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THE NEED FOR REFORM: DISCHARGING STUDENT LOAN DEBTS IN BANKRUPTCY PROCEEDINGS UNDER THE *BRUNNER* TEST

*Jacob M. Kupferman**

I. INTRODUCTION

In January of 2020, a New York Bankruptcy Court issued a controversial opinion when it relieved a 46-year-old U.S. Navy Veteran of more than \$220,000 of outstanding student loan debt. Kevin J. Rosenberg, a 2004 graduate of the Cardozo Law School, filed for bankruptcy and, as part of those proceedings, filed an adversary proceeding to have his student loan debt discharged. Ordinarily, the bar to have one's student loans forgiven is very high. \$1.7 trillion in outstanding student loans (and growing) in the United States serves as a reminder of the state of the crisis. *In Re: Rosenberg* recalibrated the previously understood stringent standard courts applied for discharging student loans. In 1987, the Second Circuit in *Brunner* reviewed an "undue hardship" test that has since been adopted by all but two circuits who instead utilize a "totality of the circumstances" test. The three-pronged *Brunner* test's interpretations have created an unreasonably high burden for the forgiveness of student loans. Courts are seldom sympathetic to petitioners seeking relief, but the *Rosenberg* opinion calls for a modern, realistic understanding of the standard.

This note will analyze how this decision could begin to move the needle towards greater leniency on student loan forgiveness in bankruptcy and could have a significant impact on American consumers in the near future. More than 44 million Americans currently have outstanding student loan debts. While

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the majority of those individuals will not file for bankruptcy, those that do file could face immense challenges in seeing their student loan debts discharged, regardless of whether their other debts are deemed dischargeable. Bankruptcy filings are sure to increase amid the escalating financial crisis created by COVID-19. Prior to the *Rosenberg* ruling, bankruptcy filings with substantial student loans stood little chance of receiving the requested relief. Now, should other courts choose to follow *Rosenberg*, the likelihood of dischargeability could be markedly improved.

Furthermore, the opinion issued in *Rosenberg* could create a new level of legislative urgency that will be discussed in the latter portion of this Note. As of the time this Note was written, there was no statutory definition for “undue hardship” and *Brunner* was not codified. Additionally, a number of candidates for President in the 2020 election campaigned on varying levels of student loan forgiveness, ranging from Senator Elizabeth Warren’s plan to drastically overhaul the bankruptcy system – a plan that has since been endorsed by the President-Elect Joe Biden – to Senator Bernie Sanders’ proposal that all student loans be forgiven in their entirety, to President Trump’s proposal that any person with student loans simply adopt a 12.5 percent income-based repayment plan. Without question, *In Re: Rosenberg* will be appealed. Those subsequent proceedings and Congressional responses could make this issue one of the foremost subjects discussed in America in the near future.

II. THE STATE OF THE STUDENT LOAN CRISIS

Everyone in the United States has some relationship to the student loan crisis. They all have listened to political figures debate how to approach the critical issue. Some have needed to fill out financial aid forms as part of the college application process. Some may count themselves among the more than 44,000,000 Americans facing student loan debts.¹ The student loan debt situation in the United States has become one of the largest sources of consumer debt in the United States, ballooning to a staggering \$1.7 trillion.² This amount encompasses more debt for Americans than does the

¹ Sen. John Thune & Sen. Mark Warner, *Americans are Drowning in \$1.5 Trillion of Student Loan Debt. There’s One Easy Way Congress Could Help*, TIME (Aug. 27, 2019) <https://time.com/5662626/student-loans-repayment/>

² *Id.*

outstanding amount of either credit card debts or auto loans.³ While the crisis disproportionately affects younger Americans, the number of Americans over the age of 60 that still have student loan debt has more than doubled in the last decade.⁴

For most, taking on debt is an inescapable reality of higher education. The Federal Reserve notes 42 percent of those who attended college in 2018 maintained at least some debt from their education.⁵ Between 1989 and 2016, the cost to attend college has increased steadily at about 2.6 percent year over year.⁶ After adjusting for inflation, the cost of a four year college education has essentially doubled since 1980.⁷ Over that same period, the average annual growth in wages has been only 0.3 percent.⁸ When considered together, the annual growth in wages has been roughly one-eighth of the annual growth in the cost of college. Effectively, every graduating class is being charged more for their degree than the class that came before them.

With rising costs, more students are borrowing to attend college and graduating with those debts. In Illinois alone, among those graduating in the class of 2018 from public universities, 66 percent left college with debt, averaging \$29,064.⁹ Nationwide, of those making payments, the average monthly payment is between \$200 and \$300.¹⁰ These high costs cause high rates of default, with recent studies demonstrating 10.9 percent of borrowers are more

³ Nigel Chiwaya, *These five charts show how bad the student loan debt situation is*, NBC NEWS (Apr. 24, 2019) <https://www.nbcnews.com/news/us-news/student-loan-statistics-2019>

⁴ *Id.*

⁵ *Report on the Economic Well-Being of U.S. Households in 2017 - May 2018*, BD. OF GOVERNORS OF THE FED. RES. SYS., <https://www.federalreserve.gov/publications/2018-economic-well-being-of-us-households-in-2017-student-loans.htm> [Hereinafter BOARD OF GOVERNORS].

