Secretary of Education.[149] Similar to borrowers receiving social security benefits for total and permanent disabilities, borrowers with service-connected disabilities can seek relief directly from the ED. Nonetheless, those already seeking debt relief in bankruptcy should be able to quickly receive student loan relief without having to pursue a separate application process.

4. Retirement Income

Unfortunately, elderly Americans are filing for bankruptcy at higher rates today than in the past.[150] Although student loans are typically viewed as the purview of young people, increasingly they are held by older individuals.[151] In some cases, older borrowers may take out student loans to finance educa-

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149. *See* 34 C.F.R. §§ 682.402(c)(9), 685.213(c) (2019).

150. *See, e.g.*, Deborah Thorne et al., *The Increasing Vulnerability of Older Americans: Evidence from the Bankruptcy Court*, 3 HARV. L. & POL'Y REV. 87 (2009); Deborah Thorne et al., *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, IND. UNIV., MAURER SCH. OF LAW, LEGAL STUDIES RESEARCH PAPER SERIES, no. 406 (2018), https://ssrn.com/abstract=3226574 [https://perma.cc/2NFX-STWL].

151. *See* Stacy Canan & Seth Frotman, *A Nationwide Look at How Student Debt Impacts Older Adults*, CONSUMER FIN. PROT. BUREAU (Aug. 18, 2017), https://www.consumerfinance.gov/about-us/blog/nationwide-look-how-student-debt-impacts-older-adults/ [https://perma.cc/939Z-EBZC]; CONSUMER FIN. PROT. BUREAU, SNAPSHOT OF OLDER CONSUMERS AND STUDENT LOAN DEBT (2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf [https://perma.cc/RGW4-JTJC]. The average amount of debt held by borrowers sixty and older has also dramatically increased. *See* FED. RESERVE BANK OF N.Y., 2016 STUDENT LOAN UPDATE (2016), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/sl_update_2016.xlsx [https://perma.cc/VLY3-XMNX] (reporting that average student debt for borrowers sixty and older was $12,100 in 2005, and $23,500 in 2015).

tion to pursue a second career or to obtain additional training.[152] In other cases, parents may co-sign their children's student loans to assist them through school.[153] Students who graduate later in life tend to have more student debt on average, perhaps reflecting a decreased amount of family support or a larger amount of family responsibilities.[154] In both cases, many older borrowers may still have student loans even after they reach an age at which continuing to work is both less realistic and less feasible.[155]

In theory, older Americans should have money saved for retirement, enabling them to provide for themselves without working for the rest of their lives. However, for a significant percentage of the population, retirement benefits accrued through private savings, pension, or by Social Security will be inadequate to sustain them at a livable standard.[156] These

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152. *See* Carly Margon, *Student Loan Debt: This Generation's Albatross*, 6 NAT'L CHAMBER REV., Summer 2017, at 1, https://nationalchamberreview.org/wp-content/uploads/2018/07/vol_6_no_3.pdf [https://perma.cc/R45D-HW4S] (noting that "by some estimates, nearly as few as one in five modern day college students actually qualify as what we would consider 'traditional'"). Non-traditional students are defined broadly to include those who are older than eighteen when they begin college, are not dependent on parents, and have their own dependents. *Id.*; *see also* Adam Looney & Constantine Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2015, at 1, 33 (noting that nontraditional borrowers tended to be older, with less ability to draw on family and more capacity to borrow).

153. SNAPSHOT OF OLDER CONSUMERS AND STUDENT LOAN DEBT, *supra* note 151.

154. One study has indicated that each year of age at graduation adds an average of $312 to cumulative student loan debt. *See* Steven A. Harrast, *Undergraduate Borrowing: A Study of Debtor Students and Their Ability to Retire Undergraduate Loans*, J. STUDENT FIN. AID, no. 1, 2004, at 21, 30; *see also* Looney & Yannelis, *supra*, note 152, at 2 ("[Nontraditional borrowers] experienced poor labor market outcomes, had few family resources, and owed high debt burdens relative to their earnings."). This study also found that nearly 40 percent of federal borrowers in 2014 were nontraditional borrowers. Harrast, *supra*, at 24.

155. Evidence indicates that older Americans have a harder time finding employment. *See* Olivera Perkins, *Older Workers Suffer from Long-Term Unemployment More Than Any Age Group*, CLEVELAND.COM (Mar. 23, 2013), https://www.cleveland.com/business/2013/03/older_workers_suffer_from_long.html [https://perma.cc/G6ML-P3E4].

156. *See* TERESA GHILARDUCCI, MICHAEL PAPADOPOULOS & ANTHONY WEBB, SCHWARTZ CTR. FOR ECON. POLICY ANALYSIS, INADEQUATE RETIREMENT SAVINGS FOR WORKERS NEARING RETIREMENT 1–3, (2017), https://www.economicpolicyresearch.org/images/docs/research/retirement_security/Account_Balances_adjusted_appendix_tables.pdf [https://perma.cc/CR5E-P5AC] (noting that over one-third of all workers nearing retirement have no retirement savings, and many with retirement accounts are likely to outlive their savings).

individuals must also look ahead to inevitabilities such as declining health, which will require additional spending for medical and home care as time moves forward.[157] It should be accepted as a matter of course that, for these individuals subsisting just ahead of the poverty line, repayment of student loans would be an undue hardship.[158]

Our proposal would allow borrowers whose income is at or below 150 percent of the federal poverty level and derived solely from retirement funds a no-contest discharge of their student loans. In addition to concerns about financial obligations hounding elderly Americans to their graves, it would be an improvident use of taxpayer funds to chase loans from individuals who are manifestly not in a position to repay them. Proof of income (both the amount and the source) is included in a debtor's initial bankruptcy schedules; accordingly, further evidentiary hearings or trial are unnecessary to reach a determination of discharge.

5. Qualified Caregiver

Our proposal would allow two categories of caregivers a no-contest discharge of their student loans in recognition of the hardships inherently shouldered by individuals acting in a caregiving capacity.[159] The first category encompasses borrowers who would be defined as caregivers pursuant to the Life-

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157. *See* TRICIA NEUMAN, JULIETTE CUBANSKI, JENNIFER HUANG & ANTHONY DAMICO, HENRY J. KAISER FAMILY FOUND., THE RISING COST OF LIVING LONGER: ANALYSIS OF MEDICARE SPENDING BY AGE FOR BENEFICIARIES IN TRADITIONAL MEDICARE 2 (2015), http://files.kff.org/attachment/report-the-rising-cost-of-living-longer-analysis-of-medicare-spending-by-age-for-beneficiaries-in-traditional-medicare [https://perma.cc/2Q55-N2VQ] (noting that average Medicare per capita spending in 2011 more than doubled between age seventy and ninety-six).

158. This is especially true because the federal poverty line does not take into account that medical costs make up an increasingly large percentage of expenditures, particularly for the elderly. *See* JULIETTE CUBANSKI & TRICIA NEUMAN, HENRY J. KAISER FAMILY FOUND., MEDICARE BENEFICIARIES' OUT-OF-POCKET HEALTH CARE SPENDING AS A SHARE OF INCOME NOW AND PROJECTIONS FOR THE FUTURE i (2018), http://files.kff.org/attachment/Report-Medicare-Beneficiaries-Out-of-Pocket-Health-Care-Spending-as-a-Share-of-Income-Now-and-Projections-for-the-Future [https://perma.cc/K4MX-JFP9] (reporting that in 2013 Medicare beneficiaries' average out-of-pocket health care spending was 41 percent of the average per capita Social Security income).

159. *See, e.g.*, Robert A. Cummins, *The Subjective Well-Being of People Caring for a Family Member with a Severe Disability at Home: A Review*, 26 J. INTELL. & DEVELOPMENTAL DISABILITY 83, 89 (2001) (detailing studies on the hardships experienced by family caregivers).

time Respite Care Act.[160] The second category includes borrowers who are family caregivers of an eligible veteran who qualifies for comprehensive assistance under federal veterans' benefits.[161] Family caregivers provide an essential service without compensation insofar as they care for individuals who might otherwise require public assistance for day-to-day tasks. Individuals who act as caregivers dedicate time and resources which might otherwise be dedicated to gainful employment. When such caregivers' incomes fall below the level necessary to realistically repay student debts, they cannot simply "go back to work" without compromising their ability to provide necessary care. Accordingly, repayment of student loans in these circumstances would be an undue hardship for themselves and those for whom they care.

Using these programs' definitions permits for a simple legislative cross-reference, identifying a group that federal law has already targeted for assistance in light of the burden they shoulder.[162] The Lifespan Respite Care Act[163] defines family caregivers as unpaid adults who provide in-home monitoring, management, supervision, or treatment of a child or adult with a special need.[164] Individuals with special needs are further defined as those who require care or supervision to meet their basic needs, prevent physical self-injury or injury to others, or avoid placement in an institutional facility.[165] Individual borrowers who the government has already determined warrant increased assistance for respite care, and who satisfy the income requirements outlined above, should be presumptively considered unable to repay their student loans without incurring undue hardship.

Pursuant to federal statutes regarding veterans' benefits,

160. *See* 42 U.S.C. § 300ii(5) (2018).

161. *See* 38 U.S.C. § 1720G (2018).

162. The authors recognize that many other individuals sacrifice personal earning power to care for others and may also be entitled to an undue hardship discharge of their student loans.

