BRIDGING THE STUDENT LOAN BANKRUPTCY GAP

by

Jason Iuliano*

Abstract

In November 2022, the Department of Justice and Department of Education announced sweeping reforms designed to make student loan bankruptcy discharge more accessible to struggling borrowers. Drawing upon an original (hand collected) dataset of more than six hundred adversary proceedings filed during the first year of implementation, this article presents the first empirical analysis of whether these reforms have achieved their goal and bridged the "Student Loan Bankruptcy Gap"—the chasm between those who could benefit from bankruptcy discharge and those who actually pursue it. The results are mixed but suggest the gap, although narrowed, remains wide. On the positive side, success rates have reached 87% in the post-reform period. But on the negative side, filings remain remarkably low. This article evaluates the reforms along four key metrics of success and proposes solutions to make bankruptcy relief more accessible to struggling borrowers.

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* Professor of Law, University of Utah S.J. Quinney College of Law. Thanks to Ashlynn Hall for invaluable research assistance; to Matthew Bruckner and Madison Kilbride for insightful discussions; to Judges Michelle Harner and Mary Jo Heston for thoughtful substantive feedback and editorial guidance; and to Dana Manke and Carrie Selby for careful editorial support.

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Introduction

Student loan debt has become the millstone around the neck of an entire generation. With over forty million Americans owing $1.8 trillion in educational debt, the crisis continues to deepen.[1] Although bankruptcy traditionally offers a fresh start to those drowning in debt, student loans have long been considered nearly impossible to discharge. The prevailing wisdom, repeated by bankruptcy attorneys and media outlets alike, is that unless you are "over the age of eighty, have no hearing, and have a serious mental illness," your student loans will follow you to the grave.[2] That mythology has also warped the market for help: many bankruptcy lawyers, treating discharge as futile, now quote exorbitant fees for student loan adversary proceedings, turning the perceived impossibility into a practical barrier.[3]

This perception of hopelessness is not entirely unfounded. Over the past five decades, Congress has steadily erected barriers to student loan discharge, transforming these debts from ones that were freely dischargeable into ones requiring proof of "undue hardship"—a standard that courts have sometimes interpreted as requiring a "certainty of hopelessness."[4] Even more troubling, student loans stand alone among consumer debts in this regard.[5] While the Bankruptcy Code makes exceptions for debts incurred through fraud, theft, and willful injury, student loans are one of the only categories of consumer debt that receives such harsh treatment despite no misconduct by the borrower.[6]

Yet the true crisis in student loan bankruptcy lies not in the legal standards themselves but rather in the chasm between those who could

[1] *See* Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE (Aug. 8, 2025), https://educationdata.org/student-loan-debt-statistics.

[2] David R. Black, *Successfully Guiding a Client Through the Chapter 13 Filing Process*, ASPATORE, 2014 WL 10512, at *13 (Jan. 2014); *see also* Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 504–07 (2020) (discussing the widespread perception that student loans are impossible to discharge in bankruptcy).

[3] *See infra* note 83 and accompanying text.

[4] *See, e.g.*, *In re* Oyler, 397 F.3d 382, 386 (6th Cir. 2005) (holding that *Brunner* requires a "certainty of hopelessness").

[5] *See* Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit,* 93 AM. BANKR. L.J. 277, 309–11 (2019) (discussing debts that are exempt from the bankruptcy discharge).

[6] *See id*. at 310 ("From tax evasion to drunk driving to intentionally harming others, the [discharge] exceptions are designed to ensure that debtors are held accountable for their unethical actions. In light of this characteristic, student loans are an odd addition to the group.").

benefit from bankruptcy discharge and those who actually pursue it. Previous research revealed a troubling gap in the bankruptcy system: for every five hundred student loan debtors who file for bankruptcy, 499 never even try to discharge their educational debt.[7] This massive disparity between potential relief and actual relief is the "Student Loan Bankruptcy Gap," and it has denied millions of Americans the fresh start that bankruptcy promises.

In November 2022, the Department of Justice (DOJ) and the Department of Education (ED) announced ambitious reforms aimed at bridging this gap.[8] Through new guidelines and a streamlined attestation process, they promised to simplify the undue hardship test first set forth in *Brunner* and make student loan bankruptcy discharge more accessible to struggling borrowers.[9] In recent reports, the departments celebrated these changes as a significant victory, pointing to increased filing rates and high success rates among those who seek discharge.[10] But have these reforms actually delivered on their promise of bridging the Student Loan Bankruptcy Gap? This article presents the first comprehensive empirical analysis of student loan bankruptcy cases filed under the new system.

The results are mixed but suggest the gap, although narrowed, remains dauntingly wide. While obtaining a discharge is indeed easier than in the pre-reform period, significant access-to-justice barriers still prevent the vast majority of financially distressed student loan borrowers from obtaining relief. Success rates have improved for those who file—reaching 87% in the post-reform period—but the total number of filings remains remarkably low. As this article demonstrates through original empirical data, the Student Loan Bankruptcy Gap persists not because of strict legal standards but because systemic barriers continue to deter eligible borrowers from pursuing their

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[7] *See* Iuliano, *supra* note 2, at 498–501 (discussing the Student Loan Bankruptcy Gap).

[8] *See* U.S. Department of Justice, *Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation*, Nov. 17, 2022, https://www.justice.gov/d9/pages/attachments/2022/11/17/student_loan_discharge_guidance_-_guidance_text_0.pdf [hereinafter "Guidance Letter"].

[9] *See id*. at 2 (setting forth three core goals for the reforms); Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).

[10] *See* U.S. Department of Justice, *Justice Department and Department of Education Announce Successful First Year of New Student-Loan Bankruptcy Discharge Process*, Nov. 16, 2023, https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-successful-first-year-new-student-loan [hereinafter "2023 DOJ Analysis"]; U.S. Department of Justice, *Justice Department and Department of Education Announce Continuing Success of Student-Loan Bankruptcy Discharge Process*, July 17, 2024, https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-continuing-success-student-loan [hereinafter "2024 DOJ Analysis"].

legal rights.

Beyond analyzing raw outcomes, this article examines the reforms' effectiveness through multiple lenses relating to both process and substance. This multifaceted analysis reveals that while the DOJ and ED's changes represent progress, they fall short of bridging the gap that has kept bankruptcy relief out of reach for millions of struggling borrowers. Understanding why these well-intentioned reforms have failed to close the gap is critical to developing more effective solutions.

Given the political significance of student loan debt, it is important to acknowledge the political context in which the 2022 Guidance Letter operates. These reforms were implemented under a Democratic administration, and political transitions inevitably raise questions about policy continuity. The current Republican administration has indicated its intention to pursue significant changes to federal education policy, including an executive order purporting to eliminate the ED entirely.[11] However, the Trump administration has thus far made no public statements indicating an intent to change the student loan bankruptcy process or to overhaul the 2022 reforms specifically.

Moreover, several factors ensure this analysis remains valuable regardless of future political developments. First, the DOJ—not the ED—serves as the primary litigation arm in student loan bankruptcy proceedings, and the DOJ will continue to represent the government's interests in adversary proceedings regardless of administrative restructuring. Additionally, should the ED be reorganized, student loan administration would transfer to another federal agency, such as the Treasury Department, which could retain existing procedural frameworks.[12]

Second, the empirical findings document how student loan discharge operates when the DOJ applies a borrower-friendly framework, providing a blueprint for future administrations that may seek to reimplement or build upon the attestation process. The cyclical nature of American politics suggests that student loan relief will remain a recurring policy priority. If

[11] Exec. Order No. 14242, 90 Fed. Reg. 13679 (Mar. 20, 2025) (instructing the Secretary of Education to "take all necessary steps to facilitate the closure of the Department of Education").

[12] Katie Hawkinson, Mike Bedigan & Ariana Baio, *What will happen to student loans if the Department of Education is closed down?*, INDEP. (Mar. 20, 2025), https://www.the-independent.com/news/world/americas/us-politics/student-loans-education-department-closure-trump-b2710275.html (noting that "[a]nother agency—such as the Treasury Department—could absorb the Education Department's $1.7 trillion loan portfolio if it shuts down").

current policies are paused or rescinded, a future administration could easily resurrect them, and the outcomes analyzed in this article would serve as a baseline for assessing their impact across different iterations and political contexts.

Third, the data offer concrete guidance to bankruptcy judges, who retain substantial discretion in evaluating undue hardship claims regardless of executive branch positions. Even if future DOJ policy becomes more aggressive in opposing discharges, courts can still look to the 2022 attestation form and accompanying case outcomes as evidence of a workable framework for assessing dischargeability. Judges inclined toward leniency may treat the attestation checklist as a persuasive—if not binding—tool for evaluating undue hardship under the *Brunner* standard, potentially reducing inconsistencies in judicial application of the test.

Finally, this article's contribution extends beyond evaluating a single administrative policy. The comprehensive dataset and methodology represent the most recent installment in a series of empirical analyses conducted roughly every five years since 2007, providing essential longitudinal data on student loan bankruptcy trends that will inform scholarship and policy regardless of future political developments.

This article proceeds in three parts. Part I traces the evolution of student loan bankruptcy law and examines how the DOJ and ED's recent reforms attempt to address long-standing problems in the discharge process. Part II presents original data from more than six hundred student loan bankruptcy cases filed during the first year of the reforms, providing the first empirical assessment of whether these changes have succeeded in bridging the Student Loan Bankruptcy Gap. Finally, Part III evaluates the reforms against four key metrics—case filings, success rates, procedural streamlining, and legal consistency—ultimately concluding that more fundamental changes are needed to provide meaningful access to bankruptcy relief for struggling student loan borrowers.

I. Legal Standards for Discharging Student Loans

The law currently governing student loan discharges was last revised as part of the Bankruptcy Abuse and Consumer Protection Act of 2005.[13] The relevant portion of the statute reads as follows:

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

[13] Pub. L. No. 109-8, 119 Stat. 23 (2005).

debt . . .

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

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

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

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.[14]

Unpacking all the nuances of this provision would take significant time. Fortunately, for present purposes, it is enough to know that the provision encompasses all federal and non-profit loans used for educational purposes and the majority of private loans used for educational purposes.[15] In short, of the $1.8 trillion of outstanding student loan debt, approximately $1.75 trillion falls within the scope of this bankruptcy provision.[16] Educational debt covered by this provision is not discharged through the normal bankruptcy process.[17] Instead, obtaining a discharge requires filing an adversary proceeding (i.e., a lawsuit against the student loan creditor) and proving to the satisfaction of the judge that repayment of the student loan would constitute an "undue hardship."[18]

This part explores the challenges borrowers face when seeking to meet the undue hardship standard and details the recent efforts to address these difficulties. Specifically, Section A traces the evolution of the student loan bankruptcy law, highlighting how each revision further restricted the ability of borrowers to discharge educational debt in bankruptcy. Section B examines the "undue hardship" standard and outlines the criteria borrowers

[14] 11 U.S.C. § 523(a)(8) (2005).

[15] *See* Iuliano, *supra* note 5, at 281–88.

[16] *See id.* at 388–413 (discussing the types of student loans that fall outside the scope of § 523(a)(8)).

[17] *See id.* at 282 (noting that educational debt that falls within the scope of § 523(a)(8) is not dischargeable through the normal bankruptcy process).

[18] Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 496 (2012) (noting that, in order to discharge student loans, "Congress requires debtors to file an adversary proceeding [and prove] that repaying their student loans would constitute an 'undue hardship.'").

must meet to fulfill this requirement. Finally, Section C discusses the ED's 2022 guidance, which aimed to simplify the process for discharging student loans in bankruptcy.

A. History

i. Pre-1976

Prior to 1976, student loans were treated as regular consumer debts under U.S. bankruptcy law.[19] At that time, there were no special provisions in the Bankruptcy Code that governed the dischargeability of student loans.[20] As a result, student loans were subject to the same discharge rules as other types of unsecured, consumer debts, such as credit card balances and personal loans.[21]

Under the Bankruptcy Act of 1898—which was the primary bankruptcy law in effect until 1978—a debtor could obtain a discharge of their debts, including student loans, by filing for bankruptcy.[22] The process allowed debtors to liquidate their assets under chapter 7 or reorganize their debts under chapter 13.[23] Upon the successful completion of the bankruptcy proceedings, the debtor's eligible debts, including student loans, would be discharged.[24] So long as debtors were honest and truthful in the filings, they would be entitled to this fresh start.

The rationale behind treating student loans like other consumer debts was that it provided equal treatment for all types of unsecured debts and ensured that debtors had access to a full range of relief options.[25] This approach recognized that student loan borrowers might face financial hardships similar to those faced by other consumer debtors and that they should have the same opportunity to obtain a fresh start through bankruptcy.

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[19] *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 419 (2005) (noting that "[p]rior to 1976, a debtor could obtain a discharge of educational debt in bankruptcy").

[20] *See id.*

[21] *See* Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 144–47 (1996) (discussing the period prior to 1976, during which, student loans were treated as normal consumer debts in bankruptcy).

[22] *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

[23] *See id.*

[24] *See* Pardo & Lacey, *supra* note 19, at 419.

[25] *See* Salvin, *supra* note 21, at 144–47.

However, as student loan programs grew in popularity and the amount of outstanding student debt increased, concerns began to arise about the potential abuse of the bankruptcy system by student loan borrowers.[26] Some policymakers argued that the ease of discharging student loans through bankruptcy might encourage borrowers to file for bankruptcy shortly after graduation, even if they had the means to repay their loans.[27]

These concerns led to discussions about the need for specific provisions in the Bankruptcy Code to address the dischargeability of student loans.[28] Proponents of reform argued that student loans were fundamentally different from other types of consumer debts because they were backed by the federal government and that their discharge through bankruptcy could lead to significant losses for taxpayers.[29] Notably, the empirical data showed these fears were unfounded. Of particular note, while this debate was ongoing in the 1970's, the General Accounting Office (now the Government Accountability Office) released a study showing that a mere three-tenths of one percent of federally insured student loans were discharged through bankruptcy.[30] Put another way, this finding means that, for every one hundred dollars in student loan debt, only three cents were discharged (at a time when there were no impediments to receiving a discharge).

Although the concern that student loan borrowers were exploiting the bankruptcy system was wholly unfounded, that argument carried the day. Its

[26] *See id*. at 145–46 (discussing how the media reported on student loan bankruptcy abuses by some debtors, which ultimately led to a "movement . . . to limit the dischargeability of student loans").

[27] *See id.* (emphasizing the conclusion by the Commission on the Bankruptcy Laws of the United States that student loan debtors who filed for bankruptcy shortly after graduation were "reprehensible").

[28] *See id.* at 146–47 (discussing reforms proposed by the Commission on the Bankruptcy Laws of the United States and Congress's ultimate embrace of those reforms).

[29] *See id.* at 161 (noting an argument embraced by the courts that "[d]ischarge does not impact the schools, but rather hurts the taxpayers who foot the bill for unpaid student loans").