⁶ Camilo Maldonado, *Price Of College Increasing Almost 8 Times Faster Than Wages*, FORBES (July 24, 2018) <https://www.forbes.com/sites/camilomaldonado/2018/07/24/price-of-college-increasing-almost-8-times-faster-than-wages/#13e0fd5e66c1>

⁷ *Id.*

⁸ *Id.*

⁹ *Student Debt and the Class of 2018*, THE INST. FOR CONSUMER ACCESS AND SUCCESS, 2019 Annual Report (Sep. 2019).

¹⁰ BOARD OF GOVERNORS, *supra* note 5; *see also* Zack Friedman, *Student Loan Debt Statistics In 2020: A Record \$1.6 Trillion*, FORBES (Feb. 3, 2020) (indicating that these monthly payment amounts and average outstanding debts are increasing year over year).

than 90 days delinquent, although that figure could be even higher as government data only analyzes defaults three years after graduation.¹¹

The subsequent ramifications of this crisis extend beyond individuals' inability to escape their student loan debts. Over-indebtedness cascades into nearly every crevasse of a debtor's life. Studies have demonstrated student debt can lead to lower post-graduate wages, lower levels of home ownership, fewer automobile purchases, lower probability of choosing public-service careers, delayed marriages, and lower probability of pursuing additional education.¹² The ripple effect of this reduction in marketplace participation can and will have long-reaching effects on the American economy.

For the avoidance of doubt, the purpose of this note is not to provide a position on the affordability of college, but rather to use data to illustrate the economic realities of those entering the college landscape. This discussion speaks directly to the effect that subsequent court and congressional decisions may have on the student debt landscape. With so many Americans facing student loan debt and the reality that reducing these debts proves difficult, the discharge of these debts (or inability to discharge) in bankruptcies will become more relevant in the American experience.

III. THE HISTORY OF DISCHARGING STUDENT LOAN DEBT IN AMERICA; ESTABLISHING THE *BRUNNER* TEST AND ITS SUBSEQUENT INTERPRETATION

Within the process of a Chapter 7 bankruptcy proceeding, a debtor may have a vast portion of their debts discharged. Indeed, the US Courts describe filing Chapter 7 as a “fresh start” for the

¹¹ See Kristen Blagg, *Underwater on Student Debt* (Aug. 2018) www.urban.org/research/publication/underwater-studentdebt/view/full_report; see also Judith Scott-Clayton, *The looming student loan default crisis is worse than we thought*, BROOKINGS INST. (Jan. 11, 2018) <https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/> (providing additional clarification on the default rates of student loan borrowers).

¹² *Am. Bankr. Inst., 2017-2019 Final Report of the ABI Commission on Consumer Bankruptcy*, 3 (2019) [hereinafter “Final Report on Consumer Bankruptcy”].

debtor.¹³ Irrespective of the amount of debt and the status of solvency, a debtor is entitled to relief under Chapter 7 if they qualify under the necessary means tests.¹⁴ To overcome the presumption that a case is filed in bad faith, the debtor must demonstrate that his or her average monthly income is less than their state's median income or effectively demonstrate that there are special circumstances that should allow them to adjust their monthly income.¹⁵ Debtors who cannot overcome the presumption of abuse, or otherwise fail to qualify under the prescribed guidelines, generally have their cases converted into a Chapter 13.¹⁶

Assuming a debtor qualifies for Chapter 7 and satisfies the filing requirements, subject to a number of exceptions, a Chapter 7 discharge releases individual debtors from personal liability for most debts and prevents the creditors owed those debts from taking any collection actions against the debtor.¹⁷ This protection is heavily skewed in favor of the debtor and in 99 percent of Chapter 7 cases, debtors are granted relief on their dischargeable debts.¹⁸ Barring fraud, misrepresentations or a bad faith filing on the part of the debtor wherein his or her case might be dismissed by a court, filing a Chapter 7 bankruptcy provides an opportunity to be shielded from further actions and relieves the debtor of a swath of debts he or she would have otherwise faced.