163. The Lifespan Respite Care Act does not provide direct services to individuals, but rather funds programs that expand and enhance state respite services by streamlining access and improving overall quality. *See* MAGGIE EDGARD & MONICA UHL, ARCH NATIONAL RESPITE CENTER AND RESEARCH NETWORK (2011), http://www.nasuad.org/sites/nasuad/files/hcbs/files/212/10555/NationalRespite_Guidelines_Final_October_2011_1MB.pdf [https://perma.cc/SCB8-CWCW].

164. 42 U.S.C. § 300ii(5).

165. *Id.* § 300ii(1).

the Secretary of the VA is authorized to identify a primary provider for each eligible veteran and to afford that provider a stipend and thirty days of respite care each year.[166] Eligible veterans are defined as former members of the armed forces who have suffered serious injury in the line of duty and are in need of personal care services because of an inability to perform the activities of daily living or who need supervision or protection.[167] The primary provider is a single family member of the veteran who provides personal care services, designated as such with the veteran's consent and the approval of the Secretary of Veterans Affairs.[168] The stipend granted to primary providers is calculated based on the number of hours of assistance the caregiver provides in a week (up to forty) multiplied by the Bureau of Labor Statistics hourly wage for home health aides.[169]

A stipend received from the Secretary of the VA for provision of care to an eligible veteran is not included as income pursuant to changes made in the HAVEN Act.[170] Accordingly, if the borrower would fall below the income threshold of 150 percent of the federal guidelines without the stipend, the borrower should qualify for a no-contest discharge. Individuals could easily produce proof of qualification as a primary caregiver of a veteran simply by providing proof of the stipend in addition to proof of general income.

6. Uncredentialed Student

Our proposal would also provide a no-contest discharge to borrowers who have failed to receive the benefit of the education for which the student loans were originally incurred. To qualify under this category, borrowers would need to show that

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166. *See* 38 U.S.C. § 1720G(a)(3)(A) (2018).
167. *Id.* § 1720G(a)(2).
168. *Id.* § 1720G(a)(7).
169. *See* U.S. DEP'T OF VETERANS AFFAIRS, FACT SHEET 11-02: CAREGIVER SUPPORT PROGRAM – STIPEND BENEFIT FOR THE PRIMARY FAMILY CAREGIVER (2016), https://www.va.gov/COMMUNITYCARE/docs/pubfiles/factsheets/FactSheet_11-02.pdf [https://perma.cc/WZQ9-EUV9]. The number of hours of personal care needed must fall into one of three tiers: the Low Tier equates to a maximum of ten hours of care per week, the Medium Tier up to twenty-five hours of care, and the High Tier up to forty hours of care. So, for example, if an eligible veteran fell into the Medium Tier, and their hourly wage was $12/hour, the primary provider could receive $300 per week or $15,600 per year.
170. *See supra* note 147.

three or more years have passed since the borrower ceased attending the institution. This delay is intended to limit the category to those borrowers who have truly dropped out of school, as opposed to those who are taking a hiatus or a temporary break. The number of intervening years required to establish a true drop out could be revised if necessary, based on empirical evidence of the actual characteristics of college dropouts.

Education is generally understood to be a mechanism whereby an individual can improve their opportunities for employment. Indeed, the government disseminates statistics demonstrating the dramatic increase in lifetime earning potential for those who obtain a postsecondary education.[171] Although evidence suggests that individuals who attend some college but fail to obtain a degree do have higher lifetime earning potentials compared with individuals whose education ends at high school, non-graduates earn substantially less on average than those who get a degree.[172] To qualify for the no-contest discharge we propose, such individuals would need to demonstrate an income no greater than 150 percent of the poverty line, and research suggests that such low earnings would not be anomalous.[173] As one study observed, borrowing to pay for college "remains a sound investment for most students, but many who borrow and then drop out appear to have lost the bet."[174]

In fact, a primary justification for making student loans nondischargeable in the first place was the prospect of recent professional graduates shedding debt just before a lucrative career enabled by their financed education.[175] As stated by

171. *See, e.g.*, *Education and Lifetime Earnings*, SOC. SEC. OFF. RETIREMENT POL'Y (Nov. 2015), https://www.ssa.gov/retirementpolicy/research/education-earnings.html [https://perma.cc/UH5A-ULDV] (citing Christopher R. Tamborini, ChangHwan Kim & Arthur Sakamoto, *Education and Lifetime Earnings in the United States*, 52 DEMOGRAPHY 1383 (2015)).

172. *See id.*; *see also* ANTHONY P. CARNEVALE, STEPHEN J. ROSE & BAN CHEAH, GEORGETOWN UNIV. CTR. ON EDUC. & WORKFORCE, THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS (2011), https://www2.ed.gov/policy/highered/reg/hearulemaking/2011/collegepayoff.pdf [https://perma.cc/KVS3-97U5]; *Comments Regarding the Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings*, NAT'L CONSUMER LAW CTR. (May 18, 2018) at 18.

173. *See* LAWRENCE GLADIEUX & LAURA PERNA, BORROWERS WHO DROP OUT: A NEGLECTED ASPECT OF THE COLLEGE STUDENT LOAN TREND 1 (2005).

174. *Id.*

175. *See* NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS 209 (1997). This justification has been strongly criticized

Representative John Erlenborn in discussions regarding the treatment of student loans in the Bankruptcy Code, students who could not obtain credit ordinarily pledge their future earning power, which is anticipated to increase because of the education.[176] Such a justification does not apply to individuals who have been unable to complete their degree and whose financial circumstances demonstrate that their limited education was not a pathway to financial stability. As Susan Dynarski has discussed, recent data indicate that the borrowers who default on their loans are typically not borrowers who complete a four-year degree, but rather borrowers who drop out of a non-selective college.[177]

Borrowers who drop out of school without obtaining a degree and meet the poverty requirements necessary for this category have demonstrated that they have simply not received the anticipated benefits of a higher education. Accordingly, it would be an undue burden to require them to repay their loans in light of their demonstrated lack of earnings. To the extent policymakers are concerned that the ability to discharge loans will incentivize students to work through months or years of higher education, accruing debt as they go only to drop out and become impoverished, the likelihood of such an incentive is highly implausible. Students generally do not attend college for the fun of it,[178] and given the difficulties of experiencing poverty,[179] it would be irrational for dropouts to deliberately accept an impoverished lifestyle to get a loan discharge. Put

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over time as being without foundation or empirical bases but has never been renounced in the legislature despite the lack of supporting evidence. *See also* Thad Collins, *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, 741–42 (1990) (noting that Congressional "ideas about substantial abuse of a bankruptcy loophole [regarding student loans] were founded more upon public relations hype than real evidence."); *see also* Pardo & Lacey, *Undue Hardship in Bankruptcy Courts*, *supra* note 29, *at* 419–427.

176. *See* 124 CONG. REC. 1791–93 (1978).

177. Susan Dynarski, *The Trouble with Student Loans? Low Earning, Not High Debt*, BROOKINGS (Jan. 7, 2019), https://www.brookings.edu/research/the-trouble-with-student-loans-low-earnings-not-high-debt/ [https://perma.cc/5NYS-FRFS]; Looney & Yannelis, *supra* note 152.

178. At least not when they are financing the education themselves through loans. *See* Ron Dicker, *Lori Loughlin's Daughter in USC Video: 'I Don't Really Care About School'*, HUFFPOST (Mar. 14, 2019), https://www.huffpost.com/entry/lori-loughlin-olivia-jade-dont-care_n_5c88dc34e4b0450ddae5cad2 [https://perma.cc/K2NQ-L92X].

179. *See supra* note 127 and accompanying text.

another way, if borrowers would prefer to voluntarily experience poverty to avoid repayment, it should be assumed that repayment is, in fact, an undue hardship.

Proof that a borrower failed to receive a degree would be relatively easy to obtain through official transcripts. A debtor's submission of official transcripts showing that they never received the conferral of a degree should be accepted as conclusive evidence that continued payment would be an undue hardship, and the loans should be discharged without the need for a trial or further evidentiary hearing.

7. Closed School

Our proposal would grant a no-contest discharge to borrowers who did not complete a program of study at the school they took out loans for because the school closed while they were enrolled. The justification for this category includes all of the reasoning described above with regard to a student who has failed to obtain a degree, with the additional consideration that when a school closes, the student's setback is due to factors outside their control. Even students who go on to complete degrees at other institutions are at a disadvantage insofar as a transfer frequently requires a loss in academic credits due to differing requirements between institutions or a refusal to accept credits, particularly from an institution that has recently closed.[180]

Furthermore, a no-contest discharge for such borrowers should be largely uncontroversial given that the ED currently offers a closed school discharge for individuals who were enrolled when the school closed.[181] The program does not cur-

180. *See Transfer Students Still Lose Lots of Credits*, COMMUNITY COLL. DAILY (Sept. 14, 2017), http://www.ccdaily.com/2017/09/transfer-students-still-lose-lots-credits/ [https://perma.cc/VLS9-AXEK] (reporting from statistics gathered by the U.S. Government Accountability Office that the percentage of credits lost after transfer is 43 percent).

181. *See* 20 U.S.C. § 1087(c)(1) (2018); 34 C.F.R. §§ 682.402(d), 685.214, 674.33(g) (2019). *See also Closed School Discharge*, FED. STUDENT AID, https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/closed-school#criteria (last visited July 24, 2019) [https://perma.cc/E9CX-X6PG]. Recent news stories have shed light on the ED's unfortunate failure to implement these policies for a significant number of closed schools. *See* Margaret Mattes, *Lawsuit Calls on Department of Education to Provide Relief to Students Whose Schools Closed*, STUDENT LOAN BORROWER ASSISTANCE (Dec. 3, 2018), https://www.studentloanborrowerassistance.org/lawsuit-calls-on-department-of-education-to-provide-relief-

rently offer a discharge of student loans to individuals who are completing a comparable educational program at another school by transferring academic credit.[182] However, we would extend a no-contest discharge to such students who also satisfy the income requirements applicable to all of these categories. The difficulty of salvaging any benefit from a student's time at the now-closed institution is likely to artificially inflate the amount of student debt an individual is required to take on. Borrowers who have demonstrated that their income approaches the federal poverty guidelines should be considered, ipso facto, to suffer an undue hardship if forced to repay student loans borrowed for an education that did not result in a degree due to the school's closure.

