
# Consumer Practice Extravaganza

## Judges' Session: Circuits 1, 2, 3, 4, 6, 11

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U.S. Bankruptcy Court (E.D. Tenn.)
Knoxville

**Hon. Paul M. Black**
U.S. Bankruptcy Judge (W.D. Va.)
Roanoke

**Hon. Paul W. Bonapfel**
U.S. Bankruptcy Court (N.D. Ga.)
Atlanta

**Hon. Heather Z. Cooper**
U.S. Bankruptcy Court (D. Vt.)
Rutland

**Hon. Elizabeth L. Gunn**
U.S. Bankruptcy Court (D. D.C.)
Washington

**Hon. Benjamin A. Kahn**
U.S. Bankruptcy Judge (W.D.N.C.)
Greensboro

**Hon. Elizabeth D. Katz**
U.S. Bankruptcy Court (D. Mass.)
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**Hon. Brian F. Kenney**
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**Hon. Jil Mazer-Marino**
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**Hon. Jerry C. Oldshue, Jr.**
U.S. Bankruptcy Court (S.D. Ala.)
Mobile

**Hon. Patrick G. Radel**
U.S. Bankruptcy Court (N.D.N.Y.)
Utica

**Hon. Gregory R. Schaaf**
U.S. Bankruptcy Court (E.D. Ky.)
Lexington

**Hon. David M. Warren**
U.S. Bankruptcy Court (E.D.N.C.)
Raleigh

2023

**NEW STANDARD FOR AGREED HARDSHIP DISCHAGE**

**OF CERTAIN FEDERAL STUDENT LOANS**

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## I. INTRODUCTION

In Nov. 2022, the United States Department of Justice (DOJ) in coordination with the Department of Education (DOE) issued new guidance and procedures designed to help more bankruptcy debtors achieve a hardship discharge of student loans.

This is not a statutory change in the law, nor is it a change in the current standards set forth in case law. Rather, this is a policy change that means instead of opposing every student loan hardship complaint filed, the DOJ attorneys have been instructed to agree to the hardship discharge as a settlement if certain conditions are met.

Currently, under Bankruptcy Code section 523(a)(8) student loan debt is excluded from discharge unless "excepting such debt from discharge would impose an undue hardship on the debtor." Section 523(a)(8) covers

> **(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;
>
> 11 USC. § 523 (a)(8)

In the Fourth Circuit, the *Brunner* standard remains the legal standard applied to hardship discharge of qualified student loans in litigated or contested cases. Under *Brunner*, a debtor must show:

[1] As of the date these materials are being finalized, the author has four pending cases in the W.D. of Virginia. DOJ/DOE has agreed to discharge loans in two of the cases and orders are forthcoming, and she is waiting on the final recommendation from DOJ/DOE in the remaining cases. She has multiple other cases being prepared to be filed. Her firm has reviewed almost a hundred files for eligibility and either clients are waiting on the present forgiveness plan or the timing is not quite right for a complaint. There are eight pending cases in the W.D. of Virginia filed since the new Guidance was announced and none have orders entered to date. In the E.D. of Virginia, there appear to be eight cases filed since the new Guidance was announced and hardship discharges have been entered as settlements in three of those and in one case that was pending when the Guidance was announced.

> (a) that he debtor cannot maintain, based on current income and expenses, a "minimal" stand of living for herself and her defendants if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.
>
> *Brunner v. New York Higher Education Services Corp.*, 831 F. 2d 395 at 396, (2nd Cir. 1987), adopted by *Educ. Credit Mgmt. Corp. v. Frushour,* 433 F. 2d 393, 401 (4th Circ. 2005).

The *Brunner* standard, combined with the existence of income based repayment plans for federal loans, has made litigating student loan cases mostly a losing battle for debtor's attorneys.[2] A recent exception to that is the case of *Bell v. U.S. Department of Education*, 633 B.R. 164 (Bankr. W.D. Va. 2021) in which Judge Rebecca Connelly granted a hardship discharge to the pro se debtor although he likely could have had a payment of $0.00 under an income based repayment plan. The opinion includes an excellent analysis of the history of the statute and the standards as applied by the courts, and what "undue hardship" really means. A copy of the opinion is attached as an exhibit to these materials and any attorney considering filing hardship discharge cases should read it. (Exhibit D)

Although the DOE's new guidance is designed to eliminate the hurdles presented by the current legal standards, the guidance is new and the results are yet unproven as these materials are being compiled. As of the compilation of these materials, the author is only aware of a few cases in Virginia in which the DOJ/DOE has agreed to the discharge. That does not mean DOJ/DOE has objected to any discharges pursued under the Guidance, simply that we are early in the process. For cases in which hardship discharges have been granted, one of those cases was pending when the new guidance was announced. *Beruk v. U.D. Department of Education*, Case 22-01050 (Bankr. E.D. Va. Jan. 25, 2023). The other three cases as of April 1, 2023 in which discharges have been granted are in the Eastern District of Virginia and appear to have been handled rapidly. The *Bell* opinion referenced above is included as counsel filing a hardship discharge case must still understand the statutory requirement and your court's view of "undue

[2] *See Weaver v. Duncan*, 2015 Bankr. LEXIS 4253 (Bankr. Md. 2015)(Holding debtor did not prove hardship would exist for a significant portion of repayment period and she failed to review options such as income-based repayment plans.); *Perkins v. Pa. Higher Educ. Assistance Agency*, 318. B.R. 300 (Bankr. M.D. N.C. 2004) (Holding debtor failed to minimize expenses and loan was not discharged.); *Halatek v. William D. Ford Fed. Direct Loan Program*, 592 B.R. 86 (E.D. N.C. 2018) (Debtor denied hardship discharge as the Court ruled she can make payments if she reduces expenses.); *Liposky v. United States Dep't of Educ.*, 2010 Bankr. LEXIS 1036 (Bankr. E.D. Va. 2010) (Debtor failed to show could not maintain minimal stand of living.); *Menefee v. Tx. Guaranteed Student Loan Corp.*, 2018 Bankr. LEXIS 2830 (Bankr. E.D. Va. 2018)(Debtor failed to provide evidence of income or expenses, so could prove hardship.); *Augustin v. U.S. Dep't of Educ.*, 588 BR 141 (Bankr. MD 2018) (Debtor claimed too many household expenses and thus had income to use for repayment of loans.)

hardship" as you are counsel in the case whether the DOE/DOJ agrees to the discharge or not. Otherwise, you might actually need to litigate the case if settlement is not reached.

## II. NEW GUIDANCE

The new Guidance was announced via a memorandum to DOJ attorneys for adversary cases filed requesting hardship discharges on Nov. 17, 2022. See Exhibit A, Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation and Exhibit B, Debtor Example Scenario. Under the Guidance, the DOJ attorneys are advised to agree to discharge if three conditions are met:

(1) The debtor presently lacks an ability to repay the loan;

(2) the debtor's ability 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.

The Guidance advises the DOJ attorneys that the debtor will be asked to provide relevant information by completing an attestation form (Attestation). This Attestation reviews the debtor's income, expenses, family situation and past loan history and uses the IRS Collection Financial Standards to determine whether the debtor can repay the loans while maintaining a minimal standard of living. Think of it as a mini-Means Test with a chance to provide for greatly expanded Special Circumstances. See Exhibit C, Attestation (Jan. 2023 version).

The DOE has articulated that it has three goals in promulgating the new Guidance:

1. To set clear, transparent and consistent expectations for discharge that debtors understand regardless of representation;

2. To reduce debtors' burdens in pursuing an adversary proceeding by simplifying the fact-gathering process. This includes use of an Attestation, and where feasible, information provided through prior submissions to the bankruptcy court and available student loan servicing records;

3. Where the facts support it, to increase the number of cases where the government stipulates to facts demonstrating a debt would impose an undue hardship and recommends to the court that a debtor's student loans be discharged.

Guidance, Page 2.

This new Guidance only covers Direct Loans and other loans held by the Department of Education. It does not apply to private lenders and it does not apply to other federal

loans held by grantors at this time, such as FFEL or Perkins loans. There has been an indication by the parties which helped negotiate the agreement that DOE may issue similar guidance on the FFEL and Perkins loans, but to date that has not occurred. However, please note that prospective clients can consolidate FFEL or Perkins loans under a DOE Direct Consolidation Loan, which then brings the loan under the current DOE Guidance, with credit still being given for the prior loan arrangements since the liability first went into repayment.

The Guidance appears to be limited to cases that were pending on Nov. 17, 2022 or filed after that. Under the current Guidance, it appears you could not (or should not) reopen a Chapter 7 filed in June 2022 that was discharged in September 2022, as the case was not pending on Nov. 17, 2022. See Exhibit A, Guidance; Exhibit B, Debtor Example Scenario; Exhibit C, Attestation. How this "limitation" plays out will be seen in the future.

## III. GATHERING INFORMATION

### A. Client Interview

Gather initial information from the client regarding his or her loans, who holds the loans and his or her educational history. If a prospective client has student loans, counsel should review the student loans to determine if the new Guidance might apply as part of the initial consultation.

- When did the prospective client attend school?
- Where did the prospective client attend school?
- Did the prospective client graduate?
- What degree was the prospective client pursuing?
- Has the client been able to find employment within that field?
- If no, why not?
- What has the client's income been like since graduating?
- What other family factors impact the client's ability to make payments in the future? Be detailed in learning about the debtor's family and income situation.
- What has the client done to address the loan since graduating? Forbearances, income based repayment plans, etc.?

### B. Studentaid.gov

Retrieve the prospective debtor's National Student Loan Data System (NSLDS) file from Studentaid.gov. The NSLDS will provide the client's loan history and usually provide the information needed to help complete the attestation. The client must retrieve this

information personally as it is a violation of the law for counsel to retrieve it for the client. The "Download My Aid Data" button is found on the Aid Summary page.

**Practice Pointer:** I personally have found that the Student Aid website can also provide valuable information about how many forbearances the debtor has taken out, how much the debtor has paid on each loan, and other relevant information. But, I have found that it is most helpful to have the client personally come into my office to log in and retrieve the information with me standing over his or her shoulder. Even when I have provided detailed step by step instructions on how to retrieve the aid data and then email it to me, most clients have difficulty with that.

**Trouble Point:** I have found that loans which were recently consolidated have no history prior to the DOE consolidation loan. Otherwise, I cannot use the NSLDS data to help detail prior payment history, forbearances, or other payment arrangements. And, if the debtor's access to the prior loan servicer is gone, that hampers getting the official information prior to filing.

## IV. THE PROCESS

### A. The Complaint

Just like in any adversary proceeding, the process is initiated with the filing of a complaint after the Chapter 7 or Chapter 13 bankruptcy has been filed. The defendant will be the United States of America Department of Education and service of the complaint must be made under Fed. Bankr. Rule 7004(b)(5) which provides you must mail the complaint and the summons (issued by the Clerk's Office after the complaint is filed) to the US Attorney in Washington DC and to the civil process clerk at the office of the US Attorney in your district. I have also been sending a copy to the current Secretary of Education at the DOE.