Historically, the test established for discharging student loan debt was that the debtor must face an "undue hardship" to discharge the debt. In 1978, Congress reformed the Bankruptcy Code, most relevantly in Section 523(a)(8), which codified the rule that student loan debts were excluded from ordinary discharge of debt in bankruptcy, but were freely dischargeable after five years and could be discharged before five years upon a demonstration of undue hardship.¹⁹ While this new codification expanded the previous amendments to the Education Amendments of 1976, it also removed additional impediments to educational debt

¹³ *Chapter 7 - Bankruptcy Basics*, UNITED STATES COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; *see also* 11 U.S.C. §707(b)(1).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Final Report on Consumer Bankruptcy, *supra* note 12, at 4.

dischargability.²⁰ Under the Bankruptcy Code Reform Act of 1978, the standard became a demonstration of undue hardship on debtors and their dependents.²¹

These codified standards established by the Bankruptcy Act remained the determinative factors in discharging student loan debt until what became the seminal case on this matter was decided. In the 1987 *Brunner* decision, the Second Circuit Court of Appeals analyzed the undue hardship test and established a new three-pronged test to determine the dischargability of student loan debt in bankruptcy.²² In the opinion, the court explained that to effectively discharge student debt, a debtor must: (1) prove that without the discharge, the debtor and their dependents could not maintain a “minimal” standard of living; (2) identify additional circumstances indicating the financial hardship is likely to continue for the duration of the repayment period; and (3) demonstrate that he or she has made good faith efforts to repay the loans.²³

The *Brunner* court provided substance to the otherwise abstract understanding of “undue hardship” and concluded the threshold should be a difficult one to reach. In retrospect, this interpretation was a reasonable one as the case was decided in 1987. At that time, debtors still maintained the right to freely discharge student loans in bankruptcy after five years of making payments.²⁴ In 1990, Congress lengthened the time period to seven years after the loans first becoming due.²⁵ However, in 1998, Congress eliminated the time period after which student loans became freely dischargeable. In other words, the only way to discharge student loan debt in bankruptcy – at any time – was to demonstrate beyond all question that the payments on those loans would create an undue hardship on the debtor and their dependents.²⁶ Moreover, courts have interpreted the caselaw punitively. Many bankruptcy courts have reasoned that there must be a “certainty of hopelessness” for a debtor to discharge their student loans in a bankruptcy.²⁷

²⁰ *Id.*

²¹ *Id.*

²² *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).

²³ *Id.*

²⁴ Final Report on Consumer Bankruptcy at 5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *In re Briscoe*, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981); *see also Matter of Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993).

Since that Congressional action and the ensuing anti-debtor caselaw, the bankruptcy community and academia have perceived the undue hardship standard as both too heavy a burden and too inconsistently applied to have merit.²⁸ Indeed, the perception amongst bankruptcy filers with student loan debt is so grim that as few as 0.1 percent file the necessary complaint to initiate the adversary proceeding required for a court discharge their student loan debts.²⁹ This extremely low percentage of filers is not because of a financial barrier – there is no additional court filing fee for the adversary proceeding once their initial bankruptcy petition is filed.³⁰ Furthermore, both media and academic journals contend that because the definition of the undue hardship standard is not codified, different courts may apply the *Brunner* factors in disparate manners.³¹ Research demonstrates that an individual seeking a discharge while gainfully employed could be viewed by some courts as putting forth a “good faith effort” to pay off their student loans in satisfaction of the third prong of the *Brunner* Test, despite the fact that gainful employment is not necessarily correlated to a textual interpretation of a good faith effort.³²

These disparate interpretations have caused external factors beyond the text of the law to govern debtors’ ability to effectively discharge their student loan debt. Studies suggest that factors such as the identity of the judge assigned to the proceeding are influential in cases that perhaps should be analyzed solely based on the debtor’s income and expenses.³³ These incongruent understandings of the *Brunner* Test by different courts have created a perception –justified or not – that a high burden is placed on debtors to proactively demonstrate their need for student loan

²⁸ Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L. J. 495, 498 (2012) [Hereinafter Iuliano].

²⁹ *Id.* at 499.

³⁰ *Id.*; see also Friedman *supra*, note 10.

³¹ *Id.* at 507.

³² *Id.* at 517; see also Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 218 (2009) (providing the research on the lack of correlation between gainful employment and a good faith effort interpretation from courts).

³³ Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 185 (2009).

discharge.³⁴ Accordingly, scholars have raised serious concerns regarding the access to justice for student loan debtors.³⁵

Of course, there is data to suggest that the discharge of student loan debt is not an impossibility. Empirical evidence shows that when debtors take the proactive measure to initiate their adversary proceeding, their chances are far better than the bleak odds presented by the aforementioned media and academic communities.³⁶ However, the reality for those that qualify for relief is that relief cannot be granted under the current law without filing the necessary adversary complaint. Perhaps, as some research suggests, this is the result of high legal fees,³⁷ or perhaps it is the perpetuated idea that discharging student loan debt in bankruptcy is an immensely difficult process with little likelihood of success. Regardless of the true reason, the historical application of the *Brunner* Test has created an environment in which few petitioners are granted relief – allowing the student loan crisis to continue to expand.