[30] *See* H.R. Rep. No. 95-595, at 148 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6109 (statement of Rep. James O'Hara) (highlighting that only "two-tenths of one percent of the loans made have been discharged in bankruptcy, involving less than three-tenths of one percent of the dollars"); John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 249 (2006) (lamenting that the "empirical data, like many empirical data gathered in Washington, fell on deaf ears"). This lack of evidence has, unfortunately, not stopped courts from asserting that a problem existed. *See, e.g.*, *In re* Renshaw, 222 F.3d 82, 87 (2d Cir. 2000) (asserting that "Congress enacted § 523(a)(8) because there was evidence of an increasing abuse of the bankruptcy process that threatened the viability of educational loan programs and harm to future students as well as taxpayers").

success was, in large part, due to the emotions it evoked among the public. The vivid image it conjured—a college student crossing the graduation stage, diploma in one hand and bankruptcy petition in the other—proved to be powerful and persuasive.

ii. Education Amendments of 1976

The Education Amendments of 1976 marked a significant shift in the treatment of student loan debt.[31] For the first time, student loans were singled out, separate and apart, from all other consumer debts. Through this law, Congress made education loans nondischargeable for the first five years of repayment.[32] Notably, there were a couple limitations. First, by proving that repayment would cause "undue hardship," a debtor could still discharge educational debt within those first five years.[33] And second, this provision applied only to federally insured or guaranteed student loans and loans made by nonprofit institutions of higher education.[34] All private loans were still dischargeable through the normal bankruptcy procedures.

As noted in the previous Section, the introduction of the five-year nondischargeability period was intended to address concerns regarding the potential abuse of the bankruptcy system by student loan borrowers.[35] Legislators believed that this waiting period would discourage borrowers from filing for bankruptcy immediately after graduation and would ensure that they made a good faith effort to repay their loans.[36]

As a compromise, the undue hardship exception provided a safeguard for borrowers who experienced significant financial difficulties within the five-year waiting period.[37] If a borrower could demonstrate that repaying their student loans would impose an undue hardship on them and their dependents, they could still obtain a discharge of their loans through bankruptcy.[38] As Congress portrays it, they were balancing the financial stability of student loan programs with the goal of providing relief to

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[31] *See* Education Amendments of 1976, Pub. L. No. 94-482, § 439A(a), 90 Stat. 2081, 2141 (codified as amended at 20 U.S.C. § 1087-3 (1976)).

[32] *Id.*

[33] *Id.*

[34] *See id.*

[35] *See* Salvin, *supra* note 21, at 146 (discussing perceived abuses and the subsequent legislative responses).

[36] *See id.*

[37] *See* Education Amendments of 1976 § 439A(a), 90 Stat. at 2141.

[38] *See id.*

borrowers in dire financial circumstances.

Notably, Congress neither defined "undue hardship" in this statute nor in any subsequent statute, instead leaving courts to interpret its meaning on a case-by-case basis.[39] In a later Section, I detail the judiciary's interpretation of "undue hardship,"[40] but for now, I turn to the next iteration of the student loan bankruptcy law.

iii. Bankruptcy Reform Act of 1978

The Bankruptcy Reform Act of 1978 was a comprehensive overhaul of the U.S. bankruptcy system, which modernized and codified the laws related to bankruptcy.[41] This legislation was the most significant update to the bankruptcy laws since the Bankruptcy Act of 1898.[42] As part of the sweeping changes, the student loan discharge provisions from the Education Amendments of 1976 were incorporated into the newly created Bankruptcy Code as § 523(a)(8).[43]

Under the Bankruptcy Reform Act of 1978, § 523(a)(8) was codified as a specific exception to discharge in the newly created Bankruptcy Code.[44] This move solidified the special treatment of student loans in bankruptcy proceedings and ensured that the nondischargeability provisions would be applied across all bankruptcy cases. It is notable that, aside from student loans, nearly all other discharge exceptions listed in § 523(a) are associated with significant moral condemnation. These exceptions include debts for tax evasion,[45] fraud or false pretenses,[46] embezzlement or larceny,[47] domestic support obligation,[48] willful or malicious injury,[49] injuries or deaths caused

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[39] *See* Salvin, *supra* note 21, at 149 (writing that "[b]ecause Congress provided no definition of undue hardship in the Bankruptcy Code, it has fallen upon the courts to define its parameters").

[40] *See infra* Part I.B.

[41] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532 (2018)).

[42] *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

[43] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. § 523(a)(8) (2018)).

[44] *See id.*

[45] *See id.* at § 523(a)(1)(c).

[46] *See id.* at § 523(a)(2).

[47] *See id.* at § 523(a)(4).

[48] *See id.* at § 523(a)(5).

[49] *See id.* at § 523(a)(6).

by driving under the influence of drugs or alcohol,[50] and criminal restitution.[51]

Although the Bankruptcy Reform Act largely incorporated the student loan discharge provisions from the Education Amendments, it did make one significant change—namely, increasing the nondischargeability period from five years to seven years. This extension was intended to provide a longer window during which borrowers were expected to make a good faith effort to repay their loans before seeking a discharge. It was also the first of many changes that would take place over the next three decades that prioritized creditor interests over borrower interests.

iv. Crime Control Act of 1990

The Crime Control Act of 1990 brought about two significant changes to the student loan nondischargeability provisions in the Bankruptcy Code. The most notable modification was the extension of the nondischargeability period for student loans from seven years to ten.[52]

Under the amended § 523(a)(8), borrowers who filed for bankruptcy within ten years of the due date of their first student loan payment were no longer eligible for a discharge of their student loans, unless they could prove undue hardship.[53] This change was implemented to further discourage potential—but unrealized—abuse of the bankruptcy system by student loan borrowers and to ensure that they made a prolonged good faith effort to repay their loans before seeking a discharge.

The extension of the nondischargeability period was driven by concerns about the increasing default rates on student loans and the perceived need to protect the financial stability of student loan programs.[54] Legislators believed that a longer nondischargeability period would encourage borrowers to prioritize the repayment of their student loans and would reduce the burden on taxpayers, who ultimately bear the cost of defaulted loans.

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[50] *See id.* at § 523(a)(9).

[51] *See id.* at § 523(a)(13).

[52] Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat. 4789, 4964-65 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)).

[53] *Id.*

[54] *See* De La Rosa v. Kelly (*In re* Kelly), 582 B.R. 905, 909 (Bankr. S.D. Tex. 2018) ("§ 523(a)(8) balances two competing policy objectives: (1) the debtor's right to a fresh start; and (2) the need to protect the financial integrity of educational loan programs and to induce lenders to lend to students who cannot qualify for loans under traditional underwriting standards.").

The Crime Control Act of 1990 also expanded the scope of § 523(a)(8) to cover any "educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or an obligation to repay funds received as an educational benefit, scholarship, or stipend."[55] The expansion of the types of educational debt governed by the provision and the extension of the nondischargeability period were another step in the decades-long tightening of student loan bankruptcy rules.

v. Higher Education Amendments of 1998

The Higher Education Amendments of 1998 marked an even more significant change. They eliminated the temporal discharge provision from the Bankruptcy Code altogether.[56] From this point on, borrowers would no longer be able to rely on the passage of time to automatically qualify for a discharge of their student loans.[57]

As with the earlier reforms, the elimination of the temporal discharge provision was driven by concerns about the increasing default rates on student loans and the perceived need to further protect the financial stability of student loan programs.[58] Despite the removal of the temporal discharge provision, the undue hardship exception remained in place.[59] Proving that repayment of a person's student loans would impose an undue hardship on them or their dependents was now the only way to discharge federal student loans.[60] By making all student loans nondischargeable, regardless of the timing of the bankruptcy filing, Congress placed a greater emphasis on the

[55] Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat. 4789, 4964–65 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)). It would take an entire article to detail the meaning of this quoted provision. *See generally* Iuliano, *supra* note 5 (discussing the meaning of "educational benefit"). For our purposes, it suffices to understand that the provision includes conditional educational grants—meaning funds given to students in exchange for a future commitment to perform services. *See id.* at 292.

[56] Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)).

[57] *See id.*

[58] *See* Brendan Baker, *Deeper Debt, Denial of Discharge: The Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1219 (2012) (noting that "[m]any critics argue that an unsubstantiated myth of abusive student debtors has fueled this progression").

[59] *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (codified as amended at 11 U.S.C. § 523(a)(8) (2012)).

[60] *See id.*

responsibility of borrowers to repay their educational debts and further insulated student loan programs from the financial risks associated with bankruptcy discharges.[61]

vi. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 was the most significant piece of consumer bankruptcy legislation since the modern Bankruptcy Code was enacted in 1978.[62] It introduced changes across the entire bankruptcy spectrum, and the student loan discharge provision was not spared. Most notably, BAPCPA expanded the scope of § 523(a) to include most private student loans.[63] For the first time, the discharge prohibition would extend beyond federal and non-profit loans.

Before this point, private student loans, which are issued by banks, credit unions, and other for-profit lenders, were treated as general unsecured debts and could be discharged in bankruptcy without the need to prove undue hardship. Recall that the prevailing argument for making student loans nondischargeable was fear that taxpayers would have to bear the cost when abusive debtors exploit the system. That fear, however, is unfounded in the context of private student loans.

Nonetheless, proponents of the expansion argued that the growing private student loan market needed protection from the financial risks associated with bankruptcy discharges. With such protections, the argument went, private creditors would be able to issue student loans on more favorable terms and with lower interest rates, thereby increasing access to educational financing.[64]

Critics of the amendment countered that the inclusion of private student loans under § 523(a)(8) would make it more difficult for borrowers

[61] *See* Baker, *supra* note 58, at 1219.

[62] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in 11 U.S.C.).

[63] *See id.* (exempting from discharge "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986"); John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 250 (2006).

[64] For an argument that student loan debtors failed to reap benefits from this change, *see generally* Preston Mueller, *The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?*, 32 EMORY BANKR. DEV. J. 229 (2015).

to obtain relief from overwhelming educational debt, even in cases of severe financial hardship.[65] They argued that private student loans often lack the flexible repayment options and borrower protections available with federal student loans, making them particularly burdensome for borrowers facing financial difficulties.[66]

The expansion of § 523(a)(8) to include private student loans under BAPCPA has had a significant impact on the ability of borrowers to discharge their educational debts through bankruptcy. By subjecting private student loans to the same undue hardship standard as federal loans, BAPCPA has made it more challenging for borrowers to obtain a fresh start and has insulated private lenders from the consequences of borrower default.

BAPCPA marks the most recent legislative modification to the student loan discharge provisions. For the past twenty years, the changes it introduced have governed student loan bankruptcy proceedings. In detailing the history of the student loan discharge laws, this section has covered five different legislative reforms taking place over a period of nearly thirty years. Table 1 below summarizes the material changes that occurred at each point. The following section narrows the scope by focusing on the specific process for proving undue hardship in the bankruptcy courts.

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[65] *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181–82 (2009) (discussing the 2005 amendment).

[66] *See id.* at 181 (noting that "unlike federal student loans, private student loans are largely unregulated. Without limits on the amount students can borrow, without programs to reduce or defer payments, and without caps on interest rates, students can quickly find themselves deeply mired in debt").

Table 1: The History of Student Loan Bankruptcy Reforms

Law	Period of Non-dischargeability	Loans Covered
Pre-1976	none	None
Education Amendments of 1976	5 years	federal and non-profit student loans
Bankruptcy Reform Act of 1978	7 years	same as above
Crime Control Act of 1990	10 years	same as above plus conditional grants
Higher Education Amendments of 1998	indefinite	same as above
BAPCPA (2005)	indefinite	same as above plus most private student loans

B. Undue Hardship

The undue hardship exception has been a central issue in student loan bankruptcy cases since its introduction into the Bankruptcy Code. Because Congress never defined the term "undue hardship," courts have been forced to develop their own tests and rules. The landmark case in the matter is *Brunner v. New York State Higher Education Services Corp*.[67] Marie Brunner, the plaintiff in the dispute, filed for bankruptcy shortly after completing a master's degree in social work. She sought to discharge her federal student loans, arguing that repaying the loans would impose an undue hardship on her.[68] At the time of filing, Brunner was unemployed and had no immediate job prospects, despite her efforts to find work in her field.[69]

The Second Circuit Court of Appeals upheld the lower court's decision, ruling that Brunner had not demonstrated undue hardship as required by 11 U.S.C. § 523(a)(8).[70] In its decision, the court set forth a three-

[67] 831 F.2d 395 (2d Cir. 1987).
[68] *Id.*
[69] *See id.* at 396.
[70] *See id.* at 396–97.

prong test for establishing undue hardship, which has since become known as the *Brunner* standard.[71]

Under the test, borrowers must prove that (1) they cannot maintain a minimal standard of living for themselves and their dependents if forced to repay their loans, (2) their current financial situation is likely to persist for a significant portion of the repayment period, and (3) they have made good faith efforts to repay their loans.[72]

Broadly, the *Brunner* test should be thought of as having three temporal components that examines a debtor's financial situation at three points in time: present, future, and past. The first prong, which assesses whether the debtor has a present inability to repay the student loans, takes into account the borrower's current income and expenses, as well as any circumstances that may affect their ability to pay, such as medical conditions or other financial obligations.[73] The second prong, which assesses whether the debtor will likely have a future inability to repay the student loans, necessitates a showing that the borrower's financial difficulties are not temporary or short-lived but rather are expected to continue for a substantial part of the loan repayment term.[74] Finally the third prong, which assesses whether the debtor made a good faith effort in the past to repay the student loans, examines the borrower's actions and intentions in managing their student loan debt, including their payment history, efforts to maximize income and minimize expenses, and any attempts to negotiate alternative repayment plans or seek deferments or forbearances.[75]

The *Brunner* standard's three-prong test has become the dominant framework for evaluating undue hardship in student loan bankruptcy cases.[76]

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[71] *See id.* at 396.

[72] *See id.*

[73] Pardo & Lacey, *supra* note 19, at 496–97 (discussing the first prong of the *Brunner* Test).

[74] *See id.* at 497 (discussing the second prong of the *Brunner* Test).

[75] *See id.* at 497–98 (discussing the third prong of the *Brunner* Test).