Proof of eligibility for this category would be similar to that currently required by the ED before it provides a discharge to borrowers who attended a closed school. The application currently requires only an attestation of the applicable facts and assignment of the right to pursue a refund to the ED.[183] Such an attestation should be sufficient to obtain a no-contest discharge in bankruptcy.

8. De Minimis Borrower

In addition to the categories described above, which look to the borrower's individual circumstances as justification for a no-contest discharge, we propose affording a no-contest discharge to student loans for which the entire amount currently

to-students-whose-school-closed/ [https://perma.cc/A4EV-TKWB].

182. Under the Borrower Defense Rule, students who attended schools that have closed are already eligible for discharge of their student loans. This rule is both broader and narrower than our proposal with respect to borrowers who attended closed schools. On the one hand, it is narrower than our proposal because students that transferred credits from the closed school to another school are not eligible for relief. On the other hand, it is broader than our proposal because our proposal is limited to those students whose income is below 150 percent of the federal poverty level (and who have filed for bankruptcy). We believe that debtors earning less than 150 percent of the federal poverty level should be eligible for a no-contest discharge even if they managed to transfer some credits, as the transfer did not manage to sufficiently augment their earning capacity. *See* Proposed Rules Amending Direct Loan Program, 83 Fed. Reg. 37,242 (July 31, 2018) (to be codified at 34 C.F.R. pts. 668, 674, 682, and 685); *Closed School Discharge*, *supra* note 181.

183. *See Loan Discharge Application: School Closure*, FED. STUDENT AID, https://studentaid.ed.gov/sa/sites/default/files/closed-school-loan-discharge-form.pdf (last visited July 24, 2019) [https://perma.cc/58LE-N6AU].

owed, including principal and interest, is less than $5,000. This category has less to do with the perceived undue hardship that repayment would impose on the borrower and more to do with the expense and hassle that recovering such a sum would inflict on the federal government and, by extension, the taxpayers. When a borrower brings an adversary proceeding in bankruptcy to discharge student loans, the borrower is obliged to prosecute the case, but the lender is similarly obliged to defend it.[184] Even entering an appearance to avoid a default judgment in the debtor's favor requires the time and attention of an attorney, which necessarily imposes costs on the ED or its agents, who must hire counsel and then monitor the attorney's work. Beyond that, in defending against student loan discharge claims, the ED or its agents (including, in some cases, the Department of Justice) must pay their counsel to conduct discovery, appear in court, and otherwise participate in the litigation. These costs are simply inefficient when loans are below a certain amount, since even the full recovery of those loans from the bankrupt borrower is unlikely to offset the expenses involved in obtaining a favorable judgment.[185]

The figure of $5,000, although not based on extensive investigation as to the reasonable breaking point from a cost benefit analysis, provides a clear standard for parties, reducing the costs of uncertainty to both borrowers seeking a discharge and the ED in deciding whether or not to oppose such a discharge. Using rough, back-of-the-napkin calculations, $5,000 seems a conservative break point at which defense of a credible claim of undue hardship would be inefficient. Assuming an hourly rate of $350 for an attorney,[186] and recognizing that even defending against a simple lawsuit is likely to involve hundreds of dollars in other costs,[187] it would be a losing

184. The creditor has the initial burden of proving, by a preponderance of the evidence, that the debt is education debt; the burden then shifts to the debtor to prove, by a preponderance of the evidence, that the repayment of the debt constitutes an undue hardship. *See* Pardo, *Undue Hardship*, *supra* note 10, at 2113–16, 2141; Pardo, *Taking Bankruptcy*, *supra* note 22, at 1165–75.

185. Because borrowers falling under our proposal would be living on the cusp of poverty, such a recovery is very unlikely to be obtained. *See infra* Section III.D.

186. *See* RONALD L. BURDGE, UNITED STATES CONSUMER LAW ATTORNEY FEE SURVEY REPORT 2015-2016 (2018), https://www.nclc.org/images/pdf/litigation/tools/atty-fee-survey-2015-2016.pdf [https://perma.cc/6KG6-HNQE] (reporting a median attorney hourly rate of $350 nationally).

187. See *Bankruptcy Court Miscellaneous Fee Schedule*, U.S. CTS. (Sept. 1, 2018), http://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneou

proposition to defend an action to discharge student loans even if one could be sure of winning. Furthermore, claims for no-contest discharge brought under this provision are likely to be meritorious: recall that any borrower seeking to take advantage of this no-contest discharge would also be required to meet the underlying income requirements. In addition, Pardo and Lacey have found that when the amount sought to be discharged is less than approximately $5,000, the stakes are insufficiently high for it to be even "potentially worthwhile for the creditor to litigate the dispute."[188] This should be neither surprising nor controversial.

Although additional research is needed, preliminary evidence suggests that permitting a discharge of student loan debt under $5,000 would provide relief to a significant number of debtors, at a relatively low absolute cost to the American taxpayer.[189] According to the Consumer Bankruptcy Project database, 13.2 percent of bankruptcy filers with student loans owed less than $5,000 in student loan debt.[190] Under current law, many of these borrowers are effectively denied the fresh start promised by bankruptcy law because of the costs associated with obtaining a judgment, and they would suffer an undue hardship if forced to repay their student loans.[191] Our proposal would both increase the efficiency of the system by allowing these debts to be discharged and reduce the costs of litigation and appeals borne by borrowers and taxpayers.[192]

The outstanding loan amount would be easily established by simple reference to the debtor's ED account, thereby making discovery or sworn testimony unnecessary. If the loan amount falls below the threshold in a case where a debtor has already

s-fee-schedule [https://perma.cc/EWV4-MGNM] for a discussion of miscellaneous fees and costs associated with filing or making copies of court proceedings.

188. Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18, at 214 n.140.

189. *See* Email from Robert Lawless, Max L. Rowe Professor of Law, University of Illinois College of Law (Oct. 31, 2018) (on file with authors). Consumer Bankruptcy Project co-investigators engage in ongoing data collection based on national random samples of people who file bankruptcy. More information about the project and its methodology are available at Pamela Foohey et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055, 1071–74 (2017).

190. Foohey et al., *supra* note 189, at 1071.

191. *See* discussion *supra* Part II.

192. While we have tried to be extremely narrow, our proposals may grant a discharge to someone otherwise thought to be undeserving. That danger lurks in everything the law does, but the anecdata it produces is a dangerous tool upon which to base policy.

established compliance with our proposed income requirements, then the ED should stipulate to discharge to more efficiently perform its duties to taxpayers.

9. Three Hundred Monthly Payments

We propose a no-contest discharge for borrowers whose income is at or below 150 percent of the poverty level and who have made at least three hundred monthly payments (twenty-five years' worth) towards their student loans, regardless of whether those payments were made continuously.[193] We argue that repayment after making the equivalent of twenty-five years' worth of payments is an undue hardship on its face.[194] Several federal loan programs currently anticipate forgiveness of debt within a similar time frame so long as a borrower has been making regular payments.[195] We would extend this forgiveness to debtors in bankruptcy, regardless of whether or not they had previously signed up for the federal programs. Such forgiveness is not only fair but also efficient. Where the borrower has not obtained loan forgiveness within the twenty-five-year period, and has an income not more than 150 percent of the poverty line, it seems clear that pursuit of loan repayment is an unprofitable venture from the perspective of the ED and, by extension, the taxpayers who funded the loans at the outset.

As with the dollar amount, proof of qualification under this category should be ascertainable from the ED's own records, therefore obviating the need for formal discovery from the bor-

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193. For purposes of our proposal, "payments" include $0 payments when the debtor is enrolled in an IDR program and does not owe more. In addition, "payments" include fractional payments of the amount invoiced. In other words, so long as the debtor pays what is due (e.g., $0 if that is what IDR requires), or at least one dollar toward their student loan debt for 300 months, they would receive a discharge under our proposal.

194. For a discussion of the consequences of long-term debts, *see* Dalié Jiménez, *supra* note 7, at 634–44.

195. For example, Public Service Loan Forgiveness (PSLF) is available to qualified borrowers after ten years, or 120 qualifying payments. *See* 34 C.F.R. § 685.219 (2019). IDR plans permit loan forgiveness after either twenty or twenty-five years of qualifying payments, depending on the time period in which the loans entered repayment. *See* 34 C.F.R. § 682.215 (2019). Similarly, Pay As You Earn (PAYE) and Revised Pay As You Earn (REPAYE) also forgive student loans after twenty or twenty-five years of repayment, depending on the nature of the loan. *See* 34 C.F.R. § 685.209 (2019). In some cases, these plans may allow for a $0 monthly payment.

rower.[196]

10. Relief for Seniors

Finally, we propose a no-contest discharge for borrowers whose income is at or below 150 percent of the poverty level and who are at least sixty-seven years old.[197] As noted in *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, America's social safety net for the elderly is badly frayed.[198] And "older Americans who file bankruptcy owe more than three dollars for every one dollar in income."[199] Thus, older Americans with income at or below 150 percent of the poverty level are particularly likely to suffer an undue hardship if forced to repay their debt. [200]

C. Conservation of Taxpayer Dollars

Establishing clear categories of borrower circumstances that satisfy the undue hardship standard—thus warranting discharge of a borrower's student loans—is useful in two ways. First, it signals to some deserving borrowers that they are likely to succeed if they seek to discharge their student loan debts. Second, it conserves taxpayer dollars by avoiding the expense of defending against discharge in cases where dischargeability is desirable from a policy standpoint. Sound fiscal principles suggest that governments should not expend funds where the anticipated recovery or benefit of the expenditure is disproportionate to its costs. And it makes little sense for the

196. Creditors already have a duty to make such disclosures, as they must provide a computation of damages that would necessarily include information regarding length of time the loan has been in repayment. *See* FED. R. CIV. P. 26(a)(1)(A)(iii); Pardo, *Undue Hardship*, *supra* note 10, at 2162 n.382.