IV. *IN RE: ROSENBERG* – A DEVIATION FROM HISTORY

The landscape of student loan debt in bankruptcy was thrown into disarray in early 2020 after the decision in *In Re: Rosenberg* was handed down. In 2018, Kevin J. Rosenberg, a former United States Marine and graduate of the Cardozo Law School, filed his adversary complaint *pro se* to discharge outstanding loans totaling \$221,385.³⁸ Rosenberg's student loans had accumulated since he began his undergraduate education in 1993, grew during his tour in the Marines, and were augmented when he attended law school from 2001 through 2004.³⁹ After graduating law school and consolidating his original loan, the principal amount had eclipsed \$116,000 and as of November 2019, the outstanding balance on his student loan was over \$221,000 with an interest rate of

³⁴ *Id.*; see also Iuliano *supra* note 28 at 495 (suggesting that a significant portion of bankruptcy proceedings in which the adversary petition for discharge of student loan debt is actually filed result in some form of relief to the petitioner).

³⁵ *Id.*

³⁶ Iuliano *supra* note 28 at 523.

³⁷ *Id.*

³⁸ *In re Rosenberg*, 610 B.R. 454, 457 (Bankr. S.D.N.Y. 2020).

³⁹ *Id.*

3.38 percent per annum,⁴⁰ a relatively low interest rate by today's standards.⁴¹

Rosenberg's situation was different from the movant's in *Brunner*. Rosenberg, at the time of his filing, was over 40 years old and unlike Brunner, Rosenberg's student loans had accumulated for years – compared to months.⁴² Rosenberg's monthly income, after accounting for his expenses, was negative, indicating he could not maintain a "minimal standard" of living and thus satisfying the first prong of the *Brunner Test*.⁴³ Despite his decision to not work in the legal community, likely lowering his earning potential, the court found that Rosenberg satisfied the second prong of the test – the additional circumstances surrounding his state of affairs and his ability to pay off the loan were likely to persist for a significant portion of the payment period.⁴⁴ Finally, citing occasions where Rosenberg had made good faith efforts to refinance his loans, enter into income-based repayment plans, and consolidate the loans, the court found that he satisfied the third prong as well.⁴⁵ The Bankruptcy Court for the Southern District of New York ruled in favor of Rosenberg, finding that his proceeding satisfied each of the elements of the three-pronged test and granted him a full discharge of his student loan debt.⁴⁶

The granting of the student loan discharge, however, was not the significant part of the opinion as there are a small number of discharges granted by bankruptcy courts every year.⁴⁷ Rather, it was the manner in which Chief Judge Cecelia G. Morris presented her decision that is the key as to why her decision could be so significant. Prior to the announcement of the decision, Judge Morris alluded to the harsh realities of the recent interpretations of

⁴⁰ *Id.*

⁴¹ Jessica Dickler, *Student loan interest rates edge higher and higher*, CNBC (Jul. 18, 2017) <https://www.cnbc.com/2017/07/18/student-loan-interest-rates-edge-higher-and-higher.html> (student loan interest rates can often get as high as 9% or more).

⁴² *Rosenberg*, 610 B.R. at 460.

⁴³ *Id.*

⁴⁴ *Id.* at 461.

⁴⁵ *Id.* at 461-62.

⁴⁶ *Id.* at 462.

⁴⁷ *See, e.g.*, Iuliano *supra* note 28, at 498 (demonstrating that successful petitions for discharge of student loan debt are not impossible but are often unpursued); *see also* Ferek *infra* note 72 (stating that only 473 people sought discharge of their student loans in a bankruptcy proceeding in 2017).

Brunner in the 32 years since its decision.⁴⁸ Judge Morris succinctly encapsulated the frustrations of many debtors and bankruptcy attorneys by alluding to the punitive nature of subsequent cases – despite the punitive language’s absence in the three-pronged test itself.⁴⁹ In deciding that her court would not “perpetuate the myth” found in the retributive opinions that preceded *Rosenberg*, Judge Morris provided an opinion aimed at flipping the narrative on the prior difficulties of discharging student loan debts in bankruptcy.

Without question, Judge Morris’ words were chosen carefully to amplify the frustrations felt by lay people and professionals alike surrounding the tribulations of discharging outstanding student loan debts in bankruptcy.⁵⁰ By stating deliberately that she would not interpret *Brunner* in the mistaken fashion as the courts had in their preceding decisions, she emphasized the disparity in analyses of *Brunner* and, without explicitly saying so, has invited this case for an appeal. Accordingly, Judge Morris’ opinion has likely raised the eyebrows of the bankruptcy world, as there has not been a bankruptcy court opinion to illustrate the perceived fallacies of the *Brunner* test in the same manner.

This common-sense approach has a significant impact in several ways. First, it was not unduly punitive of Rosenberg’s change in career, displaying a sharp about face from the opinions of previous courts which may have punished him for leaving a job with higher earning potential, and instead took a holistic approach to the second prong of *Brunner*. Second, the new more lenient approach to undue hardship signals a long-awaited wind of change in the student debt bankruptcy world, timed at the forefront of a potential consumer debt crisis which looms on the horizon.