[76] The Eighth Circuit and most bankruptcy courts in the First Circuit have rejected *Brunner* and instead adopted a "totality of the circumstances test." *See* Bronsdon v. Educ. Credit Mgmt. Corp. (*In re* Bronsdon), 435 B.R. 791, 797–98 (B.A.P. 1st Cir. 2010) (noting that "[m]ost of the bankruptcy courts within the First Circuit have adopted the totality of the circumstances test over the *Brunner* test"). Despite having different names, the two tests employ similar analyses and yield similar case outcomes. *See In re* Long, 322 F.3d 549, 553–54 (8th Cir. 2003) (holding that the totality-of-the-circumstances test requires courts to consider: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy

Since its creation, the test has been portrayed as an insurmountable obstacle for student loan borrowers.[77] But that narrative ignores the setting in which *Brunner* arose. In 1987, § 523(a)(8) still imposed a seven-year limit on nondischargeability. Nonetheless, this widespread belief has been perpetuated by a few unrepresentative cases[78] and a wave of media reports and academic articles that characterize the undue hardship standard as an all-but-impossible hurdle to overcome.[79] One quote from a consumer bankruptcy attorney illustrates the depth of this belief:

> Student loans are not dischargeable in bankruptcy under almost any circumstances. There is such a thing as a hardship discharge of student loan debt, but to get one of those you need to be over the age of eighty, have no hearing, and have a serious mental illness that prevents you from ever being able to earn a dime or receive a social security payment, and not have any family that can assist you.[80]

Contrary to this prevailing belief, my research suggests that the

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case"); Iuliano, *supra* note 18, at 497 (comparing student loan cases decided in different jurisdictions and finding that "[i]dentical debtors filing in a *Brunner* circuit and a totality of the circumstances circuit should expect similar outcomes.").

[77] *See* Aaron N. Taylor & Daniel J. Sheffner, *Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions To Discharge Student Loans*, 27 STAN. L. & POL'Y REV. 295, 297 (2016) ("Conventional wisdom dictates that it is all-but-impossible to discharge student loans in bankruptcy.").

[78] *See, e.g.*, *In re* Ballard, 60 B.R. 673, 674–75 (Bankr. W.D. Va. 1986) (claiming that "[u]ndue hardship . . . should be based on a 'certainty of hopelessness' "); *In re* Coveney, 192 B.R. 140, 142 (Bankr. W.D. Tex. 1996) (quoting *In re* Mathews, 166 B.R. 940, 943 (Bankr. D. Kan. 1994) (asserting that "'dischargeability of student loans should be based upon the certainty of hopelessness'"); *contrast with* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004) (holding that "courts need not require a 'certainty of hopelessness.' Instead, a realistic look must be made into debtor's circumstances and the debtor's ability to provide for adequate shelter, nutrition, health care, and the like.").

[79] *See, e.g.*, Jessica Dickler, *Trump Administration May Make It Easier To Wipe Out Student Debt in Bankruptcy*, CNBC (Feb. 22, 2018, 9:59 AM), https://www.cnbc.com/2018/02/21 /trump-administration-may-make-it-easier-to-wipe-out-student-debt-in-bankruptcy.html [https://perma.cc/3F8G-79QA] (quoting Mark Kantrowitz as noting that "[a]s of now, 'it's almost impossible to discharge student loans in bankruptcy'"); Charles J. Tabb, *Bankruptcy and Entrepreneurs: In Search of an Optimal Failure Resolution System*, 93 AM. BANKR. L.J. 315, 334 (2019) ("[A] debtor is burdened by her student loans *forever* unless she can prove an undue hardship, which is a very difficult standard to satisfy under current interpretations."); *see also* Iuliano, *supra* note 2, at 504–07.

[80] David R. Black, *Successfully Guiding a Client Through the Chapter 13 Filing Process*, ASPATORE, 2014 WL 10512, at *13 (Jan. 2014).

Brunner standard is not as formidable as it is portrayed.[81] In a pair of earlier articles, I analyzed empirical data from hundreds of student loan cases, demonstrating that a substantial percentage of student loan debtors in bankruptcy would satisfy the test.[82]

That said, whether the *Brunner* test is genuinely insurmountable is not the central issue here. What matters is the pervasive belief that it is. After all, this belief significantly impacts behavior: if borrowers and their attorneys are convinced that discharging student loans in bankruptcy is impossible, they are unlikely to pursue a discharge, regardless of the actual legal standard. This perception, accordingly, has a substantial influence on the practical application of the law.[83] It also contextualizes the ED's decision to implement new student loan discharge procedures in November 2022, as the agency sought to address and mitigate the effects of this widely held misconception.

C. The 2022 Guidance Letter

In November 2022, the DOJ and ED jointly published guidance to DOJ attorneys handling student loan bankruptcy proceedings.[84] This guidance established clearer, more consistent, and more efficient standards for evaluating undue hardship claims while reducing unnecessary litigation burdens for both borrowers and the government.[85]

The guidance implements two key reforms to the traditional student loan discharge process. First, it streamlines the *Brunner* test by establishing clear factors that create a presumption of dischargeability.[86] Second, it enables borrowers to receive faster responses from the DOJ, reducing

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[81] *See* Iuliano, *supra* note 2, at 504–07 (discussing the myth of nondischargeability).

[82] *See id.* at 524 (presenting original data showing that more than sixty percent of student loan adversary proceeding filers obtain relief); Iuliano, *supra* note 5, at 512–22 (presenting original data on student loan discharge rates from 2007).

[83] Notably, the perception has a compounding effect. Attorneys who perceive undue hardship litigation to be time consuming and fruitless quote exorbitant rates for clients. The exorbitant rates, in turn, increase the perception that student loan adversary proceeding are futile.

[84] *See* Guidance Letter, *supra* note 8, at 1.

[85] *Id.* at 1–2 (aiming to "enhance consistency and equity in the handling of these cases" and to "increase the number of cases where the government stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor's student loans be discharged").

[86] *See id.* at 2 (listing a goal "[t]o set clear, transparent, and consistent expectations for discharge that debtors understand regardless of representation").

litigation costs and making discharge proceedings more accessible.[87]

While this guidance represents a meaningful policy shift, it falls short of the sweeping alternatives proposed by some academics and policymakers.[88] This more limited approach, however, reflects significant legal constraints on the DOJ and ED's authority. The departments lack authority to cancel student loans through broad administrative discharge and are, instead, restricted to two primary roles: representing the government's interests in bankruptcy proceedings and administering congressionally authorized discharge programs.[89]

These statutory discharge programs include Income-Driven Repayment, Public Service Loan Forgiveness, and other targeted relief mechanisms such as closed school discharges and borrower defense to repayment.[90] Outside these congressionally authorized programs, student loans can only be discharged through the bankruptcy process under the Bankruptcy Code.

Broader executive efforts to cancel student debt have faced substantial legal challenges. In *Biden v. Nebraska*, the Supreme Court rejected the President's plan to forgive up to $20,000 per borrower, ruling that the executive branch had exceeded its statutory authority.[91] Given these legal constraints, the DOJ's new approach represents both a strategic shift and an

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[87] *See id.* at 2 (listing a goal "[t]o reduce debtors' burdens in pursuing an adversary proceeding by simplifying the fact-gathering process").

[88] *See, e.g.*, Warren for Senate, *My Plan to Cancel Student Loan Debt on Day One of My Presidency*, WARREN FOR SENATE https://elizabethwarren.com/plans/student-loan-debt-day-one (last visited Oct. 28, 2025) (detailing Senator Elizabeth Warren's student loan debt plan released during her 2016 presidential campaign, which proposed cancelation of student loan debt up to $50,000 per borrower).

[89] *See* Biden v. Nebraska, 143 S. Ct. 2355 (2023) (holding the HEROES Act did not authorize mass cancellation); 28 U.S.C. § 516 (conduct of litigation for the United States is reserved to the DOJ. ED is the client agency in student-loan adversary proceedings); U.S. Dep't of Justice, Justice Manual § 4-1.100 (Assignment of Responsibilities) (citing 28 U.S.C. §§ 516, 519) (explaining that, absent other law, DOJ attorneys represent the United States and its agencies in litigation); 20 U.S.C. § 1087e (authorizing a variety of student loan forgiveness programs).

[90] *See* Federal Student Aid, *Student Loan Forgiveness (and Other Ways the Government Can Help You Repay Your Loans)*, https://studentaid.gov/articles/student-loan-forgiveness (discussing the variety of student loan forgiveness and assistance programs); One Big Beautiful Bill Act, Pub. L. No. 119-21, § 82001(b)(3), 139 Stat. 72 (2025) (adding HEA § 455(d)(6) "Termination and Limitation of Repayment Authority" and providing a sunset for certain repayment plans available before July 1, 2026).

[91] 143 S. Ct. at 2375 (finding that "the HEROES Act provides no authorization for" the student loan forgiveness plan).

acknowledgment of existing statutory limitations.

The following sections examine the two key goals of the guidance (a streamlined test and a streamlined procedure) in turn.

i. A Streamlined Test

The Guidance Letter advises DOJ attorneys to recommend to the bankruptcy court that a student loan be discharged if three conditions are met: "(1) the debtor presently lacks an ability to repay the loan; (2) the debtor's inability to pay the loan is likely to persist in the future; and (3) the debtor has acted in good faith in the past in attempting to repay the loan."[92] These three factors, of course, parallel the *Brunner* test.

The guidance makes a significant contribution, however, by providing a framework for DOJ attorneys to apply these factors consistently and equitably.[93] Specifically, for each element, the guidance lists factors that would lead to a presumption of undue hardship.[94] By detailing these factors, the DOJ has made it possible for borrowers to know with substantial certainty—even before filing an adversary proceeding—whether they are going to satisfy the undue hardship test.

In assessing the first element (present inability to pay), the Guidance Letter focuses on whether a debtor can maintain a "minimal standard of living" while repaying the student loan debt.[95] According to the letter, this prong is satisfied when the debtor's allowable expenses exceed the debtor's income.[96]

To determine allowable expenses, the letter directs DOJ attorneys to the Internal Revenue Service Collection Financial Standards. This handbook is a detailed compendium of national and local standards that sets forth an individual's necessary expenses.[97] The standards are routinely used in

[92] Guidance Letter, *supra* note 8, at 1.

[93] The framework was strongly influenced by ideas proposed in a law review article. *See* Brook E. Gotberg et al., *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. COLO. L. REV. 183, 205–33 (2020) (presenting a series of objective factors to assess whether an individual meets the undue hardship standard).

[94] *See* Guidance Letter, *supra* note 8, at 5–13 (detailing factors that satisfy each of the three undue hardship test elements).

[95] *See id.* at 4 ("With respect to the first factor, the Guidance relies upon the Internal Revenue Service Collection Financial Standards . . . to assess whether a debtor can presently maintain a 'minimal standard of living' if required to repay student loan debt.").

[96] *See id.* at 5–9 (outlining the procedure to calculate expenses and income and determine whether the debtor can prove a present inability to pay).

[97] *See* IRS, *Collection Financial Standards*, https://www.irs.gov/businesses/small-

bankruptcy proceedings to calculate reasonable expenses as well as in tax cases to calculate an individual's ability to pay delinquent tax liabilities.[98] The Guidance Letter states that, if the debtor's allowable expenses exceed the individual's gross income, "the minimal standard of living requirement is satisfied, and the debtor may be eligible for a student loan discharge, subject to consideration of the" other two elements.[99] In short, if a debtor's income is below the expenses the Internal Revenue Service (IRS) has identified as necessary to maintain a minimal standard of living, then the debtor has a present inability to make payments on student loan debt, and that first prong of the *Brunner* test is satisfied.

Turning to the second element (future inability to pay), the Guidance Letter sets forth a list of five nonexclusive factors:

1) the debtor is age 65 or older;
2) the debtor has a disability or chronic injury impacting their income potential;
3) the debtor has been unemployed for at least five of the last ten years;
4) the debtor has failed to obtain the degree for which the loan was procured; and
5) the loan has been in payment status other than 'in-school' for at least ten years.[100]

A debtor who meets any of these factors is presumed to have satisfied the second prong of the undue hardship test.[101] The letter goes on to emphasize that these factors are not the only bases upon which a future inability to pay may be found. Debtors should disclose all facts they believe are relevant to their future finances and the DOJ will review these additional circumstances to determine whether they may warrant undue hardship relief.[102] For example, a DOJ attorney may determine that a debtor's financial situation is unlikely to improve if the debtor has a substantial history of

businesses-self-employed/collection-financial-standards ("Allowable living expenses include those expenses that meet the necessary expense test.").

[98] *See id.*

[99] Guidance Letter, *supra* note 8, at 8.

[100] *Id.* at 9.

[101] *See id.* (noting that "[a] presumption that a debtor's inability to repay debt will persist is to be applied" if any of these criteria are met).

[102] *See id.* (noting that "a debtor may attest to any facts the debtor believes are relevant to future inability to pay, and the Department attorney should review the Attestation to determine whether the facts presented by the debtor satisfy the standards for proof of likely persistence of inability to pay").

unemployment, even if it does not meet the criteria for a presumption.[103] Similarly, a stipulation may be warranted if the closure of the institution that awarded the debtor's degree has impaired the debtor's future earning potential, regardless of whether a specific presumption is met.[104] In allowing for this type of assessment, the DOJ recognizes the importance of considering each debtor's unique circumstances while also setting clear expectations for discharge.

With regard to the third element (good faith effort to pay), the guidance emphasizes that good faith "may be demonstrated in numerous ways" and that this prong "should not be used as a means for courts or Department attorneys to impose their own values on a debtor's life choices"[105] The guidance provides several examples of actions that demonstrate good faith, including:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an income-driven repayment plan (IDRP);
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with [ED] or their loan servicer, regarding payment options, forbearance and deferment options, or loan consolidation; or
- engaging meaningfully with a third party they believed would assist them in managing their student loan debt.[106]

The guidance also notes that the good faith standard assesses criteria such as "the debtor's efforts to obtain employment, maximize income and minimize expenses."[107] The document goes on to caution DOJ attorneys against placing undue weight on a debtor's actual payment history or enrollment in an IDRP.[108] In doing so, the guidance acknowledges the significant servicing problems that have plagued IDRPs.[109] Combined, these

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[103] *See id.* at 10.

[104] *See id.*

[105] *Id.* at 11.

[106] *Id.*

[107] *Id.*

[108] *See id.* at 13 (emphasizing that "non-enrollment alone does not show a lack of good faith").

[109] *See id.* (observing that the ED "has found widespread problems with IDRP servicing," that "IDRPs have not always been administered in ways that have been effective for, or accessible to, student loan debtors," and that DOJ attorneys should not "oppose

changes to analyzing the three prongs of the *Brunner* test should result in a more lenient standard while also identifying clear factors that lead to more consistent application of the test.