I believe it is beneficial to include all the factual information possible and to craft the tale of hardship in the complaint. Based on my experience to date, it is clear the DOJ and DOE representatives are reading the complaints and evaluating the hardship allegations contained in the complaint upon the filing itself. And, should a settlement not be achieved, you must have alleged sufficient facts to withstand a Rule 12(b)(6) motion if prosecution of the complaint will continue.

**Practice Pointer:** I also believe it is helpful to start a draft of the Attestation at this time, to verify the numbers line up, and to identify supplemental information which may be important in the attestation, but may merit inclusion in the complaint also.

### B. US Attorney's Office – DOE Report

Upon filing of the complaint and notification of the filing, the US Attorney's Office will contact the Department of Education and order a litigation report which should provide a records of the debtor's account history, loan details, and if available, an educational history. The initial report submitted by DOE to the Assistant United States Attorney (AUSA) assigned the case should include data related to the presumptions and the debtor's efforts to repay the loan. AND, this information has to be shared with debtor's counsel. Debtor's counsel will then incorporate this information into the Attestation, with the report attached when the completed Attestation is submitted back to the AUSA

Given the time it will take to get the DOE report and then to complete the process, it is recommended that debtor's counsel and the AUSA coordinate extending the time to file an answer to allow the process time to be completed.

**Practice Pointer:** Upon filing the case, contact the local US Attorney's Office and find out who will be assigned the case. Most have one attorney handling all of these. In the W.D. of Virginia, there is one paralegal whom I simply contact to advise the case was filed and to request that she request the DOE information. Forging a good working relationship with the AUSA and the case paralegal will help all of these cases proceed smoothly.

**C. Completing the Attestation**

1. **Personal Information. Lines 1-9.** Simply complete this section fully and completely.

2. **Current Income and Expenses. Lines 10-17.** This section requests the debtor disclose all sources of income, including income from other members of the household. This section includes forms of income such as Social Security or VA benefits that might not otherwise be considered part of disposable income.

   The Guidance provides that if a bankruptcy were filed in the last 18 months, the income from Schedule I and can be used. But, the form really does not provide a box to check for that option. I've used No. 13 and specifically attached Schedule I noting it was based on the last 6 months or last 8 weeks prior to filing depending on the circumstances.

   Note that while some expenses track the Means Test/IRS Standards "loosely", the Attestation appears allows debtors to include actual rent, actual utilities and to provide total transportation costs. The Guidance says these should be within the local standards, but DOJ counsel can consider circumstances which allow for higher expenses. (This is especially important currently with the elevated rent and utility costs.)

   Finally, note that Line 15(d)(viii) and Question 17 provide the debtor an opportunity to argue about "Special Circumstances" and to lay out

expenses needed for basic needs which are not otherwise provided for or listed in the detailed list of expenses. Like a Schedule I and J, the goal here is to show no available income after completing Lines 16 and 17, if applicable. This should show no present ability to pay the student loan(s).

**Practice Pointer:** If the budget shows an ability to pay something back, but the debtor still cannot afford minimum payments, a partial discharge may be available. It does not appear the Guidance is an all or nothing result and the DOJ/DOE will look at options to provide some form of relief, given the strong push to assist debtors. See Guidance, Section E.

3. **Future Inability to Repay Student Loans. Lines 18-19.** If the debtor indicates that one or more of the following circumstances applies, there is a presumption the debtor's inability to repay will persist:

- Debtor is age 65 or older;
- Debtor has a disability or chronic injury impacting income potential
- Debtor has been unemployed for at least five of the last ten years
- Debtor has failed to obtain the degree for which the loan was procured; or
- Loan has been in payment status other than "in-school" for at least ten years.

The Guidance states that while the presumptions are rebuttable, that "will likely be uncommon."

Finally, the fact that the debtor does not meet one of the above factors does not preclude relief. Line 19 permits the debtor to describe other facts and circumstances about why the debtor's situation is unlikely to change going forward.

**Practice Pointer:** If using Line 19 as a basis of future inability to pay, facts supporting this assertion should be included in the complaint.

4. **Prior Efforts to Repay Loans. Lines 20-26.** This is the provision which requests the debtor to prove "good faith" in efforts to repay the loan, and lays out that "good faith" can be shown by a wide variety of options. It also specifically admonishes the DOJ attorneys to not "impose their own values on a debtor's life choices."

The Guidance provides that if the debtor has taken at least one of the following steps, and if there is no countervailing circumstances, then the steps (or perhaps one step) demonstrates good faith:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an IDRP plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with Education 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.

The information needed for this section, specifically Lines 21-25 will be difficult for most debtors to recall, especially if the loans are quite old. This is where the NSLDS and the DOE report can be helpful.

It is also critical to note and provide information about what efforts the debtor may have made, even if those efforts were unsuccessful. The Guidance acknowledges the substantial issues consumer have experienced with the IDRP enrollment, miscalculation of payments, and other information that may have hampered the debtor making successful arrangements. Basically, if the debtor tried to address the loan and can show that, the effort should count as good faith.

The Guidance provides AUSAs should not oppose discharge unless there was a "willful attempt to avoid repayment."

**Trouble Point:** I have found the DOE report and the NSLDS, and information from the studentaid.gov website to be helpful in completing the questions, but they do not always provide exactly the information requested. For example, I may know my client's loan has never been in default, I may know she or he has paid $5,782.00 toward the $9,999.00 loan, but I may not know exactly how many payments she has made and the exact amounts. (Question at Line 21.) For clients whose loans were taken out in the mid-2000s, many have no exact recollection of how many times they contacted DOE.

5. **Current Assets. Lines 7-31.** The debtor requesting a hardship discharge must disclose assets as requested on the Attestation. This is not schedules A/B and C with exemptions, but primarily covers real estate, automobiles, retirement accounts, business interests and tax refunds.

The Guidance does state that DOJ attorneys should "not give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor's well-being." The Guidance suggests it may be appropriate to suggest a debtor liquidate an asset that is "unnecessary to the debtor's and dependents' support and welfare," and states liquidating a primary residence or retirement account should be exceptionally rare.

**Practice Pointer:** The form is awkward for this section, as it does not provide enough space to accurately report the information. I've been modifying the form as necessary to add additional older cars, etc.

6. **Additional Circumstances. Lines 32.** This is an opportunity to either re-plead any special circumstances listed above, or to present any additional information which counsel believes is relevant to the debtor's request for hardship discharge.

7. **Endorsement.** Once the Attestation is drafted, have the debtor review it carefully and make any changes. Upon verification all information is correct, have the debtor endorse the Attestation. My AUSA has been allowing us to use electronic signatures on the Attestation, especially given the geographical distance of some clients.

**C. Completing the Attestation**

Upon completion of the Attestation, the debtor returns the Attestation with the DOE records back to the Assistant US Attorney handling the case. Note the Attestation Q. 4 requires the DOE student loan information and educational history to be attached to the Attestation. **The Attestation is not filed with the Court.** Upon review, the AUSA will then make a recommendation on settlement to DOE. If the settlement is approved, the debtor and DOJ counsel will submit a motion to approve settlement and an order which sets forth the debtor's student loans are discharged in full or partially.

Resources with information or programs available about the new Guidance:

www.nclc.org (National Consumer Law Center)

www.nacba.org (National Association of Consumer Bankruptcy Attorneys)

www.abi.org (American Bankruptcy Institute)

www.considerchapter13.org (The NACTT Academy)

Exhibit A

November 17, 2022

**GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN BANKRUPTCY LITIGATION**

## I. Introduction

This memorandum provides guidance (Guidance) to Department of Justice (Department) attorneys regarding requests to discharge student loans in bankruptcy cases. Developed in coordination with the Department of Education (Education), this Guidance will enhance consistency and equity in the handling of these cases. 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: (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.

To assist the Department attorney in evaluating each of these factors, a debtor will typically be asked to provide relevant information to the government by completing an attestation form (Attestation). The Attestation requests information about the debtor's income and expenses to enable the Department attorney to evaluate the debtor's present ability to pay. The Attestation also seeks information that will help the Department attorney evaluate the other two factors. In the following sections, this Guidance provides more detail about the Attestation that a debtor will be asked to complete, and how the information provided in the Attestation will be considered by the Department attorney. In Appendix A, this Guidance provides a sample attestation form. In addition, in Appendix B, this Guidance provides a concrete example of how a debtor's request for discharge of a student loan will be evaluated.

## II. Objectives of the Guidance and Education's Role in Supporting Discharge Cases

In cases where a debtor seeks the discharge of a student loan in bankruptcy, the Department shares with Education the responsibility to represent the interests of the United States in accord with existing law and in the interests of justice. This responsibility includes recommending that a bankruptcy court grant full or partial discharge of student loan debts in appropriate cases. To fulfill that responsibility, Department attorneys should stipulate to facts necessary to demonstrate undue hardship and recommend discharge where the debtor provides information in the Attestation (or otherwise during the adversary proceeding) that satisfies the elements of the analysis below. Some debtors have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and due to the mistaken belief that student loans are ineligible for discharge. Other student loan borrowers have been dissuaded from seeking relief due to the cost and intrusiveness entailed in pursuing an

adversary proceeding. This Guidance is intended to redress these concerns so that discharges are sought and received when warranted by the facts and law. In addition, Department attorneys are expected to consult proactively with Education to evaluate the specific circumstances of each case.

In collaborating in the preparation of this Guidance, the Department and Education have sought to promote three goals in particular:

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

Education is committed to supporting Department attorneys handling these cases. Department attorneys should expect that, for each adversary proceeding, Education will provide to the Department attorney a record of the debtor's account history, loan details, and—where available—educational history, which the Department attorney will share with the debtor. This information will be provided with the Education litigation report.

The Department attorney is expected to consult with Education in each case; consultation includes sharing the completed Attestation and conferring on an appropriate course of action. In its initial litigation report, Education will advise on matters including whether it has data relating to the presumptions in this Guidance regarding assessment of future circumstances and whether it considers the debtor made good faith efforts to repay their student loans. This process will ensure the final decision is informed by Education's experience administering student loans and its role as creditor. Once the Department attorney reaches a recommendation in accordance with this Guidance, the Department attorney shall submit their recommendation or approval, as appropriate, along with Education's recommendation, under the standard procedures applicable in that attorney's component.

## III. Applicable Law

Under Section 523(a)(8) of the Bankruptcy Code, certain student loans may not be discharged in bankruptcy unless the bankruptcy court determines that payment of the loan "would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 278 (2010) ("the bankruptcy court must make an independent determination of undue hardship . . . even if the creditor fails to object or appear in the adversary proceeding.").[1] This inquiry is undertaken through a formal adversary proceeding in the bankruptcy court. *United Student Aid Funds*, 559 U.S. at 263-64; Fed. R. Bankr. P. 7001(6). The parties in that proceeding may stipulate to the existence of certain facts and recommend that the bankruptcy court find, based on such facts, that repayment of the student loan would cause the debtor an undue hardship.

The most common framework for assessing undue hardship is the so-called *Brunner* test, emanating from *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that (1) the debtor cannot presently maintain a minimal standard of living if required to repay the student loan, (2) circumstances exist that indicate the debtor's financial situation is likely to persist into the future for a significant portion of the loan repayment period, and (3) the debtor has made good faith efforts in the past to repay the student loan. *Id.* at 396.