While Rosenberg’s discharge is certainly a relief for him⁵¹, this case was decided by a district court, meaning it holds no binding precedent over any other court. Indeed, it is possible that in the near future, when the dust settles around what comes next in the student loan crisis, *In re: Rosenberg* may serve as a relative

⁴⁸ *Rosenberg*, 610 B.R. at 458.

⁴⁹ *Id.* at 459.

⁵⁰ *Id.*

⁵¹ Steven Chung, *An Interview With Kevin Rosenberg Where He Explains How He Successfully Discharged His Student Loans In Bankruptcy Court*, ABOVE THE LAW (Jan. 15, 2020) <https://abovethelaw.com/2020/01/an-interview-with-kevin-rosenberg-where-he-explains-how-he-successfully-discharged-his-student-loans-in-bankruptcy-court/?rf=1>

footnote as other decisions are rendered.⁵² However, at this time, the decision is significant.⁵³ A declaration that the undue hardship standard, and thus the *Brunner* Test, return to the interpretations as “originally intended”⁵⁴ is likely to urge action – either through an appeal or a legislative action.

V. THE INEVITABILITY OF NECESSARY ACTION

The *Rosenberg* decision stands for the proposition that action is necessary to rectify the growing issue of student loan debt and its dischargability in bankruptcy. Although the *Rosenberg* court did so in a less often utilized fashion than others, it is far from the first to urge that courts and/or Congress take action to rectify this issue. Groups ranging from members of Congress⁵⁵, Presidential candidates⁵⁶, commissions of bankruptcy professionals⁵⁷, and media outlets have all urged Congress to take action. Furthermore, this is not a new issue, nor one of which the Federal Government is unaware.⁵⁸ As such, the *Rosenberg* opinion could serve as the necessary catalyst to inject life into the national discussion of this crisis.

⁵² See, e.g., Adam S. Minsky, Esq., *Court Allows Bankruptcy Discharge of \$200,000 In Student Loans*, FORBES (Sep. 2, 2020) <https://www.forbes.com/sites/adamminsky/2020/09/02/court-allows-bankruptcy-discharge-of-200000-in-student-loans/#21613edc34fd> (detailing that the 10th Circuit Court of Appeals approved a discharge of \$200,000 of private student loan debt in a bankruptcy for a student that attended a non-accredited university).

⁵³ See Aisha Al-Muslim, *Upending Bankruptcy ‘Myths,’ Judge Erases \$220,000 Student Loan Debt*, WALL ST. J. (Jan 8, 2020) <https://www.wsj.com/articles/upending-bankruptcy-myths-judge-erases-220-000-student-loan-debt-11578523767> (quoting numerous national experts in the field of bankruptcy on how significant this opinion is).

⁵⁴ *Rosenberg*, 610 B.R. at 459.

⁵⁵ See Thune & Warner *supra* note 1; see also Jamerson & Ferek *infra* note 58.

⁵⁶ See Jamerson & Ferek *infra* note 59; see also Glueck and Kaplan *infra* note 61.

⁵⁷ See Final Report on Consumer Bankruptcy, *supra* note 12.

⁵⁸ See *Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge Bankruptcy Proceedings*, U.S. DEPT. OF ED., <https://www.regulations.gov/document?D=ED-2017-OPE-0085-0001>.

The need to address the student loan debt in bankruptcy conundrum is apparent through the abundance of legislation different politicians⁵⁹ have proposed in recent years, despite no Congressional action. Perhaps most significantly, Senator Elizabeth Warren proposed simultaneously codifying the ability to discharge student loan debt in bankruptcy and simplifying the process to do so.⁶⁰ Prior to becoming a Senator and Presidential candidate, Senator Warren was one of the nation's leading bankruptcy law experts while teaching at Harvard, and her proposed plan has a keen focus on alleviating the perceived burden on debtors attempting to make an effective petition to discharge their student loans.⁶¹ At the time of this announcement, Senator Warren was still a candidate for President and used this issue to reaffirm her commitment to protecting the American consumer. Indeed, her plan was so popular that President-Elect Joe Biden, with whom Senator Warren had previously clashed on bankruptcy reform,⁶² endorsed the idea, citing it as a potential bridge between his platform and those of more progressive democrats.⁶³ Unsurprisingly, this decision netted

⁵⁹ See, e.g., Katy Stech Ferek, *Lawmakers Plan Would Let Borrowers Cancel Student Loans in Bankruptcy*, WALL ST. J. (May 10, 2019) https://www.wsj.com/articles/lawmakers-plan-would-let-borrowers-cancel-student-loans-in-bankruptcy-11557440856?mod=searchresults&page=1&pos=1&mod=article_inline (outlining the Student Borrower Bankruptcy Relief Act of 2019 proposed by Senators Durbin and Warren that mirrors Senator Warren's 2020 proposal that was also introduced into the house by Reps. Jerrold Nadler and John Katko in a bipartisan effort); See also Kristen Kuchar, *Pending Student Loan Legislation*, SAVINGFORCOLLEGE.COM (Jan. 3, 2020) <https://www.savingforcollege.com/article/pending-student-loan-legislation> (providing status updates on the more than 30 bills that are currently pending in Congress about student loan debt).