Indeed, the DOJ and ED set forth clear goals supporting this enhanced access to justice:

- Streamlining the process for evaluating undue hardship claims;
- Providing more clarity and consistency in the application of the *Brunner* test;
- Encouraging a more compassionate and flexible approach to assessing borrowers' circumstances; and
- Reducing unnecessary and burdensome litigation for both borrowers and [ED].[110]

These aims represent a significant shift in the ED and DOJ's approach to student loan bankruptcy cases, signaling a more borrower-friendly stance and a willingness to work with borrowers in financial distress. Although these aims are laudable, they will only be achievable to the extent that borrowers are able to navigate the student loan discharge process. The departments were cognizant of this potential limitation and attempted to mitigate it by introducing significant procedural reforms. Having discussed the substantive changes to the undue hardship test in this section, the article now turns to the streamlined procedural reforms introduced in the November 2022 Guidance Letter.

ii. A Streamlined Procedure

Before the 2022 Guidance Letter, student loan borrowers seeking a bankruptcy discharge had to prove undue hardship to the judge through a process known as an adversary proceeding. An adversary proceeding is a separate lawsuit filed within the bankruptcy case and is typically used to determine the dischargeability of certain debts, including student loans.[111] The creditor and the debtor present arguments before a bankruptcy judge to resolve disputes over the debt's status.[112] An adversary proceeding follows the rules of civil procedure and is best thought of as a full-fledged trial

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discharge for lack of good faith where there is a basis to conclude that the debtor's IDRP non-enrollment was not a willful attempt to avoid repayment").

[110] *See* Guidance Letter, *supra* note 8, at 1–2.

[111] *See Black's Law Dictionary* (12th ed. 2024) (defining an adversary proceeding as "[a] lawsuit that is brought within a bankruptcy proceeding, governed by special procedural rules, and based on conflicting claims usually between the debtor (or the trustee) and a creditor or other interested party").

[112] *See id.*

occurring within the broader context of the bankruptcy proceeding. As such, it can be a difficult, costly, and time-consuming process.

The debtor must initiate the adversary proceeding by filing a complaint with the bankruptcy court, asserting that repayment of their student loans would impose an undue hardship. This requires drafting a legal document that details the debtor's financial circumstances and presents arguments in favor of discharge. Following the filing of the complaint, both the debtor and the creditor engage in discovery. This sometimes lengthy process involves exchanging documents, answering interrogatories, and even potentially conducting depositions. Debtors are required to provide extensive financial records, medical documentation, and other evidence supporting their claim of undue hardship.[113]

Throughout the proceeding, various motions might be filed by either party, such as motions for summary judgment or motions to compel discovery. Each motion could result in additional hearings and delays. If the case is not resolved through motions or settlement, it proceeds to trial, where the debtor bears the burden of proving undue hardship.

This traditional adversary proceeding process can be both time-consuming and expensive. Cases routinely drag on for more than a year, requiring multiple court appearances and extensive preparation. For debtors already struggling financially, the legal costs associated with this process are prohibitive, often necessitating pro bono assistance or self-representation.[114]

Throughout this process, the DOJ historically took an adversarial stance, vigorously contesting most attempts to discharge student loans. This approach was mandated by the Federal Claims Collections Act of 1966, which required agencies to "aggressively collect all debts arising out of activities of, or referred or transferred for collection services to, that agency."[115] This aggressive posture was also rooted in the widespread perception of the "undue hardship" standard as an extremely high bar. Ultimately, the DOJ's threat of protracted litigation, combined with the cost and complexity of the process, deterred the overwhelming majority of financially distressed debtors from seeking relief.[116]

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[113] *See* Iuliano, *supra* note 18, at 507 (discussing the adversary proceeding process).

[114] *See* Iuliano, *supra* note 2, at 539 (discussing the high price attorneys charge to litigate adversary proceedings); Iuliano, *supra* note 18, at 516 (finding that twenty percent of student loan debtors represented themselves pro se in the adversary proceeding).

[115] 31 C.F.R. § 901.1 (the Act goes on to require that collection activities "be undertaken promptly with follow-up action taken as necessary").

[116] *See* Iuliano, *supra* note 2, at 525 (providing data showing that 99% of bankrupt debtors who would meet the undue hardship standard decline to file an adversary

The 2022 Guidance Letter marks a significant departure from the trial process underlying the traditional adversary proceeding. At the heart of this new approach is a standardized attestation form that debtors complete following the filing of the adversary complaint to provide relevant information about their financial circumstances. This form is designed to gather the necessary information efficiently and consistently across cases, addressing one of the major criticisms of the previous system—its lack of uniformity.

The attestation form solicits specific information aligned with the three prongs of the undue hardship test. It requests details about the debtor's current income and expenses, factors affecting future ability to pay, and past efforts to manage the loan.[117] This targeted approach helps focus the inquiry on the most relevant factors for determining undue hardship, potentially reducing the need for extensive discovery and prolonged legal battles. The form also allows debtors to explain their circumstances in their own words, providing context that might have been lost in the more formal traditional process.[118]

Upon receiving the completed attestation, DOJ attorneys are instructed to review the information provided in light of the specific criteria outlined in the guidance.[119] This review process is more standardized and less adversarial than the traditional approach, with attorneys advised to accept reasonable explanations from debtors.

A key feature of the new process is the emphasis on collaboration between DOJ attorneys and ED. For each case, ED provides relevant loan history and details to inform DOJ's assessment. This interagency cooperation aims to ensure a more comprehensive and informed evaluation of each case. It also leverages ED's expertise in student loan administration, potentially leading to more nuanced and fair assessments of a debtor's situation[120]

Based on the attestation and the criteria outlined in the guidance, DOJ attorneys are empowered to make quicker determinations about whether to recommend discharge. In cases where the criteria for undue hardship are met,

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proceeding).

[117] *See* U.S. Dep't of Just., *Student Loan Attestation Fillable Form*, 3–13, https://www.justice.gov/ust/student-loan-guidance.

[118] *See id.* at 13 (inviting the borrower to "[d]escribe any other facts indicating you have acted in good faith in the past in attempting to repay the student loan(s) you are seeking to discharge").

[119] *See supra* Part I.0 (discussing the factors that DOJ attorneys are instructed to evaluate).

[120] *See* Guidance Letter, *supra* note 8, at 2.

attorneys are advised to stipulate to the facts demonstrating undue hardship and recommend discharge to the court. This approach represents a significant shift from the previously adversarial stance and should lead to faster resolutions and more frequent recommendations for discharge.[121]

Overall, this new attestation process aims to address many of the shortcomings of the traditional adversary proceeding. By providing a clear framework for evaluation and encouraging a more cooperative approach, the attestation process seeks to reduce the time, cost, and adversarial nature of student loan discharge proceedings. It also aims to make the process more accessible to debtors who might have been deterred by the complexity and uncertainty of the traditional process. The guidance explicitly acknowledges this objective, stating an intention to increase the number of cases where the government stipulates to discharge when warranted by the facts and law.[122] The next part of this article presents original data to examine whether these goals have been realized.

II. Original Data

The attestation form marks a significant procedural change from the student loan discharge process that had existed for the preceding two decades. The real question, however, is whether the reforms have improved student loan discharge outcomes for individuals in need. To answer that question, this part presents original (hand collected) data from every student loan bankruptcy case (more than six hundred in total) filed during the first year the Guidance Letter was in effect in addition to the month immediately preceding the introduction of the Guidance Letter (mid-October 2022 through mid-November 2023).

The dataset timeframe was selected to capture a sufficient number of completed cases to evaluate the reforms' efficacy while also minimizing the number of open cases included in the dataset. Because the Guidance Letter applied retroactively to all pending cases and because many cases take more than a year to resolve, including the October 2022 filings allowed for a more robust dataset. Notably, all findings and conclusions in this article remain the same if the October 2022 cases are excluded. The endpoint was chosen due

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[121] *See id.* at 1–2.

[122] *See id.* at 2 ("Where the facts support it, to increase the number of cases where the government stipulates to the facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor's student loans be discharged.").

to the rising proportion of pending cases in November 2023.[123]

To compile the dataset, Bloomberg Law's Bankruptcy Docket search function was used. Constructing search terms that accurately identify every relevant case on a topic of this scale would normally be difficult. However, because student loan adversary proceedings are assigned a specific tag (the Nature of Suit Code),[124] the relevant cases could be located in a straightforward and reliable manner.

All told, the initial dataset included 667 student loan adversary proceedings. From here, fourteen cases were excluded because they did not advance undue hardship claims but rather dealt with definitional claims regarding whether a specific personal loan is a student loan under the Bankruptcy Code definition.[125] Another case was removed due to a clerical error incorrectly linking the adversary proceeding to the wrong lead bankruptcy case.[126] This exclusion left 652 cases in the final dataset.

These cases were then coded across nearly fifty variables. The data points ranged from financial to demographic to argument presentation to litigation outcome. This process required reading multiple pleadings and court documents for each case. The most important documents were the adversary proceeding complaint, the judicial order resolving the case, the voluntary petition, and the bankruptcy schedules.

This comprehensive data collection sought to answer three key questions. First, what does the demographic and financial picture look like for bankrupt student loan debtors? Second, are the adversary proceedings resolved in a manner favorable to student loan debtors? And third, do the resolutions conform with the factors outlined in the Guidance Letter and attestation form? This part is broken down into three sections, each of which presents data regarding the above questions, respectively.

[123] Final data collection concluded in January 2025.

[124] The Nature of Suit code is "63: Dischargeability - 523(a)(8), student loan."

[125] For a full discussion of these types of cases, see Iuliano, *supra* note 2, at 507–21; Iuliano, *supra* note 5, at 288–313. For sample cases, see, e.g., Harden v. Citizens Bank N.A., Adv. No. 23-01332 (Bankr. D.N.J. 2023); Mendoza et al. v. Navient Solutions, LLC, Adv. No. 22-01280 (Bankr. D. Colo. 2022).

[126] *See* Notice of Dismissal of Adversary Proceeding at 1, Cox v. U.S. Dep't of Educ., Adv. No. 23-03013 (Bankr. N.D. Ind. 2023), Dkt. No. 5 ("A clerical error incorrectly linked this Adversary Proceeding Case to the wrong Lead Bankruptcy Case, Case No. 23-30174. Undersigned counsel was instructed by the Northern District of Indiana South Bend Clerk to dismiss this Adversary Proceeding Case to refile and correctly link the Lead Bankruptcy Case, Case No. 23-30356."). The case was subsequently refiled and that correct filing was included in the dataset. *See* Cox v. U.S. Dep't of Educ., Adv. No. 23-03014 (Bankr. N.D. Ind. 2023).

A. Demographic and Financial Data

This article uses standard statistical techniques to analyze the financial circumstances of student loan debtors and evaluate the success of different legal arguments. When presenting financial data such as debt amounts or case durations, I report three key measures: the mean (average), median (middle value), and standard deviation (measure of variability). The mean provides the typical value across all cases, while the median shows the middle point—meaning half the cases fall above and half below this figure. The median is often more representative than the mean when some cases involve unusually high or low amounts. Lastly, the standard deviation indicates how much the individual cases vary from the typical case, with higher numbers showing greater variability among debtors.

The data paint a composite picture of a forty-seven-year-old woman who owes $115,000 in student loan debt, who has nearly three times as many liabilities as assets, and who finds her expenses exceeding her income by two hundred dollars a month. With such a significant negative net worth, limited assets, and ongoing monthly deficits, the debtor faces a situation where repayment of her obligations is unmanageable without intervention. This section dives deeper into the demographic and financial data to explore the characteristics of student loan debtors who file adversary proceedings.

In the sample, the average age of the debtors is forty-seven years, with a median age of forty-six.[127] The youngest debtor was twenty-four and the oldest, seventy-six. Age exhibited a standard deviation of eleven years, indicating moderate variability among the debtors in the sample. Women comprised a significant majority of the sample (73%). This statistic is at odds with bankruptcy filings overall, where women constitute only a slight majority (52%) of consumer filings.[128]

Table 2 provides insight into the financial circumstances of student loan debtors by presenting their assets and liabilities. For visual ease, all

[127] Age is not collected as part of the normal bankruptcy filing process. Fortunately, many debtors listed their age on the adversary proceeding complaint. For debtors who did not list their age, I attempted to ascertain their date of birth through third party sites, such as OfficialUSA, Number, and Fast People Search. Between the official bankruptcy filings and these additional sites, I was able to identify the age of eighty percent of the bankruptcy filers in the dataset. For sample entries from these directories involving student loan debtors, *see* Bonnie Slauterbeck, OFFICIALUSA,https://www.officialusa.com/names/Bonnie-Slauterbeck; Anna Coates, NUWBER, https://nuwber.com/person/563a303ba219445d52a82823; Sherry Crawford, FASTPEOPLESEARCH, https://www.fastpeoplesearch.com/name/sherry-crawford_skokie-il.

[128] *See* Debt.org, *Bankruptcy Statistic*s, https://www.debt.org/bankruptcy/statistics.

figures are rounded to the nearest thousand. The mean total assets are $75,000, though the median is significantly lower at $23,000, suggesting that a small number of debtors hold substantially more assets, skewing the mean. The standard deviation of $126,000 highlights the wide variation in assets among the sample.

Table 2: Assets and Liabilities of Bankrupt Student Loan Adversary Proceeding Filers (rounded to nearest thousand)

Financial Data	Mean	Median	Std. Dev.
Assets	75,000	23,000	126,000
• Real Property	43,000	0	105,000
• Personal Property	32,000	18,000	52,000
Liabilities	222,000	156,000	215,000
• Secured Claims	49,000	12,000	108,000
• Priority Unsecured Claims	8,000	0	100,000
• Nonpriority Unsecured Claims	166,000	121,000	147,000
• Student Loans	115,000	77,000	109,000
Net worth	(134,000)	(94,000)	180,000

Turning to real estate, the largest asset for most Americans, the data show that most debtors do not own any real property, and those who do have fairly modest holdings. Personal property is more common among debtors, with a mean of $32,000 and a median of $18,000.

On the liabilities side, debtors report an average of $222,000 in total liabilities, with a median of $156,000. This high level of indebtedness is compounded by significant variability, as evidenced by the standard deviation of $215,000. Breaking down liabilities further, the data show that many debtors have fairly modest secured debts with an average of $49,000 and a median of only $12,000. Priority unsecured claims are even more rare, with a mean of $8,000 and a median of zero.

Nonpriority unsecured claims account for the largest percent of the debt burden, with a mean of $166,000 and a median of $121,000. Notably, student loans are the dominant debt within this category, averaging $115,000 and tallying a median of $77,000. The standard deviation of $109,000 for student loans underscores the financial distress faced by borrowers with the heaviest debt burdens.

Digging a bit deeper into student loan percentiles, the dataset shows that ten percent of debtors had more than $240,000 in student loans at the time of the bankruptcy filing. The top one percent owed in excess of $540,000, and the highest debtor in the sample owed just shy of $700,000 in student loans. At the other end, debtors in the lowest decile owed less than $20,000, and the individual with the lowest student loan amount in the sample owed a modest $2,103.

Overall, the data paint a negative financial picture. The net worth row at the bottom of Table 2 best captures this conclusion, showing that debtors are balance sheet insolvent and have a mean net worth of negative $134,000 and median net worth of negative $94,000.[129] At the time they file bankruptcy, student loan borrowers tend to be deeply indebted, with their assets covering only a third of their liabilities.