197. We chose this number because it is the age at which one can obtain full benefits from social security. *Retirement Age Calculators*, SOC. SECURITY ADMIN., https://www.ssa.gov/planners/retire/ageincrease.html (last visited Aug. 22, 2019) [https://perma.cc/NGY6-GAET].

198. Deborah Thorne et al., *Graying of U.S. Bankruptcy*, *supra* note 150.

199. *Id.*

200. In addition, older Americans are likely to fulfill the "persistence" factor required by both *Brunner* and *Long*, described in Section II.B.2. The average sixty-seven-year-old man can expect to live 17.4 more years whereas the average woman has a life expectancy of 19.8 years after she is sixty-seven years old. *Retirement & Survivors Benefits: Life Expectancy Calculator*, SOC. SECURITY ADMIN., https://www.ssa.gov/OACT/population/longevity.html (last visited Aug. 22, 2019) [https://perma.cc/H8ZJ-P5TR].

government to spend money challenging a borrower's claims when the borrower manifestly demonstrates undue hardship. As argued above, the list of borrower circumstances is limited to situations of extreme hardship, where we believe it is all but certain that the government is "throwing good money after bad" if it opposes an undue hardship determination in bankruptcy court.

The ED's regulations already recognize this principle, although we do not think they go far enough. Regulations pertaining to Federal Family Education Loans (FFEL) require a guarantee agency to determine "whether the expected costs of opposing the discharge petition would exceed one-third of the total amount owed on the loan, including principal, interest, late charges, and collection costs."[201] This one-third figure also appears in the ED's regulations covering Federal Perkins loans.[202] We agree with the ED that the one-third figure is a useful heuristic to determine whether pursuing these claims is worthwhile. The current regulations, however, are not enough to minimize government waste for two reasons. First, both regulations are phrased in the permissive. As such, they permit ED agents to oppose a discharge in bankruptcy even if doing so would not be cost-effective.[203] Second, and more importantly, there is no comparable regulation for Direct Loans, and these comprise the vast majority of the ED portfolio.[204]

To that end, we urge the ED to amend its regulations to better ensure that the cost of pursuing delinquent borrowers does not exceed the likely amount to be recovered. Specifically, we encourage amendments to 34 C.F.R. § 682.402(i)(1)[205] and 34 C.F.R. § 674.49(c) (the "Regulations"). We recommend altering the language of 34 C.F.R. § 682.402(i)(1) as follows:

> (iii) If the guaranty agency determines that repayment would not constitute an undue hardship, the guaranty agency must then determine whether the expected costs of opposing the discharge petition would exceed one-third of

201. 34 C.F.R. § 682.402(i)(1).
202. 34 C.F.R. § 674.49(c)(4) (2019).
203. *See id.*
204. In the first quarter of 2019, the ED reported owning $1.1 trillion in direct loans as compared to $277 billion in FFEL loans and $6.9 billion in Perkins loans. *Federal Student Aid Portfolio*, *supra* note 24.
205. 34 C.F.R. § 682.402(i)(1)(iii) (2019).

> the total amount owed on the loan, including principal, interest, late charges, and collection costs. If the guaranty agency has determined that the expected costs of opposing the discharge petition will exceed one-third of the total amount of the loan, it [shall stipulate to the discharge of the borrower's student loans. If the expected costs of opposing the discharge petition will not exceed one-third of the total amount of the loan, the guaranty agency shall –] [~~may , but is not required to,~~ ~~engage in the activities described in paragraph (i)(1)(iv) of this section.~~]
>
>> [(A) Oppose the borrower's petition for a determination of dischargeability; and
>>
>> (B) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.]

We further recommend amending 34 C.F.R. § 674.49(c), the regulation dealing with Perkins Loans, to mirror this language:

> (5) If the expected costs of opposing discharge of such a loan [exceed one-third of the total amount owed on the loan, the institution shall stipulate to the discharge of the loan. If the expected costs of opposing discharge of the loan are less than or equal to] one-third of the total amount owed on the loan, the institution shall –
>
>> (i) Oppose the borrower's request for a determination of dischargeability; and
>>
>> (ii) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.

(Alterations stricken, underlined, and bracketed.)

Since these regulations do not apply to the Direct Loans program, we urge the ED to develop analogous regulations for Direct Loans for clarity, harmonization, and consistency, and recommend that these new regulations also include the language proposed here.

We further recommend that the ED implement more forceful enforcement mechanisms to combat waste among its agents. For example, Professor Pardo has suggested that the ED should "reassess whether ECMC is an appropriate representative of the federal interest in undue hardship adversary proceedings."[206] More broadly, there is reason to believe that ED agents may sometimes act in their own self-interest, rather than in the taxpayers' best interests.[207] Unfortunately, multiple government agencies have found that the ED is failing in its servicer oversight.[208] Specifically, they found that the ED failed to keep track of servicer noncompliance and did not hold servicers accountable.[209] Like those agencies, we urge the ED

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206. *See* Pardo, *Undue Hardship*, *supra* note 10, at 2137–39, 2144. The Inspector General's 2011 audit of ECMC identified several areas of waste and non-compliance. *See* Letter from Gary D. Whitman, Reg'l Inspector Gen. for Audit Servs., U.S. Dep't of Educ., to Richard Boyle, Chief Exec. Officer, ECMC Grp. Inc. 21 (Mar. 3, 2011), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2011/a05k0001.pdf [https://perma.cc/V86M-HNYY]. For example, the Inspector General found that ECMC had effectively loaned $520,183 to one of its subsidiaries, the Records & Receivable Management Corporation (RRMC), violating its agreement with the ED and exposing the ED to credit risk. *Id.* at 2–3 ("First, ECMC used FSB revenue to support activities that are not allowed per the Agreement. Second, ECMC's CAP did not fully explain the allocation of costs, and ECMC did not provide an annual cost allocation report to the Department.").

207. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., REISSUANCE OF FINAL AUDIT REPORT, FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICER NONCOMPLIANCE WITH REQUIREMENTS FOR SERVICING FEDERALLY HELD STUDENT LOANS ED-OIG/A05Q0008 10 (2019), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf [https://perma.cc/743U-WBQW] ("From January 2015 through September 2017, monthly reports on FSA's monitoring activities disclosed recurring instances at all servicers of servicer representatives not sufficiently informing borrowers about available repayment options."); SETH FROTMAN, UPDATE FROM THE STUDENT LOAN OMBUDSMAN ON REDEFAULTS (May 16, 2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Update-from-Student-Loan-Ombudsman-on-Redefaults.pdf [https://perma.cc/5B4S-5W4E] (arguing that lawmakers "may wish to examine whether an extended period of income-driven rehabilitation payments and a complicated collector-to-servicer transition are necessary and whether current financial incentives for these companies are in the best interests of taxpayers and consumers").

208. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., *supra* note 207; U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL STUDENT LOANS: EDUCATION COULD IMPROVE DIRECT LOAN PROGRAM CUSTOMER SERVICE AND OVERSIGHT (2016), https://www.gao.gov/assets/680/677159.pdf [https://perma.cc/VC58-TM9Y].

209. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICER NONCOMPLIANCE WITH REQUIREMENTS FOR SERVICING FEDERALLY HELD STUDENT LOANS 9 (Feb. 12, 2019), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf [https://perma.cc/4LTP-2G47] (finding, *inter alia*, that Federal Student Aid, a division of the ED, "rarely held servicers accountable for noncompliance with requirements"); *see also* SETH FROTMAN,

to implement controls to keep track of servicer issues and procedures so that it can react accordingly when it finds repeated noncompliance. Accordingly, we recommend that when the costs of opposing discharge expended by ED agents exceed one-third of the loans for which discharge is sought, the ED should cap reimbursement of collection costs, including legal fees, at one-third the total amount of the loan.[210] Gross or continued violations of this standard should warrant termination of the ED's association with the malfeasant.

III. THE PROPOSAL IN CONTEXT

We are not the first to consider reforms to student loan bankruptcy provisions. This section provides an overview of various proposals for judicial, statutory, and administrative reform of the student loan system's interaction with the Bankruptcy Code, comparing and contrasting others' approaches with our own proposal.

A. *Proponents of Accepting the Current System*

Although calls for reform are loud and frequent, not every commentator agrees that there is a fundamental problem with section 523(a)(8)'s undue hardship standard. Indeed, a few commentators have suggested that the status quo is acceptable, or at least is sufficiently workable to provide relief to many debtors.[211] For example, Professor Jason Iuliano repeatedly ar-

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ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN (2016), https://files.consumerfinance.gov/f/documents/102016_cfpb_Transmittal_DFA_1035_Student_Loan_Ombudsman_Report.pdf [https://perma.cc/W42C-BE4U] (detailing myriad of problems student borrowers encounter).