⁶⁰ Joshua Jamerson & Katy Stech Ferek, *Warren Proposes Bankruptcy Overhaul in Return to Signature Issue*, WALL ST. J. (Jan. 7, 2020) https://www.wsj.com/articles/warren-proposes-bankruptcy-overhaul-in-return-to-signature-issue-11578405600?mod=article_inline

⁶¹ *Id.*

⁶² Mary Lu Carnevale, *Biden Defends Vote on Bankruptcy Bill*, WALL ST. J. (Oct. 2, 2008) https://blogs.wsj.com/washwire/2008/10/02/biden-defends-vote-on-bankruptcy-bill/?mod=article_inline

⁶³ Katie Glueck & Thomas Kaplan, *Biden, Looking to Attract Progressives, Endorses Warren Bankruptcy Plan* N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/politics/biden-warren-bankruptcy.html>

Vice President Biden an endorsement from the National Education Association, the nation's largest labor union.⁶⁴

The candidates are not alone in their pursuit of a solution. President Trump has kept student loan debt as a priority for his administration.⁶⁵ Unlike his democratic counterparts, however, the President's plan has focused on an income-based repayment plan wherein debtors would pay 12.5 percent of their income for 15 years or 30 years for undergraduate and graduate loans respectively.⁶⁶ This plan would also remove individual Stafford Loans, which are primarily received by low-income individuals.⁶⁷ While this plan has faced harsh criticism,⁶⁸ it is apparent the White House also has an eye on the crisis.

Support for reform does not end with to date unpassed Congressional legislation and efforts by the President. In a 2019 report, where student loans served as the first and foremost issue discussed by the American Bankruptcy Institute, a collective of bankruptcy legal experts,⁶⁹ the bankruptcy system around student loans was described as "badly broken."⁷⁰ Much in line with Senator Warren's recommendations, the Commission recommended eliminating much of the tedious paperwork and costs of the process and shifting back to a simplified version of student loan debt discharge, mirroring the time-based policies from pre-2005.⁷¹ The Commission

⁶⁴ *Id.*

⁶⁵ See Vivian Anguiano, Marcella Bombardieri, Antoinette Flores, Marissa Navarro, Taseen Shamim, & Victoria Yuen, *Trump's Latest Budget Proposal Would Deepen the Student Debt Crisis*, CTR. FOR AM. PROGRESS (Feb. 10, 2020) <https://www.americanprogress.org/issues/education-postsecondary/news/2020/02/10/480347/trumps-latest-budget-proposal-deepen-student-debt-crisis/>

⁶⁶ *Id.*

⁶⁷ *Stafford Loans for Students*, U.S. DEPT. OF ED., <https://www.govloans.gov/loans/loan-details/4370>

⁶⁸ See Anguiano et al. *supra* note 64.

⁶⁹ See Katy Stech, *Panel to Examine Consumer Bankruptcy and Student Loan Debt*, WALL ST. J. (Mar. 13, 2017) https://www.wsj.com/articles/panel-to-examine-consumer-bankruptcy-and-student-loan-debt-1489443328?mod=article_inline

⁷⁰ Katy Stech Ferek, *Legal Experts Urge Federal Lawmakers to Fix Consumer Bankruptcy Law*, WALL ST. J. (Apr. 11, 2019) https://www.wsj.com/articles/legal-experts-urge-federal-lawmakers-to-fix-consumer-bankruptcy-law-11554987600?mod=article_inline; see also Final Report on Consumer Bankruptcy *supra*, Note 12.

⁷¹ Final Report on Consumer Bankruptcy at 6.

rejected the proposition that student loan debts should be outright cancelable in bankruptcy, however, as this could theoretically create loopholes in which recent graduates filing for bankruptcy could have their loans discharged.⁷² Even lending companies, often accused of being predatory, want to see the ability to discharge loans in bankruptcy codified, thus establishing bright line rules for debt collection and creating less fodder for costly litigation.⁷³

The frustrations of the many parties that have spoken on this issue were encapsulated by Federal Reserve chairman Jerome Powell, who said he would be “at a loss to explain” why student loans cannot be canceled like other debt.⁷⁴ Further, there are indications student loan discharge reform enjoys bipartisan support. Judges of both parties have indicated their desire to rethink the legal standard on student loan debt⁷⁵ and the apolitical bodies that publish their recommendations do not adhere to one party’s view over another.⁷⁶

While Judge Morris may not have known just how impactful her opinion would be when she wrote it, there is an undeniable urgency to the clarify the undue hardship standard in her opinion. No doubt, there will be an inevitable surge of bankruptcies coming as a result of COVID-19. Unfortunately, the dreadful crisis facing the world also carries with it a financial downturn that affects all

⁷² See Katy Stech Ferek, *Legal Experts Urge Federal Lawmakers to Fix Consumer Bankruptcy Law*, WALL ST. J. (Apr. 11, 2019) https://www.wsj.com/articles/legal-experts-urge-federal-lawmakers-to-fix-consumer-bankruptcy-law-11554987600?mod=article_inline.