Balance sheet insolvency is not the only problem for debtors. They are also cash flow insolvent, as illustrated in Table 3.[130] Comparing the monthly income and the monthly expenses indicates that debtors cannot meet their monthly liabilities with the income they are generating. However, the picture is not quite as dire as it was in Table 2. Although subtracting monthly expenses from monthly income at the time of the bankruptcy filing yields negative income of approximately $200, a longer lookback shows that debtors had been cash flow solvent until shortly before filing bankruptcy. Specifically, current monthly income[131] (which is the average monthly income the debtor received during the six months immediately before filing bankruptcy) exceeds monthly expenses by $200, demonstrating positive cash flow in the recent past.

Nevertheless, a buffer of $200 is not suggestive of a secure financial position. In the leadup to bankruptcy, many debtors experience medical

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[129] Balance sheet insolvency occurs when a debtor's total liabilities exceed their total assets, resulting in a negative net worth. This condition signifies that even if all assets were liquidated, the debtor would still be unable to fully repay their obligations. In the context of consumer bankruptcy, balance sheet insolvency highlights a debtor's long-term financial instability.

[130] Cash flow insolvency occurs when a debtor is unable to meet their financial obligations as they come due. This condition arises from a mismatch between income and expenses, resulting in a debtor being unable to generate enough cash flow to pay bills, loan payments, or other liabilities on time. In consumer bankruptcy, cash flow insolvency underscores the immediate financial distress debtors face, often making bankruptcy necessary to prevent further default and financial deterioration.

[131] For the Bankruptcy Code definition of "current monthly income," see 11 U.S.C. § 101(10A).

issues, job loss, or reduced hours, lowering their monthly income and pushing their cash flow into negative territory.

Table 3: Cash Flow of Bankrupt Student Loan Adversary Proceeding Filers (rounded to nearest hundred)

Financial Data	Mean	Median	Std. Dev.
Monthly Income	3,300	3,000	1,900
Monthly Expenses	3,500	3,100	2,000
Current Monthly Income	3,700	3,500	2,800

Most student loan debtors are both balance sheet insolvent and cash flow insolvent at the time they file bankruptcy. Combined, these two factors suggest that debtors in the sample have legitimate financial needs that the bankruptcy system was designed to address. As the Supreme Court has routinely written, "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.' "[132] The next section examines whether the bankruptcy system has achieved this goal of providing relief to honest but unfortunate student loan borrowers.

B. Adversary Dispositions

Table 4 displays the adversary proceeding outcomes. The results are highly positive for student loan borrowers. Among the cases in the dataset that reached a final resolution, 87% fell within the Successful category, where borrowers eliminated some or all of their student loan debt. The vast majority of these outcomes (502 cases or 86% of the total) were resolved through settlements.[133] This high settlement rate underscores a pattern of cooperation

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

[133] Procedurally, settlements took a variety of different forms. Most commonly, there was a judicial order approving a stipulated agreement between the parties. *See, e.g.*, Agreed Judgment Order at 1, Sanders v. U.S. Dep't of Educ., Adv. No. 23-00158 (Bankr. N.D. Ill. Feb. 21, 2024), Dkt. No. 13 ("Judgment is entered in favor of Nakeia Sanders and against the Department of Education. All debt incurred by Sanders on account of the Department Loans, as that term is defined in the Stipulation, is discharged pursuant to 11 U.S.C. § 523(a)(8) . . . ."). In other cases, the parties entered into a Consent Order Dismissing the adversary proceeding because the parties had reached an administrative settlement outside of the bankruptcy process. *See, e.g.*, Consent Order Dismissing Adversary Proceeding at 1, Cole v. Educ. Credit Mgmt. Corp., Adv. No. 23-01178 (Bankr. S.D.N.Y. June 25, 2024), Dkt. No. 19 ("Plaintiff has submitted an application for a total and permanent disability . . . administrative discharge of her federal student loan obligations . . . which has been

between student loan creditors—including the federal government—and debtors. It suggests that creditors are willing to negotiate and offer relief rather than proceed to trial.

A smaller subset of Successful outcomes includes default judgments (5 cases, 1%). In these instances, borrowers obtained relief without active opposition, resulting in a full discharge of their debts. Notably, only one case culminated in a judicial ruling on the merits in favor of the borrower. This rarity highlights that creditors tend to avoid litigation when the debtor presents a reasonable case, likely due to the legal and financial risks associated with unfavorable precedent.

Table 4: Student Loan Adversary Proceeding Resolutions

Case Outcome	Percent	N
Successful	87%	508
• Settlement	86%	502
• Default Judgment	1%	5
• Discharged on the merits	0%	1
Neutral	12%	68
• Dismissed without prejudice	10%	60
• Dismissed with prejudice	1%	8
Unsuccessful	1%	6
• Dismissed after DOJ objection	1%	4
• Discharge denied by court	0%	2

The Neutral category comprises 12% of the cases (68 cases), with outcomes that are procedurally ambiguous. Most of these cases (60 cases, 10%) were dismissed without prejudice, allowing the debtor to potentially refile or seek alternative forms of relief, including administrative remedies. Given that many debtors voluntarily dismiss their cases to pursue other forms

conditionally approved by the United States Department of Education . . . ."). Stipulation of Dismissal without Prejudice at 2, Weigold v. U.S. Dep't of Educ., Adv. No. 23-01185 (Bankr. S.D. Fla. March 4, 2024), Dkt. No. 20 ("As of February 29, 2024, Plaintiff's outstanding balance on his Federal Student Loans is $0.00 due to an administrative discharge granted through Education's Borrower's Defense administrative discharge program. Thus, the adversary proceeding is moot . . . . Plaintiff agrees to voluntarily dismiss the instant adversary proceeding without prejudice, and each party will bear its own attorney's fees and costs.").

of debt relief, this category likely includes a significant number of cases where the borrower ultimately achieved substantial relief outside of court proceedings.[134] Cases dismissed with prejudice (8 cases, 1%) reflect a more definitive procedural closure, though the specific reasons for dismissal remain uncertain in this dataset.

Finally, only 1% of cases (6 in total) resulted in an unsuccessful outcome, where borrowers were denied a discharge. In four of these cases, the DOJ determined that the debtor did not meet the undue hardship standard, the debtor decided not to pursue litigation further, and the case was dismissed without prejudice.[135] In two cases, the bankruptcy court denied a discharge on the merits.[136] This low percentage demonstrates that outright denials of relief are exceedingly rare, supporting the conclusion that most student loan adversary proceedings yield favorable outcomes.

The data on student debt discharge and case durations in Table 5 further emphasizes the significant relief provided to debtors in the

[134] Cases were coded conservatively to ensure that the success rate was not falsely inflated. Accordingly, a significant number of cases in the Neutral category have language suggestive of an extrajudicial resolution. *See, e.g.*, Motion for Withdrawal of Complaint at 1, Cressman v. Dep't of Educ., Adv. No. 23-02013 (Bankr. W.D. Pa. May 2, 2023), Dkt. No. 35 (noting that "after discussion with the defendant, Debtor no longer wishes to pursue this matter and requests this action be dismissed without prejudice"). In other cases in the Neutral category, the type of disposition—specifically, a joint stipulation for dismissal without prejudice, where both parties bear their own costs—are suggestive of mutual agreement between the parties to resolve the dispute without further court intervention. *See, e.g.*, Stipulation for Dismissal of Adversary Proceeding at 1, Thao v. Dep't of Educ., Adv. No. 23-04007 (Bankr. D. Minn Dec. 28, 2023), Dkt. No. 24 ("The Parties request that the Court dismiss the . . . Adversary Proceeding without prejudice and without costs."); Joint Stipulation of Dismissal at 1, Settgast v. U.S. Dep't of Educ., Adv. No. 23-01010 (Bankr. E.D. Ark. June 26, 2024), Dkt. No. 26 ("[T]he parties jointly stipulate to the dismissal of the . . . action and all claims in it, without prejudice or costs."); Joint Stipulation of Voluntary Dismissal of Adversary Proceeding at 1, Paul-Zin v. Ascendium Educ. Sols., Adv. No. 23-00035 (Bankr. M.D. Fla. July 19, 2023), Dkt. No. 14 (The parties "hereby stipulate to the dismissal of this adversary proceeding, each party to bear their own fees and costs.").

[135] *See* Carter v. U.S. Dep't of Educ., Adv. No. 23-04080 (Bankr. D. Minn. Nov 14, 2023); Daniels v. U.S. Dep't of Educ., Adv. No. 23-04059 (Bankr. D. Minn. 2023); Ramos v. U.S. Dep't of Educ., Adv. No. 23-01215 (Bankr. S.D. Fla. 2023); Taylor v. U.S. Dep't of Educ., Adv. No. 23-05008 (Bankr. E.D. Va. 2023).

[136] *See* Memorandum Decision on Motions for Summary Judgment at 10, Heatt v. U.S. Dep't of Educ., Adv. No. 23-01016 (Bankr. D. Nev. Aug. 22, 2024), Dkt. No. 32 (finding that "Debtor has failed to meet his burden of proof on the first, second and third elements of the Brunner test"); Order Granting Defendant's Motion for Summary Judgment at 14, Perry v. U.S. Attorney Gen., Adv. No. 23-01003 (Bankr. W.D. Okla. Feb. 15, 2024), Dkt. No. 36 (finding that "Plaintiff does not satisfy the final *Brunner* prong").

"Successful" outcome category. Borrowers were generally able to discharge a substantial portion of their student loans. On average, borrowers eliminated $85,000 of educational debt, with a median discharge of $67,000. Even borrowers at the 25th percentile eliminated $32,000, while those in the 75th percentile discharged $106,000. These figures underscore the substantial financial impact of these settlements, offering many borrowers a fresh start by significantly reducing or eliminating their debt burden.

Table 5: Discharge Statistics and Case Duration

Case characteristic	Mean	Median	25th	75th
Student debt discharged ($)	85,000	67,000	32,000	106,000
Student debt discharged (%)	97	100	85	100
Adversary duration (days)	266	250	166	350
Lead case duration (days)	451	189	109	427

Moreover, the data highlights the favorability of these agreements, particularly when evaluating the percentage of debt discharged. Borrowers who received relief eliminated 97% of their student loan debt on average, with a median discharge rate of 100%. Even at the 25th percentile, borrowers discharged 85% of their educational debt, indicating that most settlements reached with creditors provide meaningful relief.

The prevalence of partial discharges suggests that the DOJ's more collaborative approach has created space for nuanced resolutions that account for individual circumstances.[137] Rather than engaging in all-or-nothing litigation, creditors and debtors appear to be reaching agreements that provide substantial debt relief while acknowledging cases where complete discharge may not be warranted. Partial relief represents a practical middle ground that serves the fresh start policy underlying bankruptcy law while maintaining some accountability for educational debt obligations, thereby broadening the number of debtors who are eligible for relief.

In terms of case processing times, the adversary proceeding duration—covering the time spent in the bankruptcy litigation specific to the

[137] Notably, partial discharges under the attestation process are occurring in circuits that have previously been reluctant to grant partial discharges. *See, e.g.*, Stipulation for Judgment and Partial Discharge of Plaintiffs U.S. Dep't of Educ. Loans, Johnson v. U.S. Dep't of Educ., Adv. No. 23-03009 (Bankr. D. Minn. Nov. 22, 2023), Dkt. No. 19 (parties reached a settlement discharging $42,111 out of a debtor's total $49,140 of student loan debt). *See also* Conway v. Nat'l Collegiate Trust, 495 B.R. 416 (8th Cir. BAP 2013), *aff'd*, 559 F. Appx. 60 (8th Cir. 2014) (seeming to open the door to partial discharges of student loans via an individualized loan-by-loan analysis).

student loan discharge—averaged 266 days (approximately nine months), with a median of 250 days. For the lead case duration, which encompasses the entire bankruptcy process, the mean is 451 days (about 15 months), though the median is much shorter at 189 days.[138] These timelines indicate that while some cases resolve relatively quickly, others can extend over a year, depending on procedural complexities and case characteristics. Nevertheless, the data illustrates that the relief provided through settlements and default judgments is both substantial and timely, particularly in light of the significant financial benefits achieved by debtors.

All told, the data on student loan discharge outcomes reveal a highly favorable landscape for borrowers pursuing relief through bankruptcy. The overwhelming majority of cases result in positive outcomes, with settlements leading to the discharge of substantial amounts of student debt—averaging $85,000 and often eliminating nearly all debt. The high settlement rate and minimal occurrence of adverse rulings highlight that the DOJ and other creditors are inclined to negotiate rather than litigate. These findings suggest that, for student loan debtors, bankruptcy is a viable path to financial stability and a fresh start.

C. Legal Arguments

This final section of Part II focuses on the legal arguments that were made in the court filings. In coding the legal arguments, I looked at the adversary proceeding complaint and, where available, the attestation forms. My goal was to figure out which arguments the student loan debtors advanced to assert their undue hardship claims and how these arguments mapped onto the elements set forth in the DOJ and ED's Guidance Letter and attestation form.

As discussed in Part I, the attestation process provides a series of factors that satisfy the three-part undue hardship test.[139] For present inability to repay, the key factor is negative net income. For future inability to repay, meeting any single one of five of factors (being over sixty-five years old, having a medical hardship, having been unemployed for five of the last ten years, not having a degree for which the educational loan was taken out, and

[138] Administratively, it may seem unusual that the median duration of an adversary proceeding (250 days) exceeds that of the main bankruptcy case (189 days). This discrepancy arises because courts often close the main case for administrative efficiency—once all other issues related to the bankruptcy estate are resolved—while allowing the adversary proceeding to continue in order to determine the disposition of the student loan debt.

[139] *See supra* text accompanying notes 96–107.

having a loan in repayment for more than ten years) satisfies this element. And lastly, for the good faith effort element, the attestation form's factors can be condensed into two criteria: did the debtor ever make a single payment on the loan or did the debtor ever sincerely consider loan repayment options by contacting their lender.

Table 6 examines the relationship between these legal factors and successfully discharging student loans in bankruptcy. The first column outlines the factors considered, both at the top level (i.e., present inability, future inability, and good faith effort) and at a more detailed subfactor level. The second column shows the success rates for individuals who satisfied each factor, while the third column displays the success rates for those who did not. Lastly, the final column indicates the percentage of individuals in the dataset who met each criterion.

To determine whether observed differences in success rates are meaningful or simply due to chance, I use Fisher's exact test, a statistical method well-suited for analyzing the categorical data presented here. This test calculates the probability that the observed differences could have occurred randomly if there were actually no real differences between groups. I report p-values to indicate statistical significance, with $p < 0.05$ considered statistically significant, $p < 0.01$ highly significant, and $p < 0.001$ very highly significant. When Fisher's exact test results are not statistically significant, this indicates that observed differences in success rates could reasonably be attributed to random variation rather than meaningful underlying differences between groups.