210. Some regulations already provide for limitation on recovery under such circumstances. *See* Pardo, *Undue Hardship*, *supra* note 10, at 2114 n.77 (explaining that regulations "limit the amount of collection costs that a guaranty agency can charge a borrower who has defaulted on a student loan under the Federal Family Education Loan Program (FFELP)," along with limiting "the amount of unpaid interest that can be capitalized on such a loan" and "the sum on which interest charges can accrue" (citing 34 C.F.R. § 682.410(b)(2), § 682.410(b)(3), § 682.410(b)(4) (2013)). As Pardo explains, "[t]hese limitations circumscribe a creditor's right to payment from the student-loan debtor. Thus, the creditor's burden of proof at trial requires it to show that any amount claimed to be a debt for a FFELP loan does not exceed the rights to payment that may be recovered on account of such a loan." Pardo, *Undue Hardship*, *supra* note 10, at 2114 n.77.

211. *See, e.g.*, Letter from Winfield P. Crigler, Executive Director, Student

gues that the current standard is a workable one.[212] Although he recognizes that "the undue hardship standard is neither perfect nor even a particularly reasonable provision,"[213] Iuliano argues that section 523(a)(8)'s undue hardship standard is neither unduly burdensome nor inconsistently applied.[214] Furthermore, he argues that it would be "unwise to eliminate a provision that saves billions of dollars" by sorting those who cannot repay their loans from those who can.[215]

Instead, Iuliano argues that more student loan borrowers should seek to discharge their student loans in bankruptcy, and that the primary reason they do not is the "chilling effect" of ill-informed bankruptcy scholars and judges who claim that the undue hardship standard is nearly impossible to satisfy.[216] Some student loan borrowers may avoid bankruptcy altogether for precisely that reason.[217] Iuliano's research also suggests

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Loan Servicing Alliance, to Mr. Jean-Didier Gaina, U.S. Dep't of Educ. (May 22, 2018), https://www.regulations.gov/document?D=ED-2017-OPE-0085-0410 [https://perma.cc/K59Z-GRQL] ("[T]here is no pressing need to relax the undue hardship standard. Many more borrowers today can be helped by an administrative remedy such as an [income-driven] repayment plan, or some form of loan forgiveness or discharge. And those borrowers that still need additional relief should be encouraged to file an adversary proceeding."); Kyle L. Grant, *Student Loans in Bankruptcy and the "Undue Hardship" Exception: Who Should Foot the Bill?*, 2011 B.Y.U. L. REV. 819, 820, 845 (2011) (arguing that the *Brunner* standard is "strict but predictable" and that the status quo is appropriate because it is "not absurd" and saves taxpayer dollars); Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy*, 4 AM. BANKR. INST. L. REV. 457, 484 (1996) (urging "common acceptance of the . . . *Brunner* test for undue hardship," but also "discretion and compassion" for certain borrowers).

212. Iuliano, *supra* note 22, at 495; *see also* Jason Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, 68 FLA. L. REV. 377, 379 (2016) ("[T]he widespread pessimism regarding the current undue hardship standard should be tempered."); Iuliano, *supra* note 43, at 37 (arguing that he has provided a "roadmap to push back against" expansive readings of section 523(a)(8), and that better strategy alone is sufficient to change the undue hardship landscape).

213. Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, *supra* note 212, at 379.

214. Iuliano, *supra* note 22. Not everyone agrees. *See* discussion *infra* note 49.

215. Iuliano, *supra* note 22, at 525.

216. *Id.* at 499 ("[T]he central flaw in the system: 99.9 percent of bankrupt student loan debtors do not even try to discharge their student loans."). Iuliano argues that "bleak reports have produced a chilling effect that deters debtors from pursuing student loan discharges." *Id.* at 507. In fact, the bulk of discharges may be the product of settlement between debtors and creditors that do not depend on judicial determinations of undue hardship. *See* Aaron Taylor & Daniel Sheffner, *Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 STAN. L. & POL'Y REV. 295, 297 (2016).

217. Iuliano, *supra* note 22, at 507 ("[P]eople whose debt is primarily comprised of student loans [are deterred] from filing for bankruptcy in the first

that there are substantial similarities in the financial characteristics of debtors in bankruptcy who successfully discharge their debt in a section 523(a)(8) adversary proceeding and debtors in bankruptcy who do not initiate a section 523(a)(8) adversary proceeding to discharge their student loan debt.[218] This suggests to Iuliano that many more debtors could obtain relief if they sought a discharge.[219] Although provocative, Iuliano's results have been subject to significant criticism and skepticism.[220]

Our proposal encourages more people to seek to discharge their student loan debt, but it does so by decreasing the adversarial nature of the process. While Iuliano may be correct that it would be useful to encourage more student loan debtors "to

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place. After all, why would a person who has a lot of student loan debt file if he believes that none of it will be discharged in bankruptcy.").

218. Iuliano, *supra* note 22, at 502; *see also id.* at 524 (contending that approximately 69,000 debtors in 2007 "would have had a good chance to discharge their student loans," but failed to seek discharge). *But see* NATL. CONSUMER L. CTR., THE TRUTH ABOUT STUDENT LOANS AND THE UNDUE HARDSHIP DISCHARGE (2013) (highlighting perceived "shortcomings" in Iuliano's study and claiming to "set[] the record straight on undue hardship in bankruptcy")

219. Iuliano, *supra* note 22, at 500 ("[T]ens of thousands of non-discharge seekers are as bad off financially as the typical discharge seeker.").

220. Various methodological critiques have been lodged against this particular work, including by the National Consumer Law Center and Professor Rafael Pardo. *See* NATL. CONSUMER L. CTR., *supra* note 218, at 4–5; Pardo, *Undue Hardship*, *supra* note 10, at 2138, 2124–42. Pardo directly disputes Iuliano's apparent assertion that the main problem is "bankruptcy filers' lack of accurate knowledge of the system" as opposed to fundamental access-to-justice barriers. Pardo, *Undue Hardship*, *supra* note 10, at 2125. Pardo points out that self-represented debtors, who make up a significant minority of borrowers attempting to discharge student loans in bankruptcy, were significantly less likely to experience success, holding all other factors constant. *See* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1150 (reporting that according to the model established by the data, the typical represented debtor may obtain litigation success 56.2 percent of the time, but a self-represented debtor's predicted success drops to 28.5 percent). These findings directly conflicted with Iuliano's prior work. *Cf.* Iuliano, *supra* note 22, at 507 (finding that 43 percent of pro se debtors received a discharge, but only 38 percent of debtors with attorneys received a discharge). Moreover, Pardo and Lacey's research demonstrates that even debtors with legal representation faced procedural hurdles apparently unrelated to the merits of their cases. *See* Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18, at 229 (reporting that three of the five determinants of debtor outcome in their study sample are nondoctrinal case characteristics such as the experience level of the attorney or the identity of the judge). For a response to some of Pardo's criticisms, see Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, *supra* note 212, at 391 (2016) (suggesting that the two scholars likely view the undue hardship similarly but that Pardo is more doubtful and Iuliano more optimistic).

file adversary proceedings to discharge their student loans,"[221] that approach—standing alone—is not the optimal one. As the National Consumer Law Center has pointed out, many student loan servicers, such as the ECMC, aggressively defend against claims of undue hardship.[222] Empirical studies demonstrate that the ECMC is particularly effective in discouraging relief through "procedural noncompliance" and "pollutive litigation."[223] As a result, the trial rate for student loan discharge actions remains unusually high compared to other types of state and federal cases.[224] Pardo and Lacey argue that a high trial rate in adversary proceedings suggests a low degree of certainty in decisional standards, which prevents parties from agreeing on expected outcomes and thus prevents more frequent settlement.[225] In other words, without a shared understanding of the rules that will be applied to an undue hardship adversary proceeding, neither party is willing to settle their dispute. Thus, Pardo and Lacey argue (and we agree) that it is "imperative that the standard be clarified."[226]

In addition, the lack of objective standards encourages liti-

221. Iuliano, *supra* note 22, at 500.

222. *See* NATL. CONSUMER L. CTR., *supra* note 218, at 2. ECMC has been empirically documented to be effective in its defense efforts. *See* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1152–54, 1156–57.

223. *See* Pardo, *Undue Hardship*, *supra* note 10, at 2173–78 (observing the harm caused to debtors by this behavior and calling for judges to exercise greater oversight). *See also* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1152–54, 1156–57 (explaining model results that indicate odds of litigation success decrease by 70 percent if ECMC appears as a litigant in the adversary proceeding).

224. *See* NATL. CONSUMER L. CTR., *supra* note 218, at 2 (finding only 36 percent of undue hardship proceedings are settled compared to 97 percent of other cases); *see also* Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18, at 211 (pointing to an unexpectedly high "trial rate in undue hardship discharge adversary proceedings" as evidence that the undue hardship standard is too vague); Pardo, *Undue Hardship*, *supra* note 10, 2108–09 (indicating that the "anomalously high trial rate for undue hardship adversary proceedings . . . suggests that student-loan creditors may be waging attrition litigation on their debtor adversaries"). Although there is some agreement that the trial rate is elevated for student loan dischargeability proceedings, there is disagreement about the rate itself. *See also* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1146 (study demonstrates that approximately 6.8 percent of adversary proceedings resulted in a trial).

225. Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18, at 210 ("It has been suggested that the diminishing trial rate in bankruptcy adversary proceedings can be attributed to the evolving certainty in decisional standards, which has better enabled parties to agree on expected outcomes and thus reach settlement with greater frequency.").