Other courts have employed a "totality of circumstances" test (Totality Test) to determine whether repayment of student loan debt would cause an undue hardship. *See, e.g.*, *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). The Totality Test looks to: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and their dependents' reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *Id.*

This Guidance applies in both *Brunner* and Totality Test jurisdictions. Courts have recognized the *Brunner* and Totality Tests "consider similar information—the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment." *In re Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *see also In re Jesperson*, 571

[1] Section 523(a)(8) requires the debtor to demonstrate an undue hardship to discharge nearly all federal student loans, excluding Health Education Assistance Loans, as well as private education loans that meet the definition of qualified education loans under the Internal Revenue Code. *See* 26 U.S.C. § 221(d)(1).

F.3d 775, 779 (8th Cir. 2009).[2] Both tests require assessment of the debtor's income and reasonable expenses to determine whether the debtor has the present and future ability to maintain a "minimal standard of living" while making student loan payments. *See, e.g.*, *In re Hurst*, 553 B.R. 133, 137 (B.A.P. 8th Cir. 2017) ("[I]f the debtor's reasonable financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged.") (citing *In re Jesperson*, 571 F.3d at 779). Finally, both tests direct the court to review the debtor's past efforts at repayment. *In re Polleys*, 356 F.3d at 1309; *see also In re Bronsdon,* 435 B.R. 791, 797 (B.A.P. 1st Cir. 2010).

## IV. Discussion of the Applicable Factors

As explained above, consideration of student loan debt discharge requires an evaluation of a debtor's present, future, and past financial circumstances. This Guidance offers a framework for Department attorneys to apply each of these factors.

With respect to the first factor, the Guidance relies upon the Internal Revenue Service Collection Financial Standards (the IRS Standards) to assess whether a debtor can presently maintain a "minimal standard of living" if required to repay student loan debt. In particular, the Department attorney is advised to use the IRS Standards to evaluate a debtor's expenses, and then to compare those expenses to the debtor's income, to determine whether the debtor has a present ability to pay the loan.

With respect to the second factor, the Guidance uses presumptions for determining whether inability to repay is likely to persist in the future. The Guidance recognizes, however, that even in the absence of such presumptions a debtor may be able to establish that their inability to pay will continue in the future.

With respect to the third factor, the Guidance identifies certain objective criteria that evidence a borrower's good faith. In addition, the Guidance discusses how to evaluate a debtor's

[2] The Eighth Circuit has described the Totality Test as "less restrictive" than the *Brunner* framework, *In re Long*, 322 F.3d at 554, but it has also recognized that the distinction between the standards "may not be that significant." *Jesperson*, 571 F.3d at 779 n.1, 782. *See, e.g.*, *In re Long,* 322 F.3d at 554-55 ("Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor's present employment and financial situation—including assets, expenses, and earnings—along with the prospect of future changes—positive or adverse—in the debtor's financial position"); *see also Jesperson*, 571 F.3d at 782 (the totality approach also requires consideration of "evidence of a less than good faith effort to repay . . . student loan debts"). The Guidance does not supersede applicable case law in the circuits. Department attorneys should advance the principles and goals described in this Guidance consistent with that case law.

payment history and decision to participate in an income-driven repayment plan, and clarifies that neither of these factors are dispositive evidence where other evidence of good faith exists.

Finally, the Guidance also provides direction to Department attorneys regarding the treatment of a debtor's assets and the availability of partial discharge.

The Attestation provided with this Guidance will assist in the assembly of the information needed to assess these factors.[3] Department attorneys are expected to review completed Attestations in consultation with Education.

### A. Assessment of Present Circumstances

The first factor relevant to whether a student loan debtor can meet the statutory undue hardship standard requires the debtor to prove an inability to presently maintain "a minimal standard of living" while making student loan payments. To address this factor, the Department attorney should complete two steps. First, the Department attorney should use the IRS Standards to determine the debtor's "allowable" expenses. Second, the attorney should compare those allowable expenses to the debtor's income to determine whether the debtor has income after expenses with which to make student loan payments. If the debtor's allowable expenses exceed their gross income, this element of the analysis is satisfied. If the debtor's financial circumstances changed since filing the initial bankruptcy petition, the Department attorney can look to the debtor's actual financial circumstances when making an undue hardship determination. *Cf. In re Walker* 650 F.3d 1227, 1232 (8th Cir. 2011).

#### *1. Assessment of the Debtor's Expenses*

The Attestation solicits expense information from debtors in categories corresponding to the IRS Standards, particularly the portions of the IRS Standards described as "National and Local Standards" and "Other Necessary Expenses."[4] The IRS Standards are a useful guide to assess a debtor's expenses for purposes of the "minimal standard of living" inquiry. Use of these standards will ensure more consistent and equitable treatment of debtors seeking discharge. The IRS has established and updated the IRS Standards to determine appropriate collection actions where taxpayers have outstanding unpaid tax obligations. The IRS Standards evaluate what

[3] As discussed in more detail below, the Attestation requires a debtor to present information relevant to the Department attorney's analysis in an efficient, organized manner. If the debtor's satisfaction of the requirements for discharge are clearly demonstrated by the complaint or other facts available outside the Attestation, then upon verification of those facts, a Department attorney may recommend discharge without requiring that the debtor complete the Attestation.

[4] Links to the IRS Standards are found at https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards.

expenses are "necessary to provide for a taxpayer's health and welfare[,]"[5] or, as described in the IRS Collection Manual, "the *minimum* a taxpayer and family needs to live."[6] Courts have recognized the IRS Standards as useful objective criteria in assessing "undue hardship" under Section 523(a)(8). *See, e.g.*, *In re O'Hearn*, 339 F.3d 559, 565 (7th Cir. 2003); *In re Cota*, 298 B.R. 408, 415 (Bankr. D. Ariz. 2003). The IRS Standards list certain expenses (the National and Local Standards) for which they provide a recommended maximum allowance, but also recognize other potential expenses (Other Necessary Expenses) that are potentially necessary for an individual's health and welfare.

*Allowance of Expenses in National Standard Categories:* The IRS National Standards consist of tables of allowable expense amounts in the following categories: food; housekeeping supplies; apparel and services; personal care products and services; and miscellaneous. Where the debtor's expenses are below the amount allowed under the IRS National Standards, no further inquiry into the debtor's actual expense amount is needed and the debtor is allowed the full National Standards amount. If a debtor's reported expenses exceed the IRS National Standard amount, a debtor's reasonable explanation for why particular actual expenses exceed the standard should be considered carefully by the Department attorney, in consultation with Education, and may be accepted if allowing the additional expenses is warranted by the debtor's circumstances and would comport with a "minimal standard of living."[7]

*Allowance of Expenses in Local Standards Categories:* The Local Standards provide expense standards for the categories of housing, utilities, and transportation. Unlike the expenses in the National Standards category, for the Local Standards categories, the Department attorney should limit the debtor to their *actual* expenses. To the extent such expenses do not exceed the amount prescribed in the Local Standards for the debtor's location and household size, Department attorneys should consider the debtor's actual expenses in these categories to be consistent with a minimal standard of living and treat such amount as allowed. If the debtor's actual expense exceeds the Local Standards amount, Department attorneys should generally limit the debtor's allowable expense to the standard amount. However, as with those expenses categorized as National Standards expenses, the Department attorney should, in consultation

[5] IRS, *Collection Financial Standards*, https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards.

[6] IRS, Internal Revenue Manual: Part 5.15.1.8 (July 24, 2019), https://www.irs.gov/irm/part5/irm_05-015-001#idm139862108264304 (emphasis added).

[7] The decision whether to allow expenses in excess of the National and Local Standards will necessarily be fact-intensive, but allowable excess expenses could, for example, include specific health-related costs, costs for special dietary needs, unique commuting requirements, or other needs of the debtor or dependents.

with Education, carefully consider and accept a debtor's reasonable explanation for the need for the additional expenses.

*Allowance of Other Necessary Expenses:* The IRS Standards recognize "Other Necessary Expenses" in addition to the National and Local Standards expenses. The Attestation requests that debtors list expenses in these "Other Necessary Expense" categories. For example, the IRS Standards allow expenses for alimony and child support payments if they are court-ordered and actually being paid, as well as for baby-sitting, day care, nursery and preschool costs where reasonable and necessary. These Other Necessary Expenses are consistent with a "minimal standard of living," so long as they are necessary and reasonable in amount.[8]

*Allowance for Reasonable Expenses Not Incurred:* In addition to the comparison of expenses and income described above, Department attorneys should also recognize there may be circumstances in which a debtor's actual expenditures fall below the expenses required to maintain a minimal standard of living and to meet basic needs. For example, a debtor may be living in housing that the debtor is not paying for (e.g., the debtor is staying with a family member) or living in substandard or overcrowded housing but should not be required to remain there indefinitely. Likewise, a debtor may be forgoing spending on childcare, dependent care, technology, or healthcare that would otherwise be expenses one would reasonably expect to maintain a minimal living standard. A simple comparison of present expenses and income could unduly assess the debtor's financial situation against a standard that is below a minimal standard of living. In such circumstances, it would be inappropriate to conclude a debtor possesses income with which to make student loan payments and ignore the debtor's actual living standard. To address these situations, the Attestation provides an opportunity for a debtor to identify and explain expenses the debtor would incur if able to address needs that are unmet or insufficiently provided for. The Department attorney should use those projected expenses in assessing the debtor's present and future financial circumstances. Unless the amount of the projected expenses exceeds the Local Standards, it is not necessary to probe the debtor's calculation.

Appendix B includes specific examples of the recommended analysis of expenses.[9]

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[8] The Department attorney may consult the IRS Standards themselves to assist in determining whether these expenses are necessary to a debtor's minimal standard of living.

[9] The Attestation process is intended to be distinct from the bankruptcy "means test," which is used to determine a debtor's eligibility for Chapter 7 relief. Although the means test also uses the IRS Standards as part of its calculation of a debtor's household disposable income for the purpose of establishing bankruptcy eligibility, courts have recognized that the means test is not a test of a "minimal standard of living." *See In re Miller*, 409 B.R. 299, 319–320 (Bankr. E.D. Pa. 2009) (means test not appropriate to determine whether the "undue hardship" standard is met) (citing *In re Savage*, 311 B.R. 835, 840 n.7 (1st Cir. B.A.P. 2004). Moreover, the means test calculation differs from the Attestation in specific ways, including that (1) the means test (unlike

2. *Comparison of Expenses with the Debtor's Gross Income*

After determining the debtor's allowable household expenses using the National and Local Standards and Other Necessary Expenses, the Department attorney should compare the debtor's expenses to the debtor's household gross income. Gross income includes income from employment of the debtor and other household members, as well as unemployment benefits, Social Security benefits and other income sources. Debtors normally provide this information in the Schedule I filing. Where debtors filed this form less than 18 months prior to the adversary proceeding, the debtor may use the information on Schedule I to complete the Attestation. Where Schedule I was filed more than 18 months prior to the adversary proceeding or the debtor's circumstances have changed, the Attestation directs the debtor to provide the new income information.