⁷³ See *Transparency in Policy Engagement and Political Participation, 2019 Semiannual Report*, NAVIENT, <https://about.navient.com/transparency-report.html> (providing that Navient, one of the ten largest providers of private student loans nationwide, has lobbied for bankruptcy reform that allows student loans to be discharged after good faith efforts to repay).

⁷⁴ Katy Stech Ferek, *Judges Wouldn’t Consider Forgiving Crippling Student Loans – Until Now*, WALL ST. J. (Jun. 14, 2018) https://www.wsj.com/articles/judges-wouldnt-consider-forgiving-crippling-student-loans-until-now-1528974001?mod=article_inline

⁷⁵ *Id.*

⁷⁶ See, e.g., Final Report on Consumer Bankruptcy (Wherein members of the Commission are judges of both parties, professors, and practicing attorneys); See also Rachel Hinton, *Student loan debts could be wiped out through Durbin’s bankruptcy relief bill*, Chicago Sun Times (Jun. 3, 2019) <https://chicago.suntimes.com/2019/6/3/18650697/student-borrower-bankruptcy-relief-act-college-loans-dick-durbin> (Serving as an illustrative example of the numerous bipartisan efforts to address this issue).

people. James Peck, a former bankruptcy judge turned practicing bankruptcy attorney, described trying to stay on top of incoming wave of bankruptcies as “drinking from a fire hose.”⁷⁷ Research has demonstrated that as the rate of unemployment increases, so too do the filings of bankruptcies.⁷⁸ While the unemployment rates and numbers have varied dramatically throughout the COVID-19 pandemic, in October 2020, the number of unemployed was nearly double what it was in 2019,⁷⁹ and according to the Department of Labor, 33 million individuals collected unemployment benefits the week of June 20.⁸⁰

The economic shutdown associated with Coronavirus has forced immediate attention and action to the student loan crisis. As countless Americans are without income, many politicians have proposed temporary relief to student loan debtors. Joe Biden has suggested that the Federal Government outright cancel \$10,000 of student loans for every borrower,⁸¹ while Representatives Ilhan Omar and Ayanna Pressley introduced legislation to relieve \$30,000 per debtor.⁸² Additionally, President Trump announced that all federal student loan payments would be temporarily halted and interest payments would be halted during the National

⁷⁷ Jonathan Randles, *Bankruptcy Lawyers Gear Up for Surge in Filings Due to Coronavirus Fallout*, WALL ST. J. (Apr. 2, 2020) https://www.wsj.com/articles/bankruptcy-lawyers-gear-up-for-surge-in-filings-due-to-coronavirus-fallout-11585853669?shareToken=stb3ed993384834e809354221c5bc919c5&reflink=article_email_share.

⁷⁸ Harlan D. Platt and Sebahattin Demirkan & Marjorie Platt, *Does Unemployment Steer Personal and Corporate Bankruptcies?*, REV. OF BUS. AND ECON., 9 (2011).

⁷⁹ *The Employment Situation – March 2020*, BUREAU OF LAB. STAT., U.S. DEPT. OF LAB. 2 (2020) <https://www.bls.gov/news.release/pdf/empst.pdf> at 2.

⁸⁰ Jason Jabbari, Olga Kondratjeva, Mathieu Despard, and Michal Grinstein-Weiss, *Low-income households falling further behind on student debt due to COVID-19*, BROOKINGS (Aug. 5, 2020) <https://www.brookings.edu/blog/up-front/2020/08/05/low-income-households-falling-further-behind-on-student-debt-due-to-covid-19/>

⁸¹ Zack Friedman, *Joe Biden: Cancel \$10,000 of Student Loans Due to Coronavirus*, FORBES (Mar. 23, 2020) <https://www.forbes.com/sites/zackfriedman/2020/03/23/student-loans-forgiveness-biden/#1d14231072b2>

⁸² Zack Friedman, *Ilhan Omar: Cancel \$30,000 of student Loan Debt Due to Coronavirus*, FORBES (Mar. 23, 2020) <https://www.forbes.com/sites/zackfriedman/2020/03/23/student-loans-ilhan-omar-forgiveness/#a756b4e46c6e>