The data reveal several key findings: First, none of the factors—present inability, future inability, or good faith effort—achieve statistical significance in predicting success. The closest is the future inability factor, which has a Fisher's exact test statistic of 0.1902. In line with this lack of statistical significance, the success rates across all factors are high and narrow, ranging from 85% to 89%.

The present inability factor, which reflects a negative net income, shows an equal success rate of 88% for both those who met the factor and those who did not. This finding suggests that being cash flow positive, at least to a certain degree, may not hinder one's ability to successfully obtain a student loan discharge in bankruptcy.

Table 6: Legal Arguments as a Predictor of Success

Element	Success Rate		Percent of Sample
	Yes	No	
1: Present Inability (negative net income)	88%	88%	45%
2: Future Inability	89%	85%	71%
• Age ≥ 65	87%	88%	10%
• Medical hardship	89%	87%	25%
• Unemployed (5 of 10)	93%	87%	5%
• No degree	91%	87%	22%
• Loan ≥ 10 years old	88%	87%	53%
3: Good Faith	89%	87%	67%
• Made one payment	88%	88%	45%
• Contact lender	89%	86%	54%

For the future inability element, which encompasses a variety of subfactors, the overall success rate is 89% for those who met any subfactor and 85% for those who did not. Among the subfactors, only 10% of debtors were aged 65 or older, and just 5% had experienced prolonged unemployment during the preceding ten years. However, these groups still had success rates near the overall average, suggesting that these circumstances may not carry substantial weight in discharge proceedings. The most frequently met subfactor under future inability was having a loan in repayment for at least ten years, with 53% of debtors meeting this criterion.[140]

The good faith effort element similarly shows minimal variation in success rates, with 89% of those meeting the factor and 87% of those not meeting it obtaining favorable outcomes. Subfactors within this category include making at least one payment (met by 45% of debtors)[141] and

[140] Where debtors had multiple student loans that entered repayment at different times, I coded the debtor as meeting this criterion if any student loan had been in repayment for at least ten years. For an example of such a case, *see, e.g.*, Complaint at 2, Good v. U.S. Dep't of Educ., Adv. No. 23-07028 (Bankr. W.D. Va. Nov. 22, 2023) ("The majority of the debtor's student loans are more than 10 years old.").

[141] I coded debtors as satisfying this factor if they claimed to have made any payment towards their student loans. This coding system is in line with the DOJ's interpretation that making a single payment satisfies the criterion. *See, e.g.*, Guidance Letter, *supra* note 8, at 11 (noting that "[w]here the debtor has taken at least one of the following steps . . . the steps demonstrate good faith" and going on to list "making a payment" as one of the steps); Joint

contacting the lender to explore alternative repayment options (met by 54%).[142]

Overall, while it may be too strong to conclude that legal arguments for discharge are irrelevant, the consistency in success rates suggests that none of them, on their own, is a strong determinant of case outcomes. The data may indicate that creditors and courts take a holistic view of debtors' financial circumstances rather than focusing narrowly on any individual criterion. The next table explores that possibility.

Specifically, Table 7 analyzes the impact of satisfying multiple legal elements on success rates. Debtors who satisfied none of the elements had a surprisingly high success rate of 90%, which is equivalent to the success rates of those who satisfied either two (90%) or all three (89%) elements. This suggests that debtors who did not explicitly advance any arguments in their complaints may have conveyed their legal positions to the DOJ through other means, such as through an attestation form that was not disclosed on the court docket.[143]

Motion for Entry of Consent Judgment Discharging Student Loan Debt at 3, Burdett v. U.S. Dep't of Educ., Adv. No. 22-06028 (Bankr. D. Or. May 18, 2023), Dkt. No. 27 (in justifying the reason for its consent to discharge the debtors student loans, the DOJ stipulated that "the Debtor has made a payment"). For sample cases that were coded as having met the "making a payment" factor, see Complaint at 3, Tenner v. U.S. Dep't of Educ., Adv. No. 23-00101 (Bankr. M.D. Fla. Nov 13, 2023) ("Debtor made about 60 payments of $5.00 in the income based repayment program."); Complaint at 2, Burns v. U.S. Dep't of Educ., Adv. No. 23-00146 (Bankr. N.D. Ill. June 8, 2023) ("Over the years, Plaintiff has made several payments on the loans when Plaintiff could . . . ."); Complaint at 3, Woller v. U.S. Dep't of Educ., Adv. No. 23-02085 (Bank. E.D. Wis. July 21, 2023) ("[T]he debtor has [m]ade several payments on the loans, totaling less than $2,000.00 . . . .").

[142] Cases were not coded as satisfying an element where the complaint stated that the element had been satisfied in a conclusory manner and failed to provide any supporting evidence. For an example of such cases, see Complaint at 4, Hughes v. U.S. Dep't of Educ., Adv. No. 23-04104 (Bankr. E.D. Mich. March 6, 2023) (claiming that "Plaintiff satisfies the third prong of the *Brunner* by acting in good faith and attempting to repay the subject loan . . . " but providing no evidence that the debtor actually submitted a payment or took any affirmative steps to meet any of the good-faith factors); Complaint at 3, Carey v. U.S. Dep't of Educ. Off. of Gen. Couns., Adv. No. 23-03009 (Bankr. W.D. Ky. May 30, 2023) (claiming that "[t]he Debtor has made good faith efforts in the past to repay or address the student loans" but providing no supporting evidence).

[143] Many of the cases that advanced zero legal arguments used identical boilerplate complaints that detailed the history of the student loan program but failed to provide any details about the debtor's specific circumstances or financial situation. *See, e.g.*, Complaint at 2–3, Durham v. U.S. Dep't of Educ., Adv. No. 23-00028 (Bankr. M.D. Fla. Sept. 14, 2023); Complaint at 1, Palmer v. U.S. Dep't of Educ., Adv. No. 23-03023 (Bankr. D. Minn. April 21, 2023); Complaint at 1, Chastanet-Bush v. U.S. Dep't of Educ., Adv. No. 23-00202

Table 7: Number of Undue Hardship Elements Met as a Predictor of Success

Number of Elements Met	Success Rate	N
Zero	90%	66
Only One	80%	114
• Present Inability	78%	46
• Future Inability	82%	33
• Good Faith	80%	35
Only Two	90%	231
• PI + FI	92%	38
• PI + GF	88%	18
• FI + GF	90%	175
All Three	89%	141

By contrast, debtors who met only one element had a lower success rate of 80%. Among this group, those individuals who relied on the present inability factor had the lowest success rate at 78%, while those who cited future inability had a slightly higher rate of 82%. Good faith effort claims resulted in an 80% success rate. Ultimately, though, this variation is small, yielding no statistically significant differences in success rate among any of the groups.

Debtors who met two elements fared better, achieving a 90% success rate. Among these, the combination of present inability and future inability had the highest success rate at 92%, followed by future inability and good faith at 90%, and present inability and good faith at 88%. This pattern indicates that meeting multiple factors may enhance a debtor's case, though no combination significantly outperformed the others.

Interestingly, debtors who satisfied all three elements fared no better than their counterparts who satisfied only two elements. One possible explanation is that the DOJ may not weigh the final element as heavily once two critical elements are already established. In other words, satisfying two key factors may create a sufficiently compelling case for discharge, making

(Bankr. M.D. Fla. Nov. 9, 2023); Complaint at 1, Bradley v. U.S. Dep't of Educ., Adv. No. 23-90060 (Bankr. M.D. Tenn. 2023).

the third element redundant when negotiating a settlement. This suggests that achieving success may depend more on the strength and clarity of a debtor's primary arguments rather than the sheer number of elements satisfied. Additionally, this finding indicates the DOJ may be taking a more holistic—rather than purely element-by-element—view in its assessment of whether a debtor meets the criteria for a discharge. Although such a holistic view may be laudable, it does run counter to the Guidance Letter's position that a debtor must meet all three of the elements to satisfy the undue hardship standard and merit a student loan discharge.[144]

While legal arguments may not have been strong predictors of success, other factors appear to play a significant role in case outcomes. This section analyzes four key factors: attorney representation, gender, bankruptcy chapter, and loan type.

The presence of legal representation is a powerful determinant of success. In the sample, 89% of debtors had attorneys, while 11% filed pro se. Debtors represented by attorneys had a significantly higher success rate of 91%, compared to only 61% for pro se filers. The Fisher exact test statistic for this difference is less than 0.00001, indicating that the result is statistically significant at $p < .001$. Although there is a substantial difference in success rate between represented litigants and pro se litigants, it is worth emphasizing that a majority of pro se litigants still managed to discharge their student loans.

This fact demonstrates that debtors without the financial means to hire an attorney are still likely to prevail in court. Of particular note, a common reason pro se litigants lost their cases was not for failure on the merits, but rather, for failure to prosecute.[145] This finding suggests some debtors found

[144] *See* Guidance Letter, *supra* note 8, at 1 ("In accordance with existing case law and Education policy, the Guidance advises Department attorneys to stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor's student loan be discharged if three conditions are satisfied . . . .").

[145] *See, e.g.*, Notice of Intent to Dismiss at 1, Garlick v. U.S. Dep't of Educ., Adv. No. 23-02009 (Bankr. D. Wyo. Sept. 5, 2023), Dkt. No. 9 (noting that "[t]o date, no certificate of service reflecting proper service of process upon Defendant has been filed" and proceeding to dismiss the case); Order Dismissing Adversary Proceeding Without Prejudice at 2, Piezonka v. U.S. Dep't of Educ., Adv. No. 23-50039 (Bankr. S.D. Ind. March 7, 2024), Dkt. No. 12 (The court "directed Plaintiff/Debtor . . . to appear . . . and show good cause why his Complaint . . . should not be dismissed for failure to prosecute. Plaintiff failed to appear as directed by the Order."); Order Dismissing Case at 1, Brown v. U.S. Dep't of Educ., Adv. No. 23-01182 (Bankr. S.D.N.Y. Dec. 21, 2023), Dkt. No. 5 (holding that "the Debtor having failed to serve the summons and complaint on the Defendant . . . and the Debtor having failed to respond to multiple communications from the Court . . . . there are sufficient grounds to

the litigation process overwhelming and abandoned their claims prematurely. If these individuals had continued pursuing their cases, they likely would have reached a settlement with the DOJ that resulted in at least a partial discharge of their student loan debt.

Gender also plays a statistically significant role in case outcomes. Women comprised 73% of the sample, while men made up 27%. Women had an 89% success rate in discharging student loan debt, compared to 82% for men. The Fisher exact test statistic for this difference is 0.0467, making it significant at $p < .05$. These findings suggest that women may face more favorable outcomes, though the reasons for this disparity are unclear and warrant further investigation.

The type of bankruptcy filed (chapter 7 or chapter 13) does not appear to have a substantial impact on success rates. In the sample, 78% of cases were filed under chapter 7 and 12% under chapter 13. The success rates were similar across both chapters, with chapter 7 filings achieving an 87% success rate and chapter 13 filings achieving an 89% success rate. This minimal difference suggests that the choice of bankruptcy chapter is not a decisive factor in student loan discharge cases. Such a finding is, however, surprising. One would expect chapter 7 debtors to receive discharges at higher rates than chapter 13 filers, given that chapter 7 debtors typically present with worse financial circumstances, have fewer assets to repay creditors, and are less likely to have disposable income to make any contributions towards their student loans.[146]

The last category explored here is loan type. The distribution of loans in the sample reflects the overall student loan market, with 92% of cases involving federal loans and 8% involving private loans. Success rates for both categories were nearly identical, with federal loans having an 88% success rate and private loans an 86% success rate. These findings indicate that the type of educational debt does not significantly affect case outcomes.

Although this article focuses primarily on federal student loan bankruptcy proceedings under the new DOJ and ED guidance, it is also important to consider private loans to provide a comprehensive view of student loan bankruptcies. There are four key reasons supporting the inclusion of private loans in the dataset. First, outcomes for public and private

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dismiss the above-captioned adversary proceeding . . . .").

[146] It may be the case that some debtors who would otherwise file for chapter 7 are, instead, opting to file chapter 13 cases for attorney payment reasons. Specifically, adversary proceeding fees can be bundled into the chapter 13 plan and paid off over several years, whereas chapter 7 adversary proceedings generally require prepayment.

loans were similar. Second, debtor demographics and statistics showed comparable patterns between the two loan types. Third, the public-private loan distribution in bankruptcy mirrored the overall lending market, where 92% of loans are federal and 8% are private.[147] Finally, as noted, private loans accounted for only 8% of the sample. These factors suggest that including private loans does not skew the data but instead enhances the breadth of comparisons and conclusions that can be drawn.

Overall, these factors illustrate that procedural and demographic characteristics, particularly legal representation and gender, have a more pronounced influence on case outcomes than the type of legal argument advanced.

III. Guidance Letter Impact

This part explores the extent to which the November 2022 reforms have impacted the student loan bankruptcy landscape. Since the release of the Guidance Letter, the federal government has issued two subsequent press releases (one in November 2023 and one in July 2024) on the program.[148] In both instances, the DOJ and ED declared the reforms an overwhelming success.[149]

In reaching this conclusion, the departments focused on three key metrics: (1) an increase in case filings, (2) a high success rate among debtors, and (3) a high adoption rate of the attestation form. These three criteria are reasonable metrics by which to evaluate the success of the program. To these, I propose an additional metric: consistent application of legal standards.

Although the government paints an optimistic picture, assessing the true impact of the reforms requires a comparison to the pre-reform period. Without such an analysis, it is impossible to determine whether the data reflect a meaningful shift driven by the new guidance or whether they are merely a continuation of existing trends. Evaluating the efficacy of the

[147] *See* Hanson, *supra* note 1 (noting that "[f]ederal student loan debt represents 92.4% of all student loan debt; 7.57% of student loan debt is private").

[148] *See* 2023 and 2024 DOJ Analysis, *supra* note 10.

[149] *See* 2023 DOJ Analysis, *supra* note 10 ("The Justice Department, in close coordination with the Department of Education, announced today a successful first year of the new process for handling cases in which individuals seek to discharge their federal student loans in bankruptcy."); 2024 DOJ Analysis, *supra* note 10 ("The Justice Department, in close coordination with the Department of Education, announced today the continued and growing success of a process instituted in November 2022 for handling cases in which individuals seek to discharge their federal student loans in bankruptcy.").

reforms requires analyzing each of the key metrics in the context of historical data and broader filing trends. With that in mind, this part examines the success of the reforms along those four metrics.