Using the expense and income information provided in the Attestation, the Department attorney should determine whether the debtor possesses income with which to make student loan payments. If the debtor's allowable expenses exceed the debtor's 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 additional factors below. If, however, after considering the analysis described above, the debtor has sufficient discretionary income to make full student loan payments as required under their loan agreement, the debtor has not satisfied the test for undue hardship.[10] Where a debtor's income allows for payment toward the student loan debt but in an amount insufficient to cover the required monthly student loan payment, the Department attorney

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the Attestation) is required only for "consumer" debtors whose income exceeds a state "median," and (2) in practice, the means test often allows expenses regardless of their necessity to the debtor's basic or minimal standard of living, such as payments on multiple vehicles or for real property other than the debtor's residence.

[10] Department attorneys are expected to consult with Education to determine the monthly repayment amount. Generally, where permitted in a given jurisdiction, the Department attorney should use the monthly payment amount due under a "standard" repayment plan for the student loan in question when determining whether the debtor has the ability to make payments. The standard repayment amount is the payment amount required to pay the student loan within the remaining term of the loan, as determined by Education. *See* 34 C.F.R. § 685.208. Where the account includes unpaid interest, Department attorneys should take care to ensure that the monthly payment amount would be sufficient to pay the loan obligation in full. Except as required by controlling law, the Department attorney should not use the monthly payment amount available through income-driven repayment plan options as the comparator. Finally, where a student loan has been accelerated, whether based on a debtor's payment default or otherwise, the Department attorney should, following consultation with Education, determine the standard repayment amount either prior to default or as calculated if the loan were removed from default status.

should consider the potential for a partial discharge (discussed more fully in Section IV.E. below).

### B. Assessment of Future Circumstances

The second factor for discharge is whether the debtor's current inability to repay the debt while maintaining a minimal standard of living will likely persist for a significant portion of the repayment period. This showing is required in both *Brunner* Test and Totality Test jurisdictions. *See In re Thomas,* 931 F.3d 449, 452 (5th Cir. 2019); *In re Long*, 322 F.3d at 554.

A presumption that a debtor's inability to repay debt will persist is to be applied in certain circumstances, including: (1) the debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential;[11] (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.[12] The Attestation is designed to identify any such circumstances, and it advises the debtor to disclose all of the circumstances applicable to their situation and not rely exclusively on a single presumptive basis for claiming a continuing inability to repay.

The presumptions identified in this Guidance are rebuttable. Although circumstances supporting rebuttal of a presumption will likely be uncommon, the Department attorney need not apply a particular presumption if the debtor's attestation nonetheless indicates a likely future ability to pay. Such a rebuttal must be based on concrete factual circumstances. Mere conjecture about the borrower's future ability is not enough. For example, the presumption in favor of a

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[11] The debtor may, but is not required to, submit information from a treating physician indicating that the debtor suffers from a disability or chronic injury impacting their income potential, and when provided, that information should be considered carefully. The presumption may be applied even in the absence of a formal medical opinion.

Education offers Total and Permanent Disability (TPD) discharge for qualifying borrowers with certain severe disabilities. Because TPD discharge has its own requirements, the existence of that potential administrative relief generally should not foreclose the debtor from showing a future inability to pay. If, in the view of the Department attorney, the debtor may qualify for TPD discharge, the attorney can provide information to the debtor about the program. Finally, Education's denial of a TPD discharge request is not dispositive of the future circumstances analysis: a prior denial for TPD discharge only implies that Education determined the borrower is likely to have some ability to earn income at the time of the application based on the information provided and evaluation criteria in place, but does not otherwise suggest that the debtor's income is sufficient to service student loan debt or that future circumstances are likely to change.

[12] In the case of consolidation loans, the length of time the debtor has been in repayment includes periods in repayment on the original underlying loans.

debtor who failed to obtain a degree may be rebutted by evidence that the debtor has received employment offers with salaries significantly higher than their current income. In sum, a presumption may be rebutted by evidence that a debtor's future financial circumstances render them able to pay their outstanding debt.

The presumptions identified above are not the sole bases upon which a future inability to pay may be found. 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. A Department attorney may find, for example, that a debtor's financial circumstances are unlikely to improve in the future where the debtor has a significant history of unemployment, even if the debtor's unemployment does not meet the criteria for a presumption. A stipulation may also be appropriate, even absent a particular presumption, where the institution that granted the debtor's degree has closed, and that closure has inhibited a debtor's future earning capacity.[13] Education has indicated that closure of a school after completion of the debtor's degree may affect a debtor's future ability to pay where the debtor incurs reputational harm from such closure or where the debtor's lack of access to records hampers employment efforts.[14]

### C. Assessment of Good Faith

Whether a debtor has demonstrated good faith with regard to repayment of student loan debt depends upon the debtor's actions relative to their loan obligation.[15] Good faith may be demonstrated in numerous ways and the good faith inquiry "should not be used as a means for courts" or Department attorneys "to impose their own values on a debtor's life choices." *Polleys*, 356 F.3d at 1310. A debt should not be discharged if the debtor has "willfully contrive[d] a hardship in order to discharge student loans," *id.*, abused the student loan system, *In re Coco*, 335 Fed. App'x 224, 228-29 (3rd Cir. 2009), for example, by committing fraud in connection with obtaining the loans, or otherwise demonstrated a lack of interest in repaying the debt, *id*.

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[13] Education offers a loan discharge for students attending a school that closed while the borrower was in attendance or shortly after withdrawal. As with a TPD discharge, the availability of this administrative relief should have limited influence on the analysis discussed in this Guidance. Debtors may not receive the "closed-school" discharge for a range of reasons that do not implicate their financial status.

[14] The presumptions discussed in this Guidance are intended to direct a Department attorney's assessment of the debtor's situation and do not shift any burden of proof in undue hardship litigation. Before the court in the adversary proceeding, the debtor retains the burden of proof on all elements of the undue hardship claim.

[15] In discussing good faith, this Guidance intends to encompass satisfaction of both Prong Three of the *Brunner* test and good faith as considered under the Totality Test in evaluating the debtor's past efforts at repayment.

Where the debtor has taken at least one of the following steps and in the absence of countervailing circumstances as discussed below, the steps demonstrate good faith. We would normally expect the Department attorney to be able to determine the presence of any countervailing circumstances based on the information contained in the Attestation and provided by Education or that is publicly available.

*Evidence of good faith:* The following steps evidence good faith:

- making a payment;
- applying for a deferment or forbearance (other than in-school or grace period deferments);
- applying for an IDRP plan;
- applying for a federal consolidation loan;
- responding to outreach from a servicer or collector;
- engaging meaningfully with Education 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.

The good faith standard also assesses criteria such as "the debtor's efforts to obtain employment, maximize income and minimize expenses." *In re Mosko*, 515 F.3d 319, 324 (4th Cir. 2008) (citing *In re O'Hearn*, 339 F.3d at 564); *see, e.g.*, *In re Jesperson,* 571 F.3d at 780. A debtor's handling of finances in a manner that suggests responsible management of their debts, including student loan debts, also suggests good faith. A debtor has minimized expenses if their expenses fall within the IRS Standards as discussed in this Guidance.[16] Good faith can be satisfied where debtors' personal or family obligations significantly reduce their employment opportunities or increase their expenses." Issues concerning employment, income, and expenses are case-specific and may be highly dependent on a debtor's family, community, and individual circumstances. Debtors may provide an explanation of those circumstances, and the Department attorney should weigh the explanation in consultation with Education.

*Actual payment history and IDRP enrollment:* Department attorneys should consider the following two issues that frequently arise and deserve additional attention: a debtor's actual payment history and a debtor's enrollment or non-enrollment in an IDRP. Department of Education studies have shown that the servicing of student loan debt has been plagued at times

[16] By contrast, a debtor whose expenses exceed the IRS Standards should not be foreclosed from showing they have minimized expenses, and the Department attorney and Education should carefully assess any explanations debtors may provide for exceeding the standard expenses.

by administrative errors and dissemination of confusing and inaccurate information, and that these issues may have affected debtors' responses to their loan obligations. In addition, the Consumer Financial Protection Bureau has found that debtors have been wrongfully denied IDRP enrollment and that monthly payments have been inaccurately calculated. *See* Consumer Financial Protection Bureau, *Supervisory Highlights* Fall 2022, Summer 2021, and Fall. The Bureau has also found that servicers falsely but affirmatively represented to borrowers that loans were never dischargeable in bankruptcy. *See* Consumer Financial Protection Bureau, *Supervisory Highlights*, Fall 2014 & Fall 2015. These problems have also given rise to a lack of trust by debtors in the repayment process. As a result, the good faith inquiry should not disqualify debtors who may not have meaningfully engaged with the repayment process due to possible misinformation, wrongful IDRP determinations, or a lack of adequate information or guidance. When considering a debtor's attempts to engage with their student loan, attorneys should look at the entire life of the loan rather than merely considering the recent history.

Department attorneys should consider payment history within the broader context of the debtor's financial means and personal circumstances. Where other evidence of good faith exists, including evidence that the debtor lacked financial means to pay or that the debtor made meaningful contact with Education or the servicer to explore repayment options, the failure to repay (or inconsistent or limited repayment) does not indicate a lack of good faith. In some circumstances, the Department of Education may not have records or have incomplete records about a debtor. The absence of ED data should not reduce the weight of the borrower's evidence.[17]

Department attorneys should also exercise caution in assessing IDRP enrollment. IDRPs are intended to provide a means through which debtors may respond to difficult financial circumstances, and the model Attestation asks a debtor to identify if they enrolled in an IDRP and to offer an explanation if they did not. Where a debtor participated in an IDRP, this factor is evidence of good faith.[18]

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[17] Between March 2020 and December 2022, borrowers were placed into an automatic COVID-related forbearance. The vast majority of borrowers remained in that forbearance for the duration of the period because it included a zero percent interest rate and eligibility toward IDRP and PSLF forgiveness. Due to this extended period, many debtors may not have taken any action toward their loans. This period of inactivity is not evidence of bad faith and actions taken prior to March 2020 should not be discounted because they are not recent.

[18] *See, e.g.*, *In re Tingling*, 990 F.3d 304, 309 (2d Cir 2021); *In re Krieger*, 713 F.3d 882, 884 (7th Cir. 2013); *In re Coco*, 2009 WL 1426757, at *228–229; *In re Mosko*, 515 F.3d at 323; *In re Barrett*, 487 F.3d 353, 363-64 (6th Cir. 2007); *In re Mosley*, 494 F.3d 1320, 1327 (11th Cir. 2007); *In re Jesperson*, 571 F.3d at 782-83; *In re Nys*, 446 F.3d 938, 947 (9th Cir. 2007); *In re Alderete*, 412 F.3d 1200, 1206 (10th Cir. 2005); *In re Bronsdon*, 435 B.R. at 802.

However, where a debtor has not enrolled in an IDRP, the Department attorney should give significant weight to the fact that, as noted, Education has found widespread problems with IDRP servicing. In particular, Education has advised that IDRPs have not always been administered in ways that have been effective for, or accessible to, student loan debtors. In some cases, borrowers may not have been aware of their IDRP options. At times, servicers failed to inform borrowers about these options in favor of other repayment plans or nonpayment options like forbearance. Likewise, many schools have failed to advise prospective borrowers about IDRPs, despite being legally obligated to do so. *See* 20 U.S.C. § 1092(d). Thus, non-enrollment alone does not show a lack of good faith.