226. *Id.* at 210–11.

gation, driving up the cost of pursuing an undue hardship determination and forcing debtors to consider acting pro se instead of obtaining representation.[227] Even without hiring counsel, the cost of litigation can be prohibitively expensive, particularly for individuals currently seeking bankruptcy relief.[228] Instead of encouraging people to file pro se, we advocate the more sensible approach of reducing barriers to discharge.[229]

B. Statutory Reform Proposals

Most people who have studied the issue conclude that section 523(a)(8) needs to be reformed, if not repealed outright.[230]

227. *Supra* Section II.C. *See also* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1160–1161 (noting the disproportionately high rate of self-representation for debtors in student loan dischargeability proceedings). Pardo's work also indicates that self-represented debtors have significantly lower rates of success. *Id.* at 1148–50.

228. Pardo conservatively estimates that it would cost between "$4,000 and $10,000 to properly litigate a student-loan adversary proceeding, if not more." Pardo, *Undue Hardship*, *supra* note 10, at 2138; *see also* NATL. CONSUMER L. CTR., *supra* note 218, at 3 (noting that "fees can easily mount in the thousands and tens of thousands of dollars" and that most debtors cannot pay such high fees). In addition, section 523(a)(8) adversary proceedings are complex undertakings, with multi-factor tests nested within multi-factor tests. Pardo, *Undue Hardship*, *supra* note 10, at 2117 (calling the *Brunner* test "complex" because "multifactor considerations [have] proliferat[ed] within a multifactor test"). Somewhat curiously, Iuliano argues that "the cost of pursuing a student loan discharge is relatively low compared to the cost of filing bankruptcy." Iuliano, *supra* note 22, at 501. Thus, even when debtors cannot afford an attorney, he argues that debtors should file a § 523(a)(8) adversary proceeding pro se. *But see* Taylor & Sheffner, *supra* note 216, at 315 (2016) (finding a positive correlation between attorney representation and student loan relief); *id.* at 333 ("[D]ebtors unable (or unwilling) to retain legal representation were less likely to obtain student loan discharge or settlement relief."). It seems that Iuliano may be referring to the financial cost of filing an adversary proceeding, but even so, that does not appear to be correct. "[T]he average cost to file for Chapter 7 bankruptcy is $1,450." *Survey Results: How Much Does it Cost to File Chapter 7 Bankruptcy?*, LAWYERS.COM, https://www.lawyers.com/legal-info/bankruptcy/cost-duration/chapter-7-bankruptcy-how-much-does-it-cost.html [https://perma.cc/HNL5-LBY5]. Even if Iuliano were referring to the non-financial costs of pursuing an adversary proceeding, he would be incorrect. Litigating a § 523(a)(8) adversary proceeding is likely to consume a substantial amount of time, particularly for a pro se litigant. *See, e.g.*, Pardo, *Undue Hardship*, *supra* note 10, at 2140, 2141 n.259.

229. Pardo, *Undue Hardship*, *supra* note 10, at 2142 (calling for readers to reject the assertions made by Iuliano "that access-to-justice barriers are not a concern in undue hardship litigation").

230. *See, e.g.*, Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 589 (2012) (advocating "a two-part overhaul of the student loan system, urging the federal

One statutory reform proposal, suggested by Abbye Atkinson and others,[231] is to return the statute to its pre-1990 iteration, where student loans older than five years were fully dischargeable, and debtors were only required to show undue hardship if they wished to discharge more recently acquired student loans.[232] As noted below, an even more dramatic revision of the statute—which would allow the discharge of all student loans without limitation—has recently been proposed by members of Congress.[233]

Others have suggested that Congress should change or clarify the undue hardship standard, even if that means maintaining the nondischargeability of student loans generally. For example, Kevin J. Smith proposed tying eligibility for a discharge of student loans to the means test.[234] G. Michael Bedinger VI advocated for a congressional solution to issues with the undue hardship standard, including codifying the *Long* test, focusing on totality of the circumstances, and making available partial discharges.[235] Finally, Rebekah Keller called on Congress to "provide a more transparent and objective standard by which debtors entering into the twists and turns of bankruptcy filings can expect some form of consistency in terms of discharge and treatment [of their student loans]."[236]

Another statutory reform proposal would replace the undue hardship standard with an alternative approach. In his ar-

government both to begin risk-rating its student loans and to repeal § 523(a)(8) in its entirety." The author argues that this is necessary because "hundreds of thousands of debtors per year obtain no relief from billions of dollars of educational debt."); *see also* Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1, 33 (2010) (arguing that Congress's "most obvious course of action would be to make educational loans fully dischargeable in bankruptcy").

231. *See* Atkinson, *supra* note 230, at 33 (suggesting that "Congress might return to the concept of a mandatory, post-graduate waiting period during which the loans would not be dischargeable absent a finding of undue hardship");

232. 11 U.S.C. § 523(a)(8) (2018), *amended by* Pub. L. No. 101-647, § 362(1)–(2) (1990).

233. *See infra* note 255.

234. *See* Smith, *supra* note 18, at 260 (arguing for an objective policy that removes judicial discretion by allowing a debtor who "makes less than the limit allowed under the 'means test' to file bankruptcy" to satisfy Brunner's first two prongs and to satisfy the third prong (good faith) by waiting ten years after borrowing the loan to seek discharge).

235. *See* Bedinger VI, *supra* note 48, at 1836–37.

236. Rebekah Keller, *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, 239 (2017).

ticle, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, Aaron Taylor called on Congress to replace the undue hardship standard with an alternative statutory framework.[237] He argued Pardo and Lacey's empirical work provides "compelling support for a new framework for determining the propriety of student loan bankruptcy discharges."[238] Taylor argued in favor of a three-part test for dischargeability. First, the loans must have been in repayment for at least five years.[239] Second, the borrower must have participated in an income-based repayment plan for at least three years.[240] Third, "[t]he debtor's Standard monthly payment amount (aggregated over the year) must have been above applicable maximum debt service thresholds for five consecutive years leading up to discharge."[241]

Similarly, Kurt Wiese reviewed the tests bankruptcy courts use to determine whether an undue hardship discharge is appropriate and concluded that the "results of the tests are often unfair and contribute to the waste of societal resources."[242] In their place, Wiese offered two alternative tests that might be "a more just and efficient alternative."[243] Notably, his proposal centered on determining the economic benefit to the debtor from their loans.[244] For Wiese's proposition, he focused on the decision in *In re Yarber*, which "held that making the debtor pay for an unmarketable education would be an undue hardship."[245] His proposal appears to depend on creating incentives for institutions of higher education "to

237. Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185 (2012).

238. *Id.* at 228.

239. *Id.* at 229. In the case of a graduate or professional school program, Taylor argues that debtors should be ineligible for discharge of their loans unless the debtor has been "in repayment for at least ten years." *Id.*

240. *Id.* at 229–30.

241. *Id.* at 231. Taylor used maximum debt service thresholds for his proposal based on "a model developed by researchers at the College Board." *Id.*

242. Kurt Wiese, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of "Undue Hardship,"* 26 ARIZ. L. REV. 445, 447 (1984).

243. *Id.*

244. *Id.* at 457. This is similar to an argument advanced by Daniel A. Austin in *The Indentured Generation: Bankruptcy and Student Loan Debt*, SANTA CLARA L. REV. 329, 333 (2013) (advocating for amendments to the Bankruptcy Code that would allow student loans to be written down to their actual value, which would remain nondischargeable: "the remaining balance of the loan would be dischargeable as general unsecured debt").

245. Wiese, *supra* note 242, at 447.

ensure that loan recipients graduate with marketable degrees."[246] He argued that his proposal did so because institutions of higher education could lose their eligibility to participate in Title IV programs if the institution's students discharge too many of their loans in bankruptcy.[247]

Still another approach might be reform through rule-making procedures, targeting procedural hurdles that limit access to relief. Pardo has suggested reforms to the Federal Rules of Bankruptcy Procedure as a method of improving access to justice for debtors seeking discharge of their student loans.[248] In particular, he has argued that student loan dischargeability determinations should be treated as contested matters rather than adversary proceedings, which would reduce procedural complexity and expense for debtors.[249]

Although statutory reform is an admirable goal and we support the move toward more objective and less ambiguous standards, it may not be realistic to expect a revision to the statute itself. As others have noted, in the past "Congress has not demonstrated any inclination to take serious action in reforming student-loan relief through the bankruptcy system."[250] Proposals to address student loans have recently been promoted by Democratic Party candidates for the 2020 presidential race, particularly Senator Elizabeth Warren.[251] On May 9, 2019, Senator Dick Durbin, along with Senator Warren and other legislators, proposed the *Student Borrower Bankruptcy Relief Act*, which would eliminate section 523(a)(8), making all student loans fully dischargeable in bankruptcy.[252] However, history suggests that this bill will not pass due to the influence of political factors unrelated to the merits of the proposal.[253]

246. *Id.*

247. *See id.* at 456–57. This does not appear to be an accurate summation of the regulations in existence at the time, which focused not on whether the students discharged their loans in bankruptcy but whether too many student loans were discharged at all. *See* 34 C.F.R. § 674.6a (2019); 34 C.F.R. § 682.611 (2019).

248. Pardo, *Taking Bankruptcy*, *supra* note 22, at 1175–79.

249. *Id.* at 1176.

250. Pardo, *Undue Hardship*, *supra* note 10, at 2174–78.

251. *See* Helaine Olen, *One Way to Tackle the Student Loan Crisis: Bankruptcy Court*, WASH. POST (May 15, 2019), https://www.washingtonpost.com/opinions/2019/05/15/one-way-tackle-student-loan-crisis-bankruptcy-court/ [https://perma.cc/2SWN-HWKR].