A. Number of Adversary Proceedings

First, the government cites an increase in the number of adversary proceedings filed after the reforms. In a 2023 press release, it reported that 632 cases were filed in the first ten months of the program (November 2022 to September 2023).[150] A 2024 press release celebrated a total of 1,220 cases filed from November 2022 through March 2024.[151] The DOJ described these figures as "a significant increase from recent years."[152]

This claim raises the question of how many student loan adversary proceedings were filed before the 2022 reforms. Table 8 provides that data. Specifically, the rightmost column tracks annual student loan adversary proceedings from 2011 to 2024.[153] The reforms have been in effect for two full calendar years—2023 and 2024—during which 595 and 692 cases were filed, respectively. By comparison, 249 cases were filed in 2022.[154] This reflects a 139% year-over-year increase from 2022 to 2023—a notable percentage shift. However, three key considerations caution against declaring the reforms a success based solely on these numbers.

First, the data suggest this increase may simply be a return to historical norms. Between 2011 and 2016, more student loan adversary

[150] *See* 2023 DOJ Analysis, *supra* note 10. My own data yielded 551 cases over that same time period, suggesting the DOJ may be counting all adversary proceedings involving student loans rather than limiting the dataset to undue hardship cases. At any rate, the numbers are close enough for evaluative purposes.

[151] *See* 2024 DOJ Analysis, *supra* note 10; Belisa Pang, Dalié Jiménez & Matthew Bruckner, *Full Discharge Ahead? An Empirical First Look at the New Student Loan Discharge Process in Bankruptcy*, 41 EMORY BANKR. DEV. J. 259, 264 (2025) (evaluating the 23-month period following the guidance and finding nearly a 330% increase in the number of student loans but cautioning that the total number "is still small in absolute numbers—we estimate this involves between 0.5–0.8% of all debtors who filed bankruptcy with student debts").

[152] 2024 DOJ Analysis, *supra* note 10.

[153] To compile the data for this column, I searched Bloomberg Law's bankruptcy dockets for all cases filed during the relevant time period that were categorized with the student loan Nature of Suit code (63: Dischargeability - 523(a)(8), student loan).

[154] This was a year in which the reforms were in effect for approximately two and a half months. If we strip out the cases filed during that period, we're left with 187 cases, which, when annualized equals 236, very close to the actual 249 figure, suggesting that the reforms may have encouraged the filing of an additional dozen or so cases that year.

proceedings were filed each year than in 2023, the first full year of the reforms. A decline occurred between 2017 and 2022, followed by a recovery in 2023 and 2024.

Second, the federal student loan moratorium likely influenced these trends. From 2020 through much of 2023, the government paused federal student loan payments, eliminating the immediate need for borrowers to seek discharge in bankruptcy. When the moratorium ended in October 2023, filings increased.

Third, the absolute increase in filings remains small. The reforms resulted in approximately 350 additional cases, a negligible figure given the scale of student loan distress. As of the end of 2024, more than forty million Americans have student loan debt, with 5.5 million of those people in default and another ten million delinquent.[155] The additional 350 cases account for just 0.003% of financially distressed borrowers. Put differently, in the first full year of the reforms, only one in 42,000 struggling borrowers filed an adversary proceeding to seek relief.

Table 8: Student Loan Bankruptcy Proceedings by Year

Year	Filers with Student Loans	Estimated Filers with Undue Hardship	Adversary Proceedings
2011	411,000	120,000	643
2012	354,000	103,000	736
2013	311,000	91,000	690
2014	271,000	79,000	685
2015	242,000	70,000	674
2016	227,000	66,000	604
2017	223,000	65,000	447
2018	218,000	63,000	404
2019	219,000	64,000	273
2020	171,000	50,000	295
2021	121,000	35,000	306
2022	109,000	32,000	249
2023	126,000	37,000	595
2024	139,000	40,000	692

[155] *See* Chris Hicks, *Millions of Student Loan Borrowers are Headed Towards a Default Cliff*, PROTECT BORROWERS (Dec. 11, 2024), https://protectborrowers.org/millions-of-student-loan-borrowers-are-headed-towards-a-default-cliff (noting that "[a]ccording to federal data, more than 5.5 million borrowers are in line to begin receiving collection notices at any moment"); U.S. Government Accountability Office, *Federal Student Loans: Preliminary Observations on Borrower Repayment Practices after the Payment Pause* (July 29, 2024), https://www.gao.gov/products/gao-24-107150 (finding that "[n]early 30%—accounting for about $290 billion in loans—were past due on their payments").

The leftmost two columns in Table 8 reinforce this concern. Specifically, the first column details the number of student loan borrowers who file bankruptcy each year.[156] And the second column provides a conservative estimate of the number of student loan borrowers in bankruptcy who likely meet the undue hardship standard.[157] In 2023, an estimated 37,000 borrowers in bankruptcy were eligible to discharge their student loans. Yet only 595 actually filed an adversary proceeding—just over 1.5%. This means that 98.5% of eligible borrowers already in bankruptcy did not even attempt to seek a discharge. Given this statistic, it would be premature to suggest that the reforms have meaningfully addressed the Student Loan Bankruptcy Gap.

To take a broader perspective, between 2011 and 2024, more than three million student loan borrowers filed for bankruptcy. Over that same period, only 7,293 (0.2%) of those individuals filed an adversary proceeding to request a student loan discharge. For every five hundred student loan borrowers in bankruptcy, 499 of them give up without even attempting to discharge their student loans. That is an astonishing statistic, which illustrates the true breadth of the Student Loan Bankruptcy Gap. And the DOJ and ED reforms have, at least so far, done little to bridge that gap. Case filings should

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[156] The data for the first column in Table 7 are derived from the following sources: *Just the Facts: Consumer Bankruptcy Trends, 2005–2021*, U.S. CTS. (Aug. 9, 2022), https://www.uscourts.gov/news/2022/08/09/just-facts-consumer-bankruptcy-trends-2005-2021; *Bankruptcy Filings Rise 16.8 Percent*, U.S. CTS. (Jan. 26, 2024), https://www.uscourts.gov/news/2024/01/26/bankruptcy-filings-rise-168-percent#:~:text=According%20to%20statistics%20released%20by,31%2C%202023. These estimates are consistent with data from the Consumer Bankruptcy Project and earlier work of mine. *See* Iuliano, *supra* note 18, at 504.

[157] In a previous article, I estimated the number of bankrupt debtors who could have successfully discharged their student loans if they had pursued the proper legal process. To arrive at this estimate, I analyzed two groups: those who successfully discharged their student loans through bankruptcy, and those who filed for bankruptcy but did not attempt to discharge their student loans. By comparing these two groups, I was able to determine the percentage of bankrupt individuals who likely could have eliminated their student loan debt had they taken the necessary legal steps. *See* Iuliano, *supra* note 18, at 504–07, 512–26. To determine the number of student loan borrowers who filed for bankruptcy in the past decade and could have successfully proven undue hardship, I analyzed data from two sources. Specifically, I combined data from column one of this table with data from one of my previous articles. This approach enabled me to estimate the number of bankrupt student loan debtors who would likely have been able to demonstrate undue hardship and discharge their student loans, had they pursued this legal option. *See id.* at 523–25 (comparing debtors who successfully discharged their student loans with those who did not file an adversary proceeding to determine the likely percentage of nonfiling debtors who could prove undue hardship).

be several orders of magnitude higher to serve the population of financially distressed borrowers, and substantial work remains to achieve that goal.

B. Success Rate

The second metric the DOJ and ED emphasized was the success rate for debtors who filed adversary proceedings. In their 2023 analysis, they stated that the "vast majority of borrowers seeking discharge have received full or partial discharges. In 99% of cases where courts have entered orders or judgments to date, the government recommended, and the court agreed to, a full or partial discharge."[158] Their 2024 analysis made a similar claim, asserting that the "vast majority of borrowers seeking discharge continue to benefit from the guidance. In cases decided by the courts from November 2022 through March, 98% have provided debt relief through full or partial discharge."[159]

However, it is unclear how the DOJ and ED arrived at these figures. As discussed earlier, my own comprehensive analysis of the first thirteen months following the reforms found a success rate of 87%.[160] Given that just over 1% of the cases in my dataset were formally denied on the merits, the government's statistics indicate that any case that was not formally denied on the merits is a success. This approach raises two concerns.

First, the government may be categorizing all dismissals—regardless of their circumstances—as "successful." It is possible that the government has additional information about settlements reached outside the adversary proceeding process, in which case it would be reasonable to count those cases as successes. However, to achieve the reported success rate, every single dismissed case would have to reflect a successful resolution—an assumption that does not hold. In my dataset, about two dozen cases were dismissed because the debtor failed to prosecute the case against the ED.[161] While

[158] 2023 DOJ Analysis, *supra* note 10.

[159] 2024 DOJ Analysis, *supra* note 10.

[160] *See supra* Part II.B.

[161] *See, e.g.*, Order Dismissing Adversary Proceeding Without Prejudice at 1–2, Piezonka v. U.S. Dep't of Educ., Adv. No. 23-50039 (Bankr. S.D. Ind. Mar. 7, 2024), Dkt. No. 12 (The court "directed Plaintiff/Debtor . . . to appear . . . and show good cause why his Complaint . . . should not be dismissed for failure to prosecute. Plaintiff failed to appear as directed by the Order."); Order of Dismissal of Adversary Proceeding at 1, Nealey v. U.S. Dep't of Educ., Adv. No. 23-02021 (Bankr. S.D. Ohio July 17, 2023), Dkt. No. 4 (dismissing the case for "want of prosecution"); Order Dismissing Adversary Proceeding without Prejudice for Failure to Prosecute at 1–2, Ivey v. U.S. Dep't of Educ., Adv. No. 23-50005 (Bankr. N.D.N.Y. May 31, 2024), Dkt. No. 31 (dismissing the case because debtor "failed to

settlements outside of court are theoretically possible in such instances, it would be highly unusual for neither the debtor nor the DOJ to inform the court to allow a more appropriate case closure. Moreover, some dismissals involved cases where the plaintiff's attorney informed the court that the debtor was unreachable—a scenario that all but rules out a settlement with the DOJ.[162]

The second possibility for how the government arrived at its 98% success rate is that it simply excluded all dismissals that did not provide a definitive outcome. In other words, the government may have disregarded all cases categorized as "neutral" in my dataset.[163] This approach does produce the 98% success rate cited in its press release. However, given that the government also reports the total number of filings, omitting neutral cases from the success rate calculation would be misleading. Moreover, this framing is unnecessary; my analysis found a definitive success rate of 87%, which is already a positive outcome. Given these discrepancies, there is strong reason to believe that the government's reported success rate overstates the actual figure. Accordingly, the remainder of this analysis will rely on the success rate reflected in my dataset.

There is no denying that 87% is a high success rate for any type of litigation, much less for student loan discharge proceedings which have sometimes been viewed to require a "certainty of hopelessness."[164] But before declaring the reforms a success, we need to know how the rate compares to the pre-reform period.

In two earlier studies, I analyzed student loan adversary proceedings filed in 2007 and 2017.[165] Table 9 presents the outcomes for each year—

appear" and "has not responded to any communications sent to her about this case" for several months).

[162] *See, e.g.*, Order Dismissing Adversary Proceeding at 1, Haynes v. Sec'y U.S. Dep't of Educ., Adv. No. 23-00085, (Bankr. N.D. Ill. Sept. 26, 2023), Dkt. No. 11 ("On three separate status dates . . . Ms. Haynes failed to appear to prosecute her complaint . . . . Counsel for Defendant . . . indicated that Ms. Haynes had not responded to any communications."); Notice of Stipulated Order of Dismissal in an Adversary Proceeding at 1, Queen v. U.S. Dep't of Educ., Adv. No. 23-05030 (Bankr. N.D. Ohio Aug. 9, 2024), Dkt. No. 11 (dismissing the case because "Counsel for Plaintiff has been unable to reach Plaintiff in this matter").

[163] *See supra* Part II.B.

[164] *See, e.g.*, *In re* Oyler, 397 F.3d 382, 386 (6th Cir. 2005) (holding that *Brunner* requires a "certainty of hopelessness"); O'Hearn v. Educ. Credit Mgmt. Corp., 339 F.3d 559, 564 (7th Cir. 2003) (same).

[165] *See* Iuliano, *supra* note 18, at 512 (detailing the 2007 case resolutions); Iuliano, *supra* note 2, at 524 (detailing the 2017 case resolutions).

categorized as Successful, Neutral, or Unsuccessful—using the same methodology detailed in Part II.B. The data show a clear upward trend in success rates: successful outcomes rose from 39% in 2007 to 61% in 2017, and then to 87% in the post-reform period. While only three data points limit the ability to draw firm conclusions, the trend suggests that the increase in success rates reflects a longer-term pattern rather than a dramatic shift solely attributable to the reforms.

Table 9: Adversary Proceeding Resolutions Before and After Reforms

Period	Successful	Neutral	Unsuccessful
2007	39%	43%	8%
2017	61%	31%	8%
Post Reform	87%	12%	1%

Much of this increase in successful outcomes corresponds to a decline in neutral outcomes. In each successive period, fewer cases were dismissed without substantive resolution, meaning that more cases reached a clear outcome. This shift likely reflects improvements in how debtors and creditors present their cases, particularly in explaining the reasons for dismissals to the court. As a result, it remains uncertain whether the rise in positive outcomes is primarily due to the reforms themselves or to broader improvements in case transparency and resolution practices.

One clear indicator of the reforms' impact, however, is the decrease in negative outcomes. In both 2007 and 2017, 8% of debtors were formally denied a discharge. In the post-reform period, that figure dropped to just 1%. This suggests that the new guidelines have led the DOJ to take a less aggressive stance in opposing student loan discharges. From this perspective, the reforms represent a meaningful, albeit modest, success in improving outcomes for borrowers who pursue discharge.

C. Attestation Form Adoption

The third metric the DOJ and ED emphasized was the high voluntary adoption rate of the new attestation process among debtors. In its press releases, the government reported that between 96% and 97% of debtors voluntarily submitted the attestation form as part of their adversary proceeding.[166]

[166] *See* 2024 DOJ Analysis, *supra* note 10 (noting that 96% of borrowers are voluntarily using the attestation process); 2023 DOJ Analysis, *supra* note 10 (noting that "97% of all

I am unable to independently verify this claim. Although many debtors included their attestation form as an exhibit in the bankruptcy court docket,[167] a significant number did not.[168] The absence of an attestation on the docket, however, does not necessarily mean the debtor failed to submit one to the ED. Many debtors referenced their intent to pursue the attestation process even though they never filed the form with the court.[169] Given that these cases often resulted in favorable outcomes for the debtor, it is likely that they did, in fact, provide an attestation directly to the ED.[170] Due to this data collection limitation, the DOJ and ED are in the best position to provide accurate statistics on attestation usage.

That said, given the earlier discussion regarding the government's unexpectedly high success rate—one that conflicts with observable data—it is plausible that the government is overstating the adoption rate as well. Specifically, the reported figure likely excludes cases that were dismissed without the debtor ever filing an attestation form. However, whether the actual uptake is 96% or slightly lower is ultimately not a critical distinction. Based on my review of complaints and adversary proceeding dockets, it is clear that the attestation adoption rate is very high. By that measure, the government's reforms can be considered a success.