Where a debtor did not enroll in an IDRP, the Department attorney is expected to look first to the debtor's Attestation response and to accept any reasonable explanation or evidence supporting the debtor's non-enrollment in an IDRP. Acceptable explanations or evidence could include, for example:

- that the debtor was denied access to, or diverted or discouraged from using, an IDRP, and instead relied on an option like forbearance or deferment;
- that the debtor was provided inaccurate, incomprehensible, or incomplete information about the merits of an IDRP;
- that the debtor had a plausible belief that an IDRP would not have meaningfully improved their financial situation;
- that the debtor was unaware, after reasonable engagement, of the option of an IDRP and its benefits; or
- where permitted under controlling case law, that the debtor was concerned with the potential tax consequences of loan forgiveness at the conclusion of an IDRP.

Where these explanations are based in part on contact or attempted contact with Education, servicers, or trusted third parties, they evidence good faith.

If a debtor provides an explanation that lacks sufficient detail or is not otherwise acceptable (or fails to provide any explanation), the debtor may still demonstrate good faith through other actions such as making payments, responding to outreach from a servicer or collector, enrolling in deferment or forbearance, making contact with Education or their servicer about their loan, or otherwise taking professional or financial steps that indicate a good-faith attempt to meet their loan obligations. In sum, we would expect Department attorneys not to oppose 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.

### D. Consideration of a Debtor's Assets

A debtor's assets must also be considered in the undue hardship analysis. Department attorneys, however, should not give dispositive weight to the existence of assets that are not easily converted to cash or are otherwise critical to the debtor's well-being, and should be cautious in concluding that the existence of real property or other financial assets demonstrates a lack of undue hardship.[19]

The Attestation facilitates this inquiry by seeking information regarding the debtor's assets. It may be appropriate to suggest that a debtor consider liquidating an asset where the asset is unnecessary to the debtor's and dependents' support and welfare. Residential real property and funds in retirement accounts are often exempt from collection under federal or state exemption laws. Although the exempt status of property may not be dispositive of whether that property is necessary for a minimal standard of living, the Department attorney should be careful in considering such property in the undue hardship analysis. *In re Marcotte*, 455 B.R. 460, 471 (Bankr. D.S.C. 2011).[20] The Department recognizes that liquidating a primary residence or retirement account is an extreme measure and therefore requests to liquidate those assets should be exceptionally rare.

### E. Partial Discharge.

Where appropriate and permissible under governing case law, Department attorneys may recognize the availability of partial discharge. Partial discharge occurs where the bankruptcy

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[19] The debtors' assets may be liquidated by a bankruptcy trustee to fund payments to creditors of the estate. Such property, if liquidated by the trustee, would not be available for the payment of student loan debt and thus should not be considered.

[20] The question of how exempt property should be considered under the "undue hardship" analysis has generated disagreement among courts. Generally, courts find that "the exempt character of an asset does not necessarily preempt its relevance to a hardship evaluation." *In re Armesto*, 298 B.R. 45, 48 (Bankr. W.D.N.Y. 2003); *see also In re Nys*, 446 F.3d at 947 (recognizing courts must consider availability of assets "whether or not exempt, which could be used to pay the loan"); *In re Gleason*, 2017 Bankr. LEXIS 3455, at *14 (Bankr. N.D.N.Y. Oct. 6, 2017) (allowing consideration of IRA or 401K account, regardless of exemption status). Other courts, however, have noted the necessity to weigh the policies underlying certain exemptions, for example, the homestead exemption in the debtor's residence, before considering such assets in assessing undue hardship. *Schatz v. Access Grp., Inc. (In re Schatz)*, 602 B.R. 411, 427-28 (1st Cir. B.A.P. 2019) (reversing bankruptcy court's treatment of exempt equity in homestead as dispositive of a lack of undue hardship). Notably, the *Schatz* opinion states that the bankruptcy court failed to make any finding whether the equity in the debtor's home could be liquidated without imposing an undue hardship on the debtor. *Id.* at 428.

court discharges a portion of the outstanding student loan debt while requiring payment of the remainder.[21]

Department attorneys may consider recommending partial discharge based upon a determination that the debtor has the ability to make some payments on the loan while maintaining a minimal standard of living, but an inability to make the full standard monthly repayment due. A partial discharge should not result in a remaining (undischarged) balance larger than what a debtor's discretionary income (as determined under the Prong One analysis) permits them to pay off in monthly payments over the remaining loan term. In practice, a full discharge is appropriate for debtors whose expenses are equal to or greater than their income where they meet the other elements of the analysis. Partial discharge may also be available to a debtor who is able to liquidate assets to pay a portion of the debt but remains unable to pay the remainder while maintaining a minimal standard of living. *See In re Stevenson*, 463 B.R. 586, 598-99 (Bankr. D. Mass. 2011); *In re Clavell*, 611 B.R. 504, 531-32 (Bankr. S.D.N.Y. 2020).

## V. Procedures

Although the process for soliciting and reviewing the Attestation may vary from case to case, Department attorneys should generally observe the following procedures in soliciting Attestations.

### A. Submission of the Attestation

Upon a debtor's commencement of an adversary proceeding seeking discharge pursuant to 11 U.S.C. § 523(a)(8), the Department attorney should provide a debtor the opportunity to complete and submit the Attestation. The Department attorney is encouraged to contact the debtor or debtor's counsel as soon as practicable after service of process in an adversary

[21] Section 523(a)(8) is silent with respect to whether bankruptcy courts may discharge part of a student loan based on undue hardship. The concept, however, has been recognized by several courts of appeals. *See generally In re Miller*, 377 F.3d 616, 622 (6th Cir 2004); *In re Saxman*, 325 F.3d 1168, 1173-1174 (9th Cir. 2003); *In re Alderete*, 412 F.3d at 1207; *In re Cox*, 338 F.3d 1238, 1243 (11th Cir. 2003). In most jurisdictions where no circuit level authority exists, lower courts have permitted partial discharges. *See, e.g.*, *In re Rumer*, 469 B.R. 553, 564 n.12 (Bankr. M.D. Pa. 2012) (recognizing majority rule is to allow partial discharges); *In re Gill*, 326 B.R. 611, 644 (Bankr. E.D. Va. 2005) (recognizing lower courts have generally allowed partial discharges); *but see, e.g.*, *In re Conway*, 495 B.R. 416, 423 (B.A.P. 8th Cir. 2013) (explaining that the general rule prevents discharging parts of individual loans). Prior to any partial discharge, a debtor must have established all elements necessary for an undue hardship determination. *See In re Saxman*, 325 F.3d at 1175; *Hemar Ins. Co. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1243 (11th Cir. 2003).

proceeding, advising the debtor of the opportunity to submit the Attestation for review by the United States. Any Attestation should be submitted by a debtor under oath by signing under penalty of perjury pursuant to 28 U.S.C.§ 1746. The Attestation requests that a debtor provide documents corroborating the debtor's stated income (tax returns, or where appropriate, paystubs or other documents proving income). The Department attorney may seek additional evidence where necessary to support representations in the Attestation.

Education will provide debtors' account history and loan details to the Department and that information will be provided to the debtor with the Attestation form.

### B. Time for Attestation

Ideally, the Department attorney would solicit the Attestation from the debtor at the outset of the case to permit early consideration whether to stipulate to facts relevant to undue hardship. The Department attorney is not required to impose any strict time limit for the Attestation.

### C. Bankruptcy Court Authority

The Department attorney should advise debtors that although the United States may stipulate to facts relevant to undue hardship and recommend to the bankruptcy court that a finding of undue hardship is appropriate, the United States' position is not binding on the bankruptcy court, which will render its own determination whether a debtor has met the standard for an undue hardship discharge. Department attorneys and debtors should cooperate to file appropriate documents to enable the court to consider whether to issue an order to discharge student loan debt based upon undue hardship.

## VI. Conclusion

The goal of this Guidance is to provide Department attorneys with a consistent and practical approach for handling student loan discharge litigation. Because of the fact-specific nature of such litigation, questions may arise about how the Guidance should be applied in particular cases. For assistance in interpreting and implementing the Guidance, Department attorneys are invited to contact the Commercial Litigation Branch, Corporate/Financial Litigation Section of the Civil Division.[22]

[22] This memorandum applies only to future bankruptcy proceedings, as well as (wherever practical) matters pending as of the date of this Guidance. This Guidance is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter.

Exhibit B

**APPENDIX B:**
**Debtor Example Scenario**

On January 3, 2022, Jane Smith filed a chapter 7 bankruptcy case in Maryland. She later filed a complaint to seek to discharge approximately $26,000 in student loans. The complaint and summons were served on February 12, 2022. In the complaint, Ms. Smith pleads that her student loan debt should be discharged because requiring payment will cause an "undue hardship" for her and her ten-year-old daughter, Sarah. Ms. Smith's bankruptcy attorney forwards a signed Attestation to the Department Attorney with a copy of Ms. Smith's 2020 tax return. (She has not yet completed the 2021 return.) Pursuant to the Guidance, the Department Attorney would evaluate the information provided in the Attestation as follows to determine if the facts in Ms. Smith's case justify stipulating that she has shown an undue hardship within the meaning of Section 523(a)(8) of the Bankruptcy Code.

*Part I: Personal Information*

Part I of Ms. Smith's Attestation lists relevant background information. It shows that she lives in Baltimore County, Maryland, in a household consisting of herself (age 30) and her daughter (age 10). She lists a student loan balance of $26,369 and indicates her loan has been in default since June 2012. Part I also shows that Ms. Smith incurred her student loans to attend John Doe Community College, seeking a nursing degree, but that Ms. Smith left school in December 2010 and did not receive a degree. Ms. Smith is currently employed as a nursing assistant at Baltimore County Hospital in Baltimore.

*Part II: Present Ability to Pay*

Ms. Smith provided information about her income and expenses in Part II of the Attestation. Ms. Smith has reported on her Attestation that she earns $3900 per month and has current monthly expenses of $3782, including $600 that is deducted from her paycheck for taxes, Medicare, Social Security, and health insurance. Ms. Smith has indicated that she resides in inadequate housing and needs to incur additional housing expenses to achieve a minimal standard of living which will increase her total expenses by $800 (for a total expense amount of $4582). Below are the steps the Department attorney, in consultation with Education, takes in analyzing Ms. Smith's income and expenses:

(1) The Department attorney checks Ms. Smith's submitted tax return to determine if it is consistent with her stated monthly gross income ($3900). Ms. Smith has not yet filed her 2021 tax return, so the only income the Department attorney can review is from her 2020 return. That return shows Adjusted Gross Income of $45,952. This amount divided by 12 is $3829, a monthly average which is consistent with (and

slightly less) than the $3900 Ms. Smith has listed on the Attestation. The income stated on the Attestation thus appears correct.[1]

(2) The Department attorney should use the IRS standards to determine Ms. Smith's allowable expenses:

(a) Payroll deductions. Ms. Smith's payroll deductions of $600 are almost certainly allowable. She has deducted $400 for taxes, Medicare, and Social Security expenses, which are generally allowed under the IRS Standards, and the Department attorney should accept the amount of tax withholdings as an expense unless there is an obvious pattern of over withholding. In general, excessive withholding will be accompanied by a significant tax refund; however, Ms. Smith's most recent tax refund is $3000[2] (which averages to a hypothetical $250 in monthly income) an amount which is not significant. Accordingly, there is no basis to conclude that Ms. Smith has engaged in excessive withholding.