252. *See* S. 1414, 116th Cong. (2019); H.R. 2648, 116th Cong. (2019).

253. *See* Sunlight Foundation, *Only Four Percent of Bills Become Law,*

Accordingly, while we would celebrate more broad-reaching legislative reforms, it is advisable to seek other avenues of change simultaneously.

C. Judicial Reforms

Some scholars have focused on judicially reforming the undue hardship standard, either by encouraging substantive changes to judicial standards or procedural alterations that would facilitate predictability.[254] As discussed above, some individual judges have taken a more flexible approach to student loan discharge litigation than others.[255] As Pardo and Lacey point out, the current undue hardship case law offers courts "free rein to infuse subjectivity into what should be a straightforward financial calculation," leading to inconsistent application.[256] For example, as discussed in Part I, some judges require that the debtor establish only that it is "unlikely" that the debtor's prospects for increasing repayment will improve in the future (rather than requiring proof that the debtor's financial situation will not materially improve for twenty years or more), while others require a "certainty of hopelessness."[257] Pardo has called on bankruptcy judges to be more aggressive in striking procedurally improper pleadings and granting default judgments to debtors, which would enable more debtors to obtain discharge absent creditor objection.[258] However, although

HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/the-vast-majority-of-bill_n_268630 [https://perma.cc/B9LA-EAVF] ("The vast majority of bills are essentially dead upon arrival. In any given two-year session of Congress, ten-thousand or more bills are introduced. But only about 4 percent of them become law.").

254. Pardo, *Taking Bankruptcy*, *supra* note 22, at 1176.

255. *See generally* Ferek, *supra* note 41.

256. Pardo & Lacey, *Real Student Loan Scandal*, *supra* note 18, at 197; *see also* Taylor & Sheffner, *supra* note 216, at 332 (noting that the undue hardship tests "allow for judicial subjectivities to influence outcomes").

257. *Compare In re* Fern, 553 B.R. 362, 368 (Bankr. N.D. Iowa 2016) *with supra* Section II.B.2.

258. Pardo, *Undue Hardship*, *supra* note 10, at 2174–78; *see also* Pardo & Lacey, *Undue Hardship in Bankruptcy Courts*, *supra* note 29, at 509 (explaining that they "seek to provide a correct interpretation of the meaning of undue hardship that will enable courts to apply the standard in a way that comports with the command and structure of the Bankruptcy Code, as well as with the fresh start principle[s], and that will be more conducive to producing uniform results"). Many other authors are also concerned about the lack of uniformity, and Pardo himself has recognized these potential problems. *See, e.g.*, Somers & Hollis, *supra* note 211; Pardo, *Taking Bankruptcy*, *supra* note 22, at 1165–75.

scholars have advocated for judicial uniformity for over a decade, no such uniformity has emerged.[259]

D. Other Administrative Reform Proposals

In addition to our proposal,[260] more than four hundred other individuals, organizations, and groups submitted responses to the ED's Request for Information (RFI).[261] This section highlights some of the key takeaways from our survey of these responses. The surveyed responses generally agreed on three points: (1) ED agents are too aggressive, (2) a set of bright line rules for when an undue hardship exists would be helpful, and (3) the ED should be disincentivized from engaging in pretrial discovery in certain circumstances. Broadly speaking, we agree with all three points.

1. ED Agents Are Too Aggressive

A substantial percentage of the surveyed responses agreed that the ED should take affirmative steps to "to direct borrowers and student loan holders towards settlement and . . . to address pervasive aggressive litigation tactics that raise costs to tax payers and prevent eligible borrowers from obtaining student loan discharges."[262] The responses expressed a variety of

259. *See supra* Part II.

260. Dalié Jiménez, et al., *Comments of Academics to Department of Education's RFI Regarding Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings* (Docket No. Ed-2017-Ope-0085) (May 22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183893 [https://perma.cc/3M53-7D25], reprinted in 21 J. OF CONSUMER AND COMMERCIAL L. 114 (2018).

261. Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge Bankruptcy Proceedings, 83 Fed. Reg. 35 (Feb. 21, 2018).

262. *See* The Higher Education, Not Debt Campaign, Comment Letter on Evaluating Undue Hardship Claims (May 22, 2018) [hereinafter HEND Response], https://www.regulations.gov/document?D=ED-2017-OPE-0085-0391 [https://perma.cc/R3GY-YZD3]; *see also* Jason Iuliano, Comment Letter on Evaluating Undue Hardship Claims (May 22, 2018) [hereinafter Iuliano's Response], https://www.regulations.gov/document?D=ED-2017-OPE-0085-0402 [https://perma.cc/G7ZW-VHTC] ("To help alleviate this problem, the Department of Education should ensure that it and its guaranty agencies decline to litigate adversary proceedings in which the debtors meet the spirit of the undue hardship test."); The Office of the New York Attorney General and the Office of the Massachusetts Attorney General, Together with Eleven Other Attorneys General Offices, Comment Letter on Evaluating Undue Hardship Claims (May 23, 2018)

concerns related to "overly aggressive litigation tactics."[263] Specifically, responses complained of the waste of government resources caused by efforts to keep student loan borrowers on the hook even when there is no realistic chance that they will ever repay a substantial percentage of their loans.[264] Responses also complained of ED agents creating unnecessary barriers to just outcomes for student loan borrowers.[265] Finally, responses expressed concern that overly aggressive litigation discourages student loan borrowers from pursuing an undue hardship discharge in the first instance.[266]

The responses suggested two primary mechanisms to diminish overly aggressive litigation tactics. First, the ED should require its agents to stipulate that an undue hardship exists once student loan borrowers have made a prima facie showing of certain, objectively verifiable facts.[267] Second, the ED should be required to stipulate to the existence of certain facts without engaging in pretrial discovery. As demonstrated above, our proposal incorporates both mechanisms.

[hereinafter AG Response], https://www.regulations.gov/document?D=ED-2017-OPE-0085-0399 [https://perma.cc/Z88Q-TNGP] ("[L]oan holders sometimes aggressively contest the claims, even in circumstances where the borrower has a legitimate undue hardship claim."); Twenty-two United States Senators and Fifty-one Members of Congress, Comment Letter on Evaluating Undue Hardship Claims (May 22, 2018) [hereinafter Congressional Response], https://www.regulations.gov/document?D=ED-2017-OPE-0085-0400 [https://perma.cc/R37D-5A6S] ("Aggressive litigation in bankruptcy court against student borrowers who are unlikely to make a reasonable repayment to the federal government is a waste of taxpayer resources and a short-sighted policy that keeps millions of Americans from contributing to economic growth."); NACBA Response, *supra* note 125 ("Instead, as a matter of course—in virtually all cases—any attempt to obtain such a discharge is met with harsh opposition, including motions for reconsideration and appeals."); National Consumer Law Center, Comment Letter on Evaluating Undue Hardship Claims (May 18, 2018) [hereinafter NCLC Response], https://www.regulations.gov/ document?D=ED-2017-OPE-0085-0369 [https://perma.cc/9WS3-K3DX] (describing "overly aggressive litigation tactics that have been used in undue hardship cases, which have imposed far greater barriers to justice on debtors than those facing litigants in other civil litigation").

263. NCLC Response, *supra* note 262, at 2.

264. *See* Congressional Response, *supra* note 262.

265. *See generally* NCLC Response, *supra* note 262.

266. AG Response, *supra* note 262, at 2 ("Such tactics unfairly deprive borrowers of their right to relief from their debt, and further, discourage other eligible borrowers from seeking to discharge their loans.").

267. This presumption would be rebuttable.

2. Bright Line Rules Would Be Helpful

There was substantial agreement among many of the surveyed responses that the ED ought to delineate a set of objective criteria that, if established, would create a rebuttable presumption that an undue hardship exists.[268] The responses diverged somewhat as to the specific criteria that should create a presumption of undue hardship, but there was a significant degree of overlap with our own proposal. For example, many responses called on the ED to direct its agents to stipulate that an undue hardship exists when a borrower's income falls below a certain threshold combined with some other factor, such as disability or that the borrower is a family caregiver of a veteran.[269]

Although many responses were similar,[270] our proposal is more expansive. For example, our proposal is the only one that calls for a rebuttable presumption of undue hardship when a borrower's household income is less than 150 percent of the federal poverty guidelines and the borrower ceased attending an institution of higher education without receiving a degree.[271] This and other unique criteria reflect additional situations in which borrowers face an undue hardship in repaying their student loans—situations in which the borrower is unlikely to be able to repay their student loans because of their employment prospects and potential career growth.[272]

268. *See* AG Response, *supra* note 262; Congressional Response, *supra* note 262; Comments Submitted by the American Banking Institute's Commission on Consumer Bankruptcy, Comment Letter on Evaluating Undue Hardship Claims (May 21, 2018) [hereinafter ABI Response], https://www.regulations.gov/document?D=ED-2017-OPE-0085-0378 [https://perma.cc/D5GA-4VMV]; NACBA Response, *supra* note 125; NCLC Response, *supra* note 262; Mark Kantrowitz, Comment Letter on Evaluating Undue Hardship Claims (Mar. 5, 2018) [hereinafter Kantrowitz Response], https://www.regulations.gov/document?D=ED-2017-OPE-0085-0014 [https://perma.cc/4BL2-RNTU].