But what does the government seek to demonstrate by highlighting the adoption rate? A high adoption rate, in and of itself, is not particularly meaningful. Rather, the government's goal is to promote a streamlined procedure that makes student loan bankruptcies easier to navigate.[171] One clear way to assess that objective is to examine case duration. If cases are being resolved more quickly in the post-reform period, it would suggest that the attestation process has, in practice, simplified the bankruptcy process.

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borrowers in the cases filed are voluntarily using the new streamlined process").

[167] *See, e.g.*, Complaint at 1, Harvey v. U.S. Dep't of Educ., Adv. No. 23-03020 (Bankr. E.D. Tenn. Aug. 22, 2023); Complaint at 1, Christ v. U.S. Dep't of Educ., Adv. No. 23-01115 (Bankr. C.D. Cal. Nov. 13, 2023) (filing an attestation form in lieu of a complaint).

[168] *See, e.g.*, Durham v. U.S. Dep't of Educ., Adv. No. 23-00028 (Bankr. M.D. Fla. Sep. 14, 2023)

[169] *See, e.g.*, Complaint at 3, Carey v. U.S. Dep't of Educ. Off. of Gen. Couns., Adv. No. 23-03009 (Bankr. W.D. Ky. May 30, 2023) (noting that the debtor will further prove her hardship "on her Attestation which will be provided to the Defendants").

[170] *See id.*, Agreed Motion for Discharge of Education's Student Loans at 1–3, Dkt. No. 36 (reaching a favorable settlement with the ED in which all the debtor's federal loans are discharged).

[171] *See* 2024 DOJ Analysis, *supra* note 10 (emphasizing "the streamlined process, which includes a standard attestation form that allows borrowers more easily to identify and provide relevant information in support of their discharge request").

Table 10 presents data on the duration of student loan adversary proceedings filed in 2007, 2017, and the post-reform period. Duration is measured as the number of days between the filing of the adversary proceeding and its official termination by the bankruptcy court judge.

Table 10: Duration of Adversary Proceeding (days)

Period	Mean	Median	25th	75th
2007	392	334	199	539
2017	334	283	153	438
Post Reform	266	251	166	350

The data show a clear trend toward shorter case durations. In 2007, the average case length was 392 days. By 2017, that figure had declined by 15% to 334 days. In the post-reform period, the average case duration dropped another 20%, with cases closing in just 266 days. The median follows a similar pattern, decreasing from 334 days in 2007 to 283 days in 2017 and then to 251 days post-reform.

The difference is even more pronounced at the 75th percentile. In 2007, the longest 25% of cases took more than 539 days to resolve. By 2017, that threshold had fallen by over 100 days to 438, and in the post-reform period, it declined further to 350 days. The only statistic that does not show a strong downward trend is the 25th percentile: in 2017, cases at that marker were slightly shorter than those in the post-reform period. However, even with this minor variation, the post-reform period still represents a 17% reduction in case duration compared to 2007. This data suggests that the procedural reforms have successfully streamlined the discharge process.

D. Legal Consistency

The fourth metric worth examining is legal consistency. Specifically, are the *Brunner* test and the undue hardship standard being applied uniformly? And, correspondingly, are individuals experiencing greater financial distress—measured by satisfying more undue hardship factors—more likely to receive a student loan discharge?

Tables 6 and 7 in Part II.C provide original data that address this question. As discussed in detail there, the data reveal a troubling disconnect. The likelihood of success in an adversary proceeding does not correlate with the legal arguments a debtor presents or the number of undue hardship factors they meet. In other words, individuals who exhibit more signs of financial distress, at least as defined by the courts, are not more likely to receive a discharge.

At a fundamental level, this finding is concerning. The undue hardship standard sets forth three elements that debtors must satisfy to obtain a student loan discharge, and the DOJ's guidance explicitly acknowledges this requirement. The Guidance Letter states that "[t]o discharge a student loan under the Brunner test, a bankruptcy court *must* find that the debtor has established" all three undue hardship elements.[172] It further clarifies that "[i]n accordance with existing case law and Education policy, the Guidance advises Department attorneys to stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor's student loan be discharged if [the] three [undue hardship] conditions are satisfied."[173]

Yet, in practice, the DOJ does not appear to be rigorously applying these elements when determining whether to settle cases. Instead, the DOJ seems to begin with the presumption that a debtor qualifies for an undue hardship discharge, absent a compelling reason to contest it. This approach deviates from both the statutory undue hardship standard and the DOJ and ED's own guidance. For a student loan debtor considering bankruptcy, this means that—regardless of how many legal arguments they present or how many undue hardship elements they satisfy—the DOJ is equally likely to agree to discharge their loans.

That said, while inconsistent from a legal perspective, this approach is laudable as a policy matter. The vast majority of debtors in my dataset lacked the financial means to repay a meaningful portion of their student loan debt. Aggressively litigating these cases would impose significant costs on the DOJ while providing little to no financial benefit, as most postbankruptcy debtors would still be unable to allocate funds toward their loans. Beyond that, the DOJ's willingness to settle nearly all cases serves a broader policy goal by signaling to consumer bankruptcy attorneys that adversary proceedings are not an expensive, time-consuming, and futile process but rather a straightforward path to debt relief. This perception shift could encourage more debtors to pursue adversary proceedings, ultimately expanding access to relief.

This metric presents the most complex assessment. From a strict legal consistency standpoint, the DOJ's implementation deviates from the structured approach outlined in the Guidance Letter. However, in terms of fulfilling the undue hardship standard's core purpose—providing relief to

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[172] Guidance Letter, *supra* note 8, at 3 (emphasis added).
[173] *Id.* at 1.

those who need it—the DOJ's approach achieves significant success. In the application of the standards thus far, there is a tension between respect for legal formalism and achieving practical relief for financially distressed borrowers. Looking ahead, as more cases are filed and as more debtors with the ability to repay their loans enter the system, the DOJ will need to refine its approach to ensure that it applies the undue hardship standard in a consistent and legally sound manner.

Overall, the evidence reveals both progress and persistent challenges. Success rates have improved, and debtors in financial distress are receiving relief at historically high rates. However, one critical issue remains: too few student loan debtors are filing adversary proceedings.

The government has prematurely declared success on this front. While case filings have increased, the overall rise has been negligible. In the year surrounding the reforms, approximately six hundred cases were filed. That number should be, at minimum, one hundred times higher—exceeding sixty thousand cases annually. The true access-to-justice problem is not the success rate of filed cases but the vast gap between the number of financially distressed student loan borrowers and the number who seek relief through the adversary proceeding process. Bridging that gap will require an exponential increase in filings, transforming the student loan bankruptcy system into one that meaningfully serves those who need it most.

E. The Path Forward

The empirical data presented in this article reveals a paradox in student loan bankruptcy. While success rates for those who pursue discharge have dramatically improved, the vast majority of eligible borrowers never attempt to access this relief. To meaningfully bridge the Student Loan Bankruptcy Gap, reforms must focus on increasing the number of filings by addressing structural barriers that deter eligible borrowers. This section proposes three solutions that would help transform the student loan bankruptcy system into one that fulfills its promise of providing a fresh start to financially distressed debtors: (1) automatic disclosure, (2) attorney fee guidelines, and (3) public education.

The most powerful solution would be for bankruptcy courts to require completion of the DOJ's attestation form as part of the standard bankruptcy filing process for all debtors with student loan debt. This reform could be accomplished through the Rules Enabling Act, which grants the Supreme Court authority to prescribe rules of practice and procedure for federal courts, including bankruptcy proceedings.[174]

The process for implementing this change would follow established rulemaking procedures. The Advisory Committee on Bankruptcy Rules could propose amendments to the Federal Rules of Bankruptcy Procedure governing debtor disclosures, principally Rule 1007 (which specifies the lists, schedules, statements, and forms a debtor must file) and Rule 4002 (which enumerates debtor duties). In tandem, the Judicial Conference could prescribe a new Official Form modeled on the DOJ's attestation. The amendment could require debtors with student loan balances exceeding a threshold amount (for example, $10,000) to file a standardized student loan assessment as part of their Rule 1007(b) filings, and a conforming change to Rule 4002(b) could make completion and updating of that form a debtor duty.[175] The proposed amendments would proceed through public comment, review by the Standing Committee on Rules of Practice and Procedure, approval by the Judicial Conference, and finally submission to the Supreme Court and Congress under the Rules Enabling Act timeline.

This approach fits naturally within the existing disclosure framework of § 521 and the Rules. By embedding a standardized student loan assessment in the national forms that accompany Rule 1007 and by automatically referring the disclosures to the DOJ, courts would address the information gap that discourages eligible borrowers from pursuing discharge while still maintaining judicial discretion in individual cases.

Such a rule change would represent a significant step toward bridging the Student Loan Bankruptcy Gap by systematically referring potential student loan discharge claims to the DOJ rather than relying on borrowers to independently discover and navigate the discharge process. The standardized nature of the attestation form would also promote consistency across jurisdictions while providing courts with the information necessary to make informed decisions about student loan dischargeability.

In reviewing discharge eligibility, bankruptcy judges should follow

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[174] *See* 28 U.S.C. § 2075 (granting the Supreme Court the authority to promulgate bankruptcy rules that have the force of law, provided they do not abridge, enlarge, or modify substantive rights).

[175] *See* 11 U.S.C. § 521(a)(1) (debtor's duty to file lists, schedules, and statements); Fed. R. Bankr. P. 1007 (denoting required filings and Official Forms); Fed. R. Bankr. P. 4002(b) (detailing a debtor's duties); Fed. R. Bankr. P. 9009(a) (discussing Official Forms prescribed by the Judicial Conference as well as Director's Forms issued by the AO). Any nationwide requirement to file a student-loan assessment could be implemented by amending Rules 1007 and 4002 and prescribing a companion Official Form through the Rules Enabling Act process. *See* 28 U.S.C. §§ 2072–2074.

the DOJ's lead in recognizing that meaningful debt relief can take multiple forms—including both full discharges where all undue hardship elements are clearly met and partial discharges where circumstances warrant substantial but not complete relief. This flexibility combined with the automatic referral to the DOJ would expand access to meaningful debt reduction for a broader range of financially distressed borrowers.

Another possible solution is for courts to promulgate attorney fee guidelines for student loan cases. Because courts must approve all attorney fees in bankruptcy, the establishment of fee guidelines for student loan adversary proceedings would be within the bankruptcy courts' congressional mandate.[176] Since many bankruptcy attorneys are unfamiliar with the student loan discharge process, they price adversary proceedings at indefensible rates, with some setting fees as high as $40,000.[177] Given that an entire chapter 7 bankruptcy averages just $1,500, there is no justification for these exorbitant rates.[178] By providing guidelines, the courts would anchor reasonable pricing in the minds of bankruptcy attorneys. This would bring down rates and allow more debtors to pay for legal assistance. More importantly, though, fee guidelines would signal to bankruptcy attorneys that adversary proceedings need not be time-consuming endeavors but rather should be a profitable add-on service offered to most bankrupt consumers.

The last recommendation is more traditional in nature and can be implemented by all three branches of government: public outreach and education. This approach would seek to remedy the persistent, mistaken belief that student loans are virtually impossible to discharge.

On the executive branch side, the ED could implement direct notification systems targeting borrowers in default, providing clear information about the streamlined bankruptcy discharge process and connecting them with appropriate legal resources. Such notifications could be modeled after successful outreach programs in other contexts, such as the targeted communications used for Public Service Loan Forgiveness

[176] *See* 11 U.S.C. § 330(a)(4)(B).

[177] Aarthi Swaminathan, *'I Have a Chance Now To Have a Life': Navy Vet Who Won Watershed Student Loan Ruling Tells His Story*, YAHOO! FIN. (Jan. 12, 2020), https://finance.yahoo.com/news/student-loans-discharged-in-bankruptcy-kevin-rosenberg-190151284.html (reporting an attorney fee estimate of "around $40,000 because the lawyers see it as this really hard, arduous process").

[178] *Chapter 7 Bankruptcy: What Will It Cost and Will It Wipe Out My Debts?*, NOLO (Feb. 24, 2025), https://www.nolo.com/legal-encyclopedia/chapter-7-bankruptcy-survey-article.html.

remediation efforts.[179]

On the legislative side, Congress could amend the Higher Education Act to require student loan servicers to provide standardized information about bankruptcy options when borrowers experience financial distress—similar to how mortgage servicers must provide loss mitigation information to homeowners facing foreclosure under Regulation X.[180] This integration of bankruptcy information into routine servicing communications would normalize bankruptcy as a legitimate option rather than a last resort to be avoided.

Lastly, on the judicial side, the Administrative Office of the U.S. Courts could develop standardized informational materials and self-help resources specifically addressing student loan discharge, including interactive online assessment tools to help debtors determine whether they might qualify under the attestation criteria. Such court-based programs have proven effective in other contexts, particularly in increasing pro se success rates in areas like uncontested divorce and simple probate matters. These combined outreach efforts, in conjunction with the 2022 Guidance Letter reforms, would combat the persistent myth of nondischargeability that has dominated the student loan bankruptcy landscape for more than three decades.

Conclusion

The Student Loan Bankruptcy Gap has denied a fresh start to millions of Americans burdened by educational debt. In November 2022, the DOJ and ED announced ambitious reforms aimed at bridging this gap. This article's empirical examination of the reforms' first year reveals a mixed record of success.

The data paint a picture of meaningful but, ultimately, insufficient progress. Success rates for those who pursue discharge have jumped to 87% in the post-reform period, indicating that the DOJ and ED's new attestation process and more lenient interpretation of the undue hardship standard have made relief more accessible. Yet the gap persists because so few debtors attempt to pursue discharge. Of the more than one hundred thousand student

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[179] *See, e.g.*, U.S. Dep't of Educ., *Dear Colleague Letter: PSLF for State and Local Employees* (Oct. 17, 2024), https://www.ed.gov/laws-and-policy/education-policy/key-policy-letters/dear-colleague-letter-pslf-state-and-local.

[180] *See* Real Estate Settlement Procedures Act (Regulation X), 12 C.F.R. §§ 1024.1–1024.41.

loan borrowers who file bankruptcy each year, only about six hundred seek to discharge their educational debt—despite empirical evidence suggesting that tens of thousands would likely succeed.

Evaluating the reforms against four key metrics—case filings, success rates, procedural streamlining, and legal consistency—reveals both the promise of the reforms and their limitations. The high success rate and streamlined procedures demonstrate that when debtors pursue discharge, the system now works far better than it did in the pre-reform period. However, the persistently low filing rate shows that the reforms have not adequately addressed the systemic barriers that deter eligible borrowers from seeking relief in the first place. At this time, the Student Loan Bankruptcy Gap continues to deny millions of Americans the fresh start that bankruptcy promises.

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