Ms. Smith's payroll deduction for health insurance of $200 (Line 15(a)(vi)) is also almost certainly allowable. The Department attorney should generally allow health insurance expenses (whether payroll deductions or not) as long as the debtor indicates the policy covers only family members and not others. Here, Ms. Smith has indicated this on Line 15(a)(vi), and the deduction therefore appears appropriate.

(b) Living Expenses (National and Local Standards).

Line 14 of the Attestation asks the debtor to confirm whether certain expenses are within amounts allowed under the IRS National Standards. Here, Ms. Smith has confirmed that her household monthly expenses do not exceed the allowed amounts for the following categories, and the Department attorney should allow the full amount for these categories (for a household of two):

Food: $779
Housekeeping supplies: $82
Apparel & Services: $161
Personal care products and services: $82
Miscellaneous: $306

[1] The Department attorney may request further corroboration if necessary, for example, where a debtor's bankruptcy filings in total reflect unexplained inconsistencies.

[2] The Department attorney may review the debtor's most recent tax return to assess whether a listed refund suggests potential over-withholding.

Ms. Smith has indicated that her uninsured medical costs are $150, an amount which exceeds the IRS allowed amount of $75. However, she has explained that her daughter requires medication and an inhaler, and the total cost not covered by insurance is $150. Because Ms. Smith has reasonably explained why she needs this excess expense in order to meet her daughter's health care needs, she should be allowed her actual expense amount of $150.

Ms. Smith's total expense amount for the categories identified in Line 14 is $1560.

Lines 15(d) and (e) of the Attestation allow the debtor to list living expenses in categories corresponding to the IRS Local Standards. The following chart compares Ms. Smith's listed expenses to those allowed under the Local Standards for a family of two based on her locality. The final column shows the amount—typically, the lesser of the IRS Local Standards expense and Ms. Smith's actual expense in the category—that the Department attorney may treat as allowed, unless the Department attorney finds the higher amount within specific categories is justified.

| **Expense** | **Ms. Smith's Actual Expense** | **IRS Allowed Amount** | **Department Attorney Allowed Amount** |
|---|---|---|---|
| Housing & Utilities | $765 | $2233 | $765 |
| Vehicle Payments | $400 | $588 | $400 |
| Average costs of operating vehicles | $350 | $307 | $307 |
| **TOTAL** | $3290 | $4232 | $1472 |

Ms. Smith's actual expenses in each category other than "vehicle operating costs" are less than the amount allowed by the IRS Local Standards. Accordingly, they are consistent with a minimal standard of living. Ms. Smith exceeds the IRS Local Standards amount for vehicle operating costs. The Department attorney should generally limit the debtor's allowable expenses to the IRS Standard expenses amount, unless allowing the additional expenses is warranted by the debtor's circumstances.[3]

(c) Other Necessary Expenses. Line 15(f) allows a debtor to list expenses consistent with the IRS Other Necessary Expenses categories. Ms. Smith has listed only one expense, $150 per month for babysitting, day care or

[3] The Department attorney may ask the debtor to provide an explanation for any expenses over the standard expense amount, but the Department attorney need not do so where, as shown below, the debtor's aggregate expenses as limited still show an inability to make student loan payments.

nursery and preschool costs. The Other Necessary Expenses categories require explanation of the necessity for these expenditures, and Ms. Smith explains that she needs to pay for her daughter to attend before and after care because her daughter's school schedule conflicts with her work schedule. Because Ms. Smith must pay this expense in order to maintain her job, and it is reasonable that she use the services provided by her daughter's school, this expense is "reasonable and necessary."

(d) Expenses for Unmet Needs. The expenses calculated above total $3782, an amount less than Ms. Smith's income. However, the Department attorney should also consider anticipated expenses that the debtor has identified on Line 17 of the Attestation. Ms. Smith has explained in Line 17 that she currently lives in her mother's basement apartment, but that this living situation is not sustainable. She has located an apartment for $1300 per month where she intends to move within a few months, increasing her total housing and utilities expense by $800. Because Ms. Smith will need to incur this additional expense in order to meet basic housing needs for her and her daughter, the Department attorney should consider Ms. Smith's anticipated rent increase when calculating her total expenses.

(e) Ms. Smith's allowable expenses (including the additional housing expense) total $4582:

- $600 – Payroll deductions
- $1560 – National Standards
- $1472 - Local Standards (without additional future housing expense)
- $150 – Other Necessary Expenses
- $800 – future expenses (additional housing expense)

(3) Comparison to income. Ms. Smith's allowed expenses of $4582 exceed her monthly income of $3829, which has been verified by her tax returns. Because her allowed expenses exceed her income, the Department attorney should find she currently does not have sufficient means to pay her student loans while maintaining a minimal standard of living.

*Part III: Future Circumstances*

Part III of the Attestation allows a debtor to attest to matters showing that the inability to pay will persist into the future. In Line 18, the debtor can attest to circumstances that justify a *presumption* of a future inability to pay. Ms. Smith has indicated that her student loan went into repayment more than 10 years ago.[4] Accordingly, she is entitled to a presumption that she will remain unable to repay the loan in the future.

[4] This assertion is supported by Ms. Smith's statement in the Attestation that her loans entered repayment in June 2011, more than 10 years before she filed her bankruptcy case.

Although the presumption of future inability to pay is rebuttable, those circumstances should be infrequent. Illustratively, Ms. Smith has not provided any information in her Attestation that indicates a likely future ability to pay or that her financial circumstances are likely to change. The Attestation, as a whole, supports her claim that she will remain unable to pay. She has indicated on Line 19 that she (1) was forced to drop out of nursing school to care for her infant daughter, (2) she cannot obtain employment as a nurse because she did not obtain her degree, (3) her current job does not offer significant raises or promotions, and (4) she has been unable to obtain a second job and likely could not do so because her daughter suffers from asthma. None of that information provides a basis to rebut the presumption of future inability to pay. Indeed, this information would appear to support a conclusion that she lacks a future ability to pay even in the absence of any presumption. In this situation, there does not appear to be a need for the attorney to investigate further. Although there are circumstances where the Department attorney may reasonably make inquiry to supplement or elucidate statements in the Attestation, that need may be infrequent. In this example, the Department attorney should conclude that Ms. Smith's inability to pay will continue for a significant portion of the repayment period.

*Part IV: Prior Efforts to Repay Loans*

Part IV of the Attestation provides information the Department attorney should use to determine if Ms. Smith has made a good faith effort to repay her loans. In this case, good faith should likely be found, because the information provided on Ms. Smith's Attestation reflects that she has maximized income by obtaining full-time employment, minimized expenses, and has not willfully attempted to avoid repaying her loans.

Ms. Smith reports that she has made no payments on her loans (Line 21). Indeed, her responses on Part I of the Attestation show that the loans went into repayment in May 2011 and went into default in June 2012. While these facts are relevant to the "good faith" determination, the failure to make payments alone does not justify finding a lack of good faith. Here, Ms. Smith has offered an explanation for her failure to make payments (Line 26). She left school when her daughter was less than one year old. She had no support from the child's faither and initially was unable to obtain part-time employment. Since that time, she has never obtained employment permitting her to pay her student loans.

Ms. Smith also indicates she has not enrolled in an IDRP (Line 25). Failure to enroll in an IDRP, however, is not dispositive of a lack of good faith. Here, Ms. Smith attests that she contacted her loan servicer to discuss IDRPs. The servicer did not explain the process for enrolling and stated to Ms. Smith that she would pay a heavy tax burden if she completed a payment plan. Given the circumstances, as well as Ms. Smith's extremely limited income preventing any substantial payments under an IDRP, nothing in the Attestation suggests she acted "willfully" by not enrolling in an IDRP or was disinterested in repaying her loans. Rather, her lack of enrollment was reasonable in light of her confusion over the process as well as her concerns about tax consequences.

The Attestation also shows that Ms. Smith sought to maximize income and minimize expenses. On Line 26, she states that she continually worked full-time after her daughter started school, and that she cannot work more hours due to the need to care for her daughter. She also states she could not find higher paying work due to her lack of a degree. Line 26 presents information about minimization of expenses, including that Ms. Smith has lived with her mother for four years to reduce expenses. Finally, while Ms. Smith acknowledges she has acquired a vehicle with a car payment, she explains the need for reliable transportation. In addition, the vehicle payment is within the Local Standards above. Obtaining the vehicle is not evidence of a refusal to minimize expenses.

*Part V: The Debtor's Assets*

Ms. Smith's only asset is a 2018 Toyota Camry with approximately $5000 in equity (Line 28). Even if Ms. Smith did not claim an exemption for her car, it would be unreasonable to expect Ms. Smith to liquidate this asset in order to pay her student loan. Ms. Smith's Attestation demonstrates that she needs her vehicle to maintain a minimal standard of living for herself and her daughter. Ms. Smith would therefore have to purchase a new vehicle if this asset were liquidated. Additionally, requiring Ms. Smith to pay down the student loan would still leave approximately $20,000 due, and there is no showing that Ms. Smith would have the ability to satisfy this part of the student loan after liquidating the vehicle and paying $5000. For these reasons, liquidation of the asset would be inappropriate.

*Conclusion*

Based on review of the Attestation, it is appropriate for the Department attorney to conclude that Ms. Smith is entitled to a discharge of her student loans. She does not have a current ability to pay her loans while maintaining a minimal standard of living; this inability is likely to persist into the future; and she has made good faith efforts to repay her loans. In addition, she does not have any assets that are reasonably available for liquidation.

The Department attorney should contact Ms. Smith's counsel and indicate the United States would be willing to enter into a stipulation that Ms. Smith has shown undue hardship under Section 523(a)(8) and recommend the Court grant her a judgment discharging her loans.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re: | ) | |
| | ) | |
| JANE SMITH, | ) | Case No. |
| | ) | Chapter [7] |
| Debtors. | ) | |
| | ) | |
| _____ | ) | |
| | ) | |
| JANE SMITH, | ) | |
| | ) | |
| Plaintiff, | ) | Adversary Pro. _____ |
| | ) | |
| v. | ) | |
| | ) | |
| UNITED STATES DEPARTMENT OF EDUCATION, [et al.], | ) | |
| | ) | |
| Defendant[s]. | ) | |
| _____ | ) | |

ATTESTATION OF JANE SMITH IN SUPPORT OF REQUEST FOR STIPULATION CONCEDING DISCHARGEABILITY OF STUDENT LOANS

I, JANE SMITH, make this Attestation in support of my claim that excepting the student loans described herein from discharge would cause an "undue hardship" to myself and my dependents within the meaning of 11 U.S.C. §523(a)(8). In support of this Attestation, I state the following under penalty of perjury:

I. PERSONAL INFORMATION

1. I am over the age of eighteen and am competent to make this Attestation.

2. I reside at *123 Main Street, Towson MD 20204*, in *Baltimore* County, *Maryland*.

3. My household includes the following persons (including myself):

| NAME: | AGE: | RELATIONSHIP: |
|---|---|---|
| *Jane Smith* | *30 years* | *[self]* |
| *Sarah Smith* | *10 years* | *daughter* |

***Questions four through nine request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney ("AUSA") handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than one student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan, or provide that information for each loan.***

4. I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct: YES / ***NO*** [If you answered "NO," you must answer questions five through nine].