269. AG Response, *supra* note 262, at 3–4; Congressional Response, *supra* note 262, at 3 (citing Cohen Letter, *supra* note 31); Kantrowitz Response, *supra* note 268; ABI Response, *supra* note 268, at 4–5.

270. *See, e.g.*, Congressional Response, *supra* note 262, at 3.

271. Some of the individual responses did focus on the fraud perpetrated on students by some institutions, but, of the surveyed responses, only the AG Response explicitly calls upon the ED to do more to protect students victimized by their institutions.

272. INVESTING IN HIGHER EDUCATION: BENEFITS, CHALLENGES, AND THE STATE OF STUDENT DEBT 41 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160718_cea_student_debt.pdf (last visited July 9, 2019) [https://perma.cc/V2KW-CJM4] (stating "non-completers had default rates of 25

Our proposal is also more restrictive in some ways. For example, several other responses that call on the ED to establish similar presumptions use an income threshold of 175–200 percent of the federal poverty line, whereas we use 150 percent.[273] We set our income-level thresholds slightly lower than those in many other responses because borrowers with income at or below these levels—given necessary expenses to pay for housing, transportation, and other essentials—are more likely to be in severe financial distress, enduring undue hardship by paying their student loans.[274]

Some responses use a comparison to the median family income instead of the federal poverty guidelines. As discussed above, we prefer to use the federal poverty guidelines, although we acknowledge the strengths and weaknesses of both measurements.[275] Median family income takes into account differences in cost of living between states and is already used extensively in bankruptcy cases. However, because of large differences in median incomes across states, using median income as the standard would create a presumption of undue hardship to individuals who are not necessarily considered "poor" under other federal programs.[276] In some states, a be-

percent after three years, compared with just 9 percent among completers").

273. *See, e.g.*, Congressional Response, *supra* note 262, at 3; ABI Response, *supra* note 268, at 1, 4–5.

274. By contrast, the Kantrowitz Response ties his proposal to the federal poverty level, rather than 150 percent of the federal poverty level, as our proposal does. Kantrowitz suggests that using the federal poverty level may be more appropriate because it is "defined as an income level below which the family has no discretion in how it spends its income to pay for necessary living expenses." Kantrowitz Response, *supra* note 268, at 2. Additionally, he states: "One might argue that the difference between 100% of the poverty line and 150% of the poverty line is the difference between undue hardship and a partial financial hardship." *Id.* at 1. We agree in substance but believe that the federal poverty level no longer accurately captures the line where families lack discretionary income. As such, we've chosen a slightly higher threshold. Kantrowitz's proposal also appears slightly more subjective than ours and forces debtors to establish that their net income is below the federal poverty level, whereas we believe that our proposal creates easier-to-establish categories. *See id.* at 1–2.

275. *See* discussion *supra* Section III.B.1.

276. Unfortunately, this also means that some people not covered by our proposal are likely to be quite deserving of relief from their student loans. For instance, one advantage of using median income, which is state-based, instead of the federal poverty guidelines, which does not vary by locality, is that it accounts for differences between high-cost and low-cost states. Thus, our proposal will be less generous to individuals in high-cost states than a median income proposal would be. We emphasize that our proposal is meant to serve as a floor on relief that ought to be granted and not as a ceiling.

low-median-income debtor might still have a substantial income. For example, in 2017 the median household income in New Jersey was more than $76,000.[277]

We recognize the objections to the federal poverty guidelines. In contrast to median family income, the poverty guidelines are consistent across states, failing to account for differences in incomes and cost of living across state lines. Furthermore, although ubiquitous within federal programs, they do not serve as the basis for most bankruptcy calculations. Nevertheless, we prefer the consistency of the federal poverty guidelines, and a number of courts do use them as a reference point for determining whether an undue hardship exists.[278] What is more, there is little dispute that individuals at 150 percent of the poverty line are, in fact, poor, whatever their state of residence. Accordingly, we think the federal poverty guidelines are preferable.

Some other proposals agree that more should be done for student loan borrowers but do not provide concrete suggestions. By contrast, our proposal is more refined. For example, the National Student Legal Defense Network Response (NSLDN Response) argues—and we agree—that "[t]he Department should guide holders not to contest an undue hardship claim on the basis of whether a borrower has met the 'certainty of hopeless' standard where a realistic look at the borrower's circumstances indicates the borrower's inability to repay is likely to persist into the future."[279] However, the NSLDN Response does not operationalize this advice, writing instead that the ED "should give guidance to loan holders to consent to undue hardship claims where the testimony of the borrower (and, if available, friends, family, or a treating physician) is sufficient to satisfy *Brunner*."[280] Our proposal contains the concrete guidance the NSLDN Response calls for.

Finally, another major difference between our proposal and the other surveyed responses is support for partial dis-

277. By contrast, for a one-person household, the 2019 poverty guideline is $12,490 in annual income; a two-person household is $16,910; three people are allowed $21,330, etc. *Poverty Guidelines*, *supra* note 114.

278. *See supra* text accompanying notes 73–77.

279. National Student Legal Defense Network, Comment Letter on Evaluating Undue Hardship claims 3 (May 22, 2018) [hereinafter NSLDN Response], https://www.regulations.gov/document?D=ED-2017-OPE-0085-0397 [https://perma.cc/URX4-EN6C].

280. *Id.* at 1.

charges. Our proposal does not propose a structure for partial discharges. However, others proposed that if a household files chapter 13, a certain percentage of loans should be payable through the repayment plan.[281] Although allowing for partial discharge may seem an attractive compromise, it merely creates additional layers of unnecessary complication without substantially altering likely outcomes. Our proposal's simplicity will encourage more borrowers to seek a student loan discharge, which nearly all responders agree is appropriate.

3. The ED Should Engage in Less Pretrial Discovery

Respondents also generally identified concerns regarding aggressive litigation tactics by ED agents that impose unfair and onerous burdens on individuals seeking a discharge of their loans. As the American Bankruptcy Institute Response argues, "[i]f the borrower submits satisfactory evidence of undue hardship outside the litigation process, the student loan creditor should agree that the debtor is entitled to discharge of the student loan debt."[282] Too often, agents representing the ED in litigation make duplicative and expensive discovery requests when the requested information is already available from documents previously filed under penalty of perjury by the borrower in the underlying bankruptcy case. For example, debtors in chapter 13 cases are required to file their previous four years of tax returns, which could establish a debtor's long-term poverty without requiring further information from the debtor.[283] As observed by Pardo, updated information may be warranted where there has been a significant delay between the filing of the case and the filing of the adversary proceeding to discharge the debt.[284] The particulars of when such updates will be required should be established by rule and clearly communicated to debtors upon their filing.

On a related note, several responses called on the ED to force its agents "to cease engaging in unnecessary and expen-

281. NACBA Response, *supra* note 125, at 6.

282. ABI Response, *supra* note 268, at 5.

283. *See* 11 U.S.C. § 1308(a) (2018).

284. *See* Pardo, *Taking Bankruptcy*, *supra* note 22, at 1146 (finding the mean delay in his sample between the commencement of the bankruptcy case and the adversary proceeding was 257 days); FED. R. BANKR. P. 4007(b) (permitting a debt-dischargeability action to be filed at any time).

sive pre-trial discovery," such as by requesting information about "inappropriate and unnecessary factors" that are unrelated to "the borrower's ability to pay the amount of" student loan debt owed.[285] Far too often ED agents engage in extensive discovery to argue that certain expenses, such as restaurant meals, were unnecessary and that these funds should have been used to repay student loan debt instead.[286] But, as the NCLC Response argues, too often "individual expenses are highlighted without consideration of the debtor's overall budget or attempts to reduce expenses, in order to portray the debtor as irresponsible. This is done even in cases in which the debtor's income may be below the poverty level."[287] In other words, if a debtor's income is below the poverty line, whether a student loan debtor spent twelve dollars at McDonald's should be irrelevant.[288] We agree with those responses that call on the ED to limit discovery, and thereby reduce costs, as reflected in our proposal.

As many have noted, ED agents are often very aggressive in defending against claims of undue hardship.[289] This may cause a reduction in willingness to settle cases.[290] By refusing to settle cases even when the amounts the ED is likely to recover are small and by engaging in "pollutive litigation," ED agents may discourage student loan borrowers from seeking discharge in the first instance.[291] The ED should treat this proposal as an "opportunity to make it simpler and fairer for borrowers who have demonstrated legitimate hardships to receive an 'undue hardship' discharge."[292] As recommended herein, the ED should create a set of rebuttable presumptions for establishing undue hardship and thereby discourage unnecessary litigation, particularly pretrial discovery.

CONCLUSION

Our proposal would go a long way towards resolving many

285. HEND Response, *supra* note 262, at 1.
286. *See* NCLC Response, *supra* note 262, at 3.
287. *Id.* at 3.
288. *See id.*
289. *See* NATL. CONSUMER L. CTR., *supra* note 218, at 2; *see also* Pardo, *Undue Hardship*, *supra* note 10, at 2142–73.
290. *See* discussion *supra* Section II.C.
291. *See* Pardo, *Undue Hardship*, *supra* note 10, at 2108–09.
292. Congressional Response, *supra* note 262, at 3.

of the grosser inequities currently associated with restrictions on student loan discharge in the Bankruptcy Code. Applying a floor under which the ED will stipulate to a discharge, rather than engage in costly litigation, will promote greater consistency in outcomes, discourage courts from engaging in inappropriate and idiosyncratic moralizing, save time and effort for struggling debtors, and reduce costs to American taxpayers. It is our hope that the ED will adopt these proposals, which can provide targeted relief until Congress sees fit to revise the Bankruptcy Code.