Emergency for at least 60 days.⁸³ In an expansion on the President's announcement, the CARES Act codified that all federal student loan payments would be suspended from March 13 through September 30, 2020 – thus solidifying a momentary shield for student loan debtors.⁸⁴ President Trump's memorandum in August extended this emergency relief through the end of 2020.⁸⁵ In the HEROES Act, Congress proposed an extension on that temporary stay through September of 2021, though that legislation has not yet been passed by the Senate.⁸⁶

The unfortunate reality of these measures is that they do not address the root of the problem. Without clarification through binding precedent by the Supreme Court or a codification by Congress, the fluctuating interpretations of the *Brunner* Test and the undue hardship standard inevitably leads to confusion in American courts. The countless parties that have shown they are deeply invested in this issue, the fallacies in the student loan debt discharge availabilities in bankruptcies pointed out by Judge Morris in the *Rosenberg* opinion, and the anticipated surge in bankruptcy filings in the post-COVID-19 world, all signal that a watershed moment for the law is coming.

Indeed, the prospects for student loan debtors have become bleaker in the immediate wake of COVID-19 and could still get worse. For many, the pandemic has only exacerbated what was already a major issue. Despite the CARES Act banning such

⁸³ *Delivering on President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency*, U.S. DEPT. OF ED. (Mar. 20, 2020), <https://www.ed.gov/news/press-releases/delivering-president-trumps-promise-secretary-devos-suspends-federal-student-loan-payments-waives-interest-during-national-emergency>

⁸⁴ Kristen Evans, *What you need to know about student loans and the coronavirus pandemic*, CONSUMER FIN. PROT. BUREAU (Apr. 9, 2020) <https://www.consumerfinance.gov/about-us/blog/what-you-need-to-know-about-student-loans-and-coronavirus-pandemic/>

⁸⁵ Meghan Lustig, *Update on Coronavirus Student Loan Relief*, U.S. NEWS (Sep. 2, 2020), <https://www.usnews.com/education/blogs/student-loan-ranger/articles/update-on-coronavirus-relief-for-student-loan-borrowers>.

⁸⁶ Wesley Whistle, *Updated Heroes Act: Stimulus Checks, Student Loan Relief, And Money For Education*, FORBES (Sep. 28, 2020), <https://www.forbes.com/sites/wesleywhistle/2020/09/28/updated-heroes-act-stimulus-checks-student-loan-relief-and-money-for-education/?sh=2cbc2d4e2814>.

actions, some debtors have still seen their tax refunds seized.⁸⁷ Others, especially low-income debtors, have fallen even further behind on their student loan payments, prompting many research institutions to urge the federal government to take action.⁸⁸

If there is truly to be an unprecedented volume increase of bankruptcy filings in a country where as many as one-third of adults 18 to 29 have student loan debt,⁸⁹ uncertainty on whether or not their student loans are dischargeable simply will not be a functional option. First, there will be people that are advantaged or disadvantaged based on which judge hears their case. Second, there will be discrepancies between jurisdictions that could be unexplainable. Finally, and perhaps most significantly, the courts will simply not be able to manage the influx of proceedings, which could cause an unprecedented backup in the bankruptcy courts.

V. CONCLUSION

The history of student loan debt discharge in the United States has been discussed in the inner circles of the bankruptcy law community for decades. Over time, courts have established an enormously high burden to have one's student loan debt discharged should that individual file for bankruptcy. Many, like Judge Morris of New York contend the high burden is beyond the scope of the language provided by the court in *Brunner* and – in 2020 where so many Americans are crushed by student loans – must be reevaluated to more properly fit today's landscape. Others contend the issue is not the burden placed on proving dischargeability but that the system is too inefficient, bureaucratic, and difficult to navigate for the average person and thus, not enough debtors even try to have their loans discharged. In forming a solution,

⁸⁷ Annie Nova, *They were struggling to prepay their student loans before the pandemic. Now it'll get worse*, CNBC (Jun. 27, 2020) <https://www.cnbc.com/2020/06/27/how-covid-19-has-made-the-student-loan-crisis-even-worse.html>

⁸⁸ Jabbari, Kondratjeva, Despard, and Grinstein-Weiss, *supra* note 80; see also Michael Calhoun and Ashley Harrington, *The next COVID-19 relief bill must include student debt cancellation*, BROOKINGS (Jun. 3, 2020) <https://www.brookings.edu/research/the-next-covid-19-relief-bill-must-include-student-debt-cancellation/>.

⁸⁹ Anthony Cilluffo, *5 facts about student loans*, PEW RES. CTR. (Aug. 13, 2019) <https://www.pewresearch.org/fact-tank/2019/08/13/facts-about-student-loans/>

members of both political parties agree that something must be done, even though there are differing ideas as to how that solution manifests. Nonetheless, the need for reform is abundantly clear. As the United States faces what could be its most significant economic recession since the Great Depression in the wake of COVID-19, the student loan crisis cannot go unaddressed and leave borrowers with uncertainty as to whether one qualifies for relief. Whether a governing body chooses to affirm the high standard or make it more approachable, the urgency for action has never been higher.