5. The outstanding balance of the student loan[s] I am seeking to discharge in this adversary proceeding is *$26,369*.

6. The current monthly payment on such loan[s] is $*132.* The loan[s] are scheduled to be repaid in *???* [month and year] **[OR]** ____ My student loan[s] went into default in *June 2012* [month and year].

7. I incurred the student loan[s] I am seeking to discharge while attending *John Doe Community College*, where I was pursuing a *nursing* degree with a specialization in *n/a*.

8. In _____ [month and year], I completed my course of study and received a _____ degree **[OR]** In *December 2010* [month and year], I left my course of study and did not receive a degree.

9. I am currently employed as a *certified nursing assistant*. My employer's name and address is *Baltimore County Hospital, Baltimore MD* **[OR]** _____ I am not currently employed.

II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

***A. Household Gross Income***

11. My current monthly household ***gross*** income from all sources is $3900.[1]

This amount includes the following the following monthly amounts:

*$3900* my ***gross*** income from employment (if any)
_____ my unemployment benefits.
_____ my Social Security Benefits
_____ my child support
_____ my _____
_____ my _____
_____ ***gross*** income from employment of other members of household
_____ unemployment benefits received by other members of household
_____ Social Security benefits received by other members of household
_____ other income from any source received by other members of household

12. The current monthly household gross income stated above (select which applies):

[1] "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy, including Form B 106I, Schedule I - Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Attestation, or your income has changed, you should provide your new income information.

__X__ Includes a monthly average of income shown on the most recent tax return[s] filed for myself and other members of my household, which are attached, and the amounts stated on such tax returns have not changed materially since the tax year of such returns; OR

_____ Represents an average amount calculated from the most recent two months of gross income stated on four (4) consecutive paystubs from my current employment, which are attached; OR

_____ My current monthly household gross income is not accurately reflected on either recent tax returns or paystubs from current employment, and I have submitted instead the following documents verifying current gross household income from employment of household members: _____

13. In addition, I have submitted _____ verifying the sources of income other than income from employment, as such income is not shown on [most recent tax return[s] or paystubs].

***B. Monthly Expenses***

14. My current monthly household expenses do not exceed the amounts listed below based on the number of people in my household for the following categories [Indicate "yes" if your expenses do not exceed the referenced amounts]:

(a) Living Expenses[2]

i. Food ***YES*** / NO
$431 (one person)
$779 (two persons)
$903 (three persons)
$1028 (four persons)

[2] The living expenses listed in Question 14 and 15 have been adopted from the Internal Revenue Service Collection Financial Standards "National Standards" and "Local Standards" for the year in which this form is issued. This form is updated annually to reflect changes to these expenses.

| | | |
|---|---|---|
| ii. | Housekeeping supplies<br>$40 (one person)<br>$82 (two persons)<br>$74 (three persons)<br>$85 (four persons) | ***YES*** / NO |
| iii. | Apparel & Services<br>$99 (one person)<br>$161(two persons)<br>$206 (three persons)<br>$279 (four persons) | ***YES*** / NO |
| iv. | Personal care products and services (non-medical)<br>$45 (one person)<br>$82 (two persons)<br>$78 (three persons)<br>$96 (four persons) | ***YES*** / NO |
| v. | Uninsured medical costs<br>$75 (per individual under 65)<br>$153 (per individual over 65) | *YES* / ***NO*** |
| vi. | Miscellaneous expenses not included elsewhere on this Attestation:<br>$170 (one person)<br>$306 (two persons)<br>$349 (three persons)<br>$412 (four persons) | ***YES*** / NO |

(b) Households Greater Than Four Persons

If your household consists of more than four people, please provide your *total* expenses for the categories in Question 14(a): $_____

[If you filed a Form 122A-2 Chapter 7 Means Test or 122C-2 Calculation of Disposable Income in your bankruptcy case, you may refer to lines 6 and 7 of those forms for information.][3]

[3] Forms 122A-2 and 122C-2 are referred to collectively here as the "Means Test." If you filed a Means Test in your bankruptcy case, you may refer to it for information requested here and in other expense categories below. If you did not file a Means Test, you may refer to your Schedule I and Form 106J – Your Expenses (Schedule J) in the bankruptcy case, which may also list information relevant to these categories. You should only use information from these documents if your expenses have not changed since you filed them.

(c) Excess Expenses

If your current monthly household expenses exceed the amounts listed above for any of the categories in Question 13(a) and you would like the AUSA to consider such additional expenses as necessary, you may list those expenses and explain the need for such expenses here.

*I buy inhalers and medications for my daughter, who has asthma, and the total cost not covered by insurance is approximately $150 per month.*

15. My current monthly household expenses in the following categories are as follows:

(a) Payroll Deductions

i. Taxes, Medicare and Social Security $*400*
[You may refer to line 16 of the Means Test or Schedule I, line 5]

ii. Contributions to retirement accounts $ *0*
[You may refer to line 17 of the Means Test or Schedule I, line 5]

Are these contributions required as a condition of your employment? YES / NO

iii. Union dues $ *n/a*
[You may refer to line 17 of the Means Test or Schedule I, line 5]

iv. Life insurance $ *n/a*
[You may refer to line 18 of the Means Test or Schedule I, line 5]

Are the payments for a term policy covering your life? YES / NO

v. Court-ordered alimony and child support $ *n/a*
[You may refer to line 19 of the Means Test or Schedule I, line 5]

vi. Health insurance $*200*
[You may refer to line 25 of the Means Test or Schedule I, line 5]

Does the policy cover any persons other than yourself and your family members? YES / ***NO***

vii. Other payroll deductions

| | |
|---|---|
| _____ | $ *n/a* |
| _____ | $___ |
| _____ | $___ |

(d) Housing Costs[4]

| | | |
|---|---|---|
| i. | Mortgage or rent payments | $ *500* |
| ii. | Property taxes (if paid separately) | $ *n/a* |
| iii. | Homeowners or renters insurance (if paid separately) | $*15* |
| iv. | Home maintenance and repair (average last 12 months' amounts) | $ *n/a* |
| v. | Utilities (include monthly gas, electric water, heating oil, garbage collection, residential telephone service, cell phone service, cable television, and internet service). | $*250* |

(e) Transportation Costs

| | | |
|---|---|---|
| i. | Vehicle payments (itemize per vehicle) | $*400* |
| ii. | Monthly average costs of operating vehicles (including gas, routine maintenance, monthly insurance cost) | $*350* |
| iii. | Public transportation costs | $ *n/a* |

(f) Other Necessary Expenses

i. Court-ordered alimony and child support payments (if not deducted from pay) $ *n/a*
[You may refer to line 19 of Form 122A-2 or 122C-2 or Schedule J, line 18]

ii. Babysitting, day care, nursery and preschool costs $*150*
[You may refer to line 21 of Form 122A-2 or 122C-2 or Schedule J, line 8][5]

[4] You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule J, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule J) and transportation expenses (generally on lines 12, 15c and 17).

[5] Line 8 of Schedule J allows listing of expenses for "childcare and children's education costs." You should not list any educational expenses for your children here, aside from necessary nursery or preschool costs.

Explain the circumstances making it necessary
for you to expend this amount:

*I have to send my daughter to before care and after care for school because her school day is from 7:45-3:00 but I work from 7:00-3:30. This is what her school charges.*

iii. Health insurance $ *n/a*
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Does the policy cover any persons other than yourself and your family members? YES / NO

iv. Life insurance $ *n/a*
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Are the payments for a term policy covering your life? YES / NO

v. Dependent care (for elderly or disabled family members). $ *n/a*
[You may refer to line 26 of the Means Test or Schedule J, line 19]

Explain the circumstances making it necessary
for you to expend this amount:

_____
_____
_____
_____

vi. Payments on delinquent federal, state or local tax debt $ *n/a*
[You may refer to line 35 of the Means Test or Schedule J, line 17]

Are these payments being made pursuant to an agreement with the taxing authority? YES / NO

vii. Payments on other student loans I am not seeking to discharge $ *n/a*

viii. Other expenses I believe necessary for $ *n/a*

a minimal standard of living.

Explain the circumstances making it necessary for you to expend this amount:

_____
_____
_____
_____

16. After deducting the foregoing monthly expenses from my household gross income, I have *$128* remaining income.

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly expenses in the future for my, and my dependents', basic needs which are currently not met.[6] These include the following:

*I live in a basement apartment at my mother's house, but it is not possible to live there anymore with my daughter turning 10 years old. We don't have our own kitchen and the living space is too small. I have found an apartment in our area near where I work for $1300 per month. We are hoping to move there in a few months.*

## III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

___ I am over the age of 65.

_X_ The student loans I am seeking to discharge have been repayment status for at least ten years (excluding any period which I was enrolled as a student).

___ I did not complete the education for which I incurred the student loan[s].

___ I have a permanent disability or chronic injury which renders me unable to work or limits my ability to work.

[6] If you have forgone expenses for any basic needs and anticipate that you will incur such expenses in the future, you may list them here and explain the circumstances making it necessary for you to incur such expenses.

Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

_____
_____
_____
_____
_____
_____

___ I have been unemployed for at least five of the past ten years.

Please explain your efforts to obtain employment.

_____
_____
_____
_____
_____
_____

19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

_X_ I incurred student loans I am seeking to discharge in pursuit of a degree I was unable to complete for reasons other than the closure of the educational institution.

Describe your reasons for being unable to complete the degree:

*I was in nursing school but had to drop out to care for my daughter.*_____
_____
_____
_____
_____
_____
_____
_____

___ I am not currently employed.

_X_ I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment:

*I was in nursing school but did not complete my degree, so I cannot get a job as a nurse. I work as a nursing assistant.*

_X_ I am currently employed, but my income is insufficient to pay my loans and unlikely to increase to an amount necessary to make substantial payments on the student loans I am seeking to discharge.

Please explain why you believe this is so:

*I have looked for other jobs that pay more, but they require a degree. My current job does not offer any significant raises or promotions. I also need to work during the hours that my daughter is in school, so I can't work the night or weekend shifts at my current job even though it would pay more.*

_X_ Other circumstances exist making it unlikely I will be able to make payments for a significant part of the repayment period.

Explain these circumstances:

*My daughter is ten years old. She has severe asthma, requiring inhalers and other medication. Because of these conditions, working a second job is not possible for me. I need to be at home to ensure she is safe after school, and I can't afford a babysitter or additional after school care.*

IV. PRIOR EFFORTS TO REPAY LOANS

20. I have made good faith efforts to repay the student loans at issue in this proceeding, including the following efforts:

21. Since receiving the student loans at issue, I have made a total of $ 0 in payments on the loans, including the following:

___ regular monthly payments of $_____ each.

___ additional payments, including $_____, $_____, and $_____.

22. I have received *no* forbearances or deferments, for a period totaling ___ months.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education at least *10* times.

24. I have sought to enroll in one or more "Income Deferred Repayment Programs" or similar repayment programs offered by the Department of Education, including the following:

Description of efforts:

_____
_____
_____
_____
_____
_____
_____
_____
_____

25. [If you did not enroll in such a program]. I have not enrolled in an "Income Deferred Repayment Program" or similar repayment program offered by the Department of Education for the following reasons:

*I had heard of repayment plans, but I was confused when I tried to ask my servicer about the plans. They did not explain how to sign up, and they told me I might end up paying a lot of taxes if I did a payment plan. I can't afford to pay additional taxes.*

26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the loan, including efforts to obtain employment, maximize your income, or minimize your expenses:

*I've always worked full time after my daughter was old enough to go to school. I can't work more hours because I have to take care of her on the weekends and after school. I have looked for higher paying jobs, but they all require degrees.*

*I drove a used car for a long time, but I had to buy a new car a few years ago because my old one was starting to need a lot of repairs and I needed a reliable car to get to work and take my daughter to school, doctors etc. I've been living with my mother for the past 4 years to try and save expenses, but I need to move to an apartment. I'll need to stay in this area, though, because this is where my job and my daughter's school are.*

*All of my paycheck goes toward providing my daughter and myself with our necessities, including groceries, clothes for her, and her school supplies.*

## V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: *None*

Owners:[7] _____

_____

Fair market value: _____

Total balance of mortgages and other liens. _____

28. I own the following motor vehicles:

Make and model: *2018 Toyota Camry*

Fair market value: $*25,000*

Total balance of Vehicle loans And other liens $*20,000*

29. I hold a total of $ *0* in retirement assets, held in 401k, IRA and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company, partnership, or other entity:

| Name of entity | State incorporated[8] | Type[9] and %age Interest |
|---|---|---|
| _____ | _____ | _____ |

[7] List by name all owners of record (self and spouse, for example)
[8] The state, if any, in which the entity is incorporated. Partnerships, joint ventures and some other business entities might not be incorporated.

[9] For example, shares, membership interest, partnership interest.

_____ _____ _____

_____ _____ _____

31. I currently am anticipating receiving a tax refund totaling $*3,000*

VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to discharge my student loans as an "undue hardship" under 11 U.S.C. §523(a)(8):

_____
_____
_____
_____
_____
_____
_____
_____
_____

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

*/s/ Jane Smith*
Signature:

*Jane Smith*
Name:

Date: *February 25, 2022*

Exhibit C: Attestation (01/23)

[Updated January 2023]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF _____

| | | |
|---|---|---|
| In re: | ) | |
| | ) | |
| | ) | Case No. _____ |
| | ) | Chapter [7] |
| Debtors. | ) | |
| | ) | |
| _____ | ) | |
| | ) | |
| | ) | |
| | ) | |
| Plaintiff, | ) | Adversary Pro. _____ |
| | ) | |
| v. | ) | |
| | ) | |
| UNITED STATES DEPARTMENT OF EDUCATION, [et al.], | ) | |
| | ) | |
| Defendant[s]. | ) | |
| _____ | ) | |

ATTESTATION OF [_____] IN SUPPORT
OF REQUEST FOR STIPULATION CONCEDING
DISCHARGEABILITY OF STUDENT LOANS

*PLEASE NOTE: This Attestation should be submitted to the Assistant United States Attorney handling the case. It should not be filed with the court unless such a filing is directed by the court or an attorney.*

I, [_____], make this Attestation in support of my claim that excepting the student loans described herein from discharge would cause an "undue hardship" to myself and my dependents within the meaning of 11 U.S.C. §523(a)(8). In support of this Attestation, I state the following under penalty of perjury:

I. PERSONAL INFORMATION

1. I am over the age of eighteen and am competent to make this Attestation.

[Updated January 2023]

2. I reside at _____ [address], in _____ County, _____[state].

3. My household includes the following persons (including myself):

_____ [full name] _____[age] _____[self]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

_____ [full name] _____[age] _____[relationship]

***Questions four through eight request information related to your outstanding student loan debt and your educational history. The Department of Education will furnish this information to the Assistant United States Attorney ("AUSA") handling your case, and it should be provided to you. If you agree that the information provided to you regarding your student loan debt and educational history is accurate, you may simply confirm that you agree, and these questions do not need to be completed. If you have not received the information from Education or the AUSA at the time you are completing this form, or if the information is not accurate, you may answer these questions based upon your own knowledge. If you have more than <u>one</u> student loan which you are seeking to discharge in this adversary proceeding, please confirm that the AUSA has complete and accurate information for each loan, or provide that information for each loan.***

4. I confirm that the student loan information and educational history provided to me and attached to this Attestation is correct and complete: YES ☐ NO ☐ No Information Provided ☐

[If you answered anything other than "YES," you must answer questions five through eight].

5. The outstanding balance of the student loan[s] I am seeking to discharge in this adversary proceeding is $_____.

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6. The current monthly payment on such loan[s] is _____. The loan[s] are scheduled to be repaid in _____ [month and year] **[OR]** ☐ My student loan[s] went into default in _____ [month and year].

7. I incurred the student loan[s] I am seeking to discharge while attending _____, where I was pursuing a _____ degree with a specialization in _____.

8. In _____ [month and year], I completed my course of study and received a _____ degree. **[OR]** In _____ [month and year], I left my course of study and did not receive a degree.

9. I am currently employed as a _____. My employer's name and address is _____ **[OR]** ☐ I am not currently employed.

II. CURRENT INCOME AND EXPENSES

10. I do not have the ability to make payments on my student loans while maintaining a minimal standard of living for myself and my household. I submit the following information to demonstrate this:

***A. Household Gross Income***

11. My current monthly household ***gross*** income from all sources is $_____.[1] This amount includes the following monthly amounts:

[1] "Gross income" means your income before any payroll deductions (for taxes, Social Security, health insurance, etc.) or deductions from other sources of income. You may have included information about your gross income on documents previously filed in your bankruptcy case , including Form B 106I, Schedule I - Your Income (Schedule I). If you filed your Schedule I within the past 18 months and the income information on those documents has not changed, you may refer to that document for the income information provided here. If you filed Schedule I more than 18 months prior to this Attestation, or your income has changed, you should provide your new income information.

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$_____ my ***gross*** income from employment (if any)
$_____ my unemployment benefits
$_____ my Social Security Benefits
$_____ my _____
$_____ my _____
$_____ my _____
$_____ ***gross*** income from employment of other members of household
$_____ unemployment benefits received by other members of household
$_____ Social Security benefits received by other members of household
$_____ other income from any source received by other members of household

12. The current monthly household gross income stated above (select which applies):

☐ Includes a monthly average of the gross income shown on the most recent tax return[s] filed for myself and other members of my household, which are attached, and the amounts stated on such tax returns have not changed materially since the tax year of such returns; OR

☐ Represents an average amount calculated from the most recent two months of gross income stated on four (4) consecutive paystubs from my current employment, which are attached; OR

☐ My current monthly household gross income is not accurately reflected on either recent tax returns or paystubs from current employment, and I have submitted instead the following documents verifying current gross household income from employment of household members:

_____

13. In addition, I have submitted _____ verifying the sources of income other than income from employment, as such income is not shown on [most recent tax return[s] or paystubs].

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***B. Monthly Expenses***

14. My current monthly household expenses do/do not exceed the amounts listed below based on the number of people in my household for the following categories:

(a) Living Expenses[2]

i. My expenses for food — do exceed ☐ do not exceed ☐
$431 (one person)
$779 (two persons)
$903 (three persons)
$1028 (four persons)

ii. My expenses for housekeeping supplies — do exceed ☐ do not exceed ☐
$40 (one person)
$82 (two persons)
$74 (three persons)
$85 (four persons)

iii. My expenses for apparel & services — do exceed ☐ do not exceed ☐
$99 (one person)
$161(two persons)
$206 (three persons)
$279 (four persons)

iv. My expenses for (non-medical) personal care products and services — do exceed ☐ do not exceed ☐
$45 (one person)
$82 (two persons)
$78 (three persons)
$96 (four persons)

v. My miscellaneous expenses (not included elsewhere on this Attestation) — do exceed ☐ do not exceed ☐
$170 (one person)
$306 (two persons)
$349 (three persons)
$412 (four persons)

vi. My total expenses in these categories — do exceed ☐ do not exceed ☐
$785 (one person)

[2] The living expenses listed in Question 14 and 15 have been adopted from the Internal Revenue Service Collection Financial Standards "National Standards" and "Local Standards" for the year in which this form is issued. This form is updated annually to reflect changes to these expenses.

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$1410 (two persons)
$1610 (three persons)
$1900 (four persons in household)
Add $344 per each additional member if more than four in household.

If you answered that your total expenses for any of the categories (i) through (v) exceed the applicable amount listed in those categories, and you would like the AUSA to consider your additional expenses for any such categories as necessary, you may list the total expenses for any such categories and explain the need for such expenses here. (You do not need to provide any additional information if you answered that your total expenses did not exceed the applicable amount listed in subsection (vi)).

(b) Uninsured medical costs:

My uninsured, out of pocket medical costs do exceed ☐ do not exceed ☐

$75 (per household member under 65)
$153 (per household member 65 or older)

If you answered that your uninsured, out of pocket medical costs exceed the listed amounts for any household member, and you would like the AUSA to consider such additional expenses as necessary, you may list the household member's total expenses and explain the need for such expenses here.

[If you filed a Form 122A-2 Chapter 7 Means Test or 122C-2 Calculation of Disposable Income in your bankruptcy case, you may refer to lines 6 and 7 of those forms for information.][3]

[3] Forms 122A-2 and 122C-2 are referred to collectively here as the "Means Test." If you filed a Means Test in your bankruptcy case, you may refer to it for information requested here and in

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15. My current monthly household expenses in the following categories are as follows:

(a) Payroll Deductions

i. Taxes, Medicare and Social Security $_____
[You may refer to line 16 of the Means Test or Schedule I, line 5]

ii. Contributions to retirement accounts $_____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

Are these contributions required as a condition of your employment? YES☐ / NO☐

iii. Union dues $_____
[You may refer to line 17 of the Means Test or Schedule I, line 5]

iv. Life insurance $_____
[You may refer to line 18 of the Means Test or Schedule I, line 5]

Are the payments for a term policy covering your life? YES☐ / NO☐

v. Court-ordered alimony and child support $_____
[You may refer to line 19 of the Means Test or Schedule I, line 5]

vi. Health insurance $_____
[You may refer to line 25 of the Means Test or Schedule I, line 5]

Does the policy cover any persons other than yourself and your family members? YES☐ / NO☐

vii. Other payroll deductions

_____ $_____
_____ $_____
_____ $_____

other expense categories below. If you did not file a Means Test, you may refer to your Schedule I and Form 106J – Your Expenses (Schedule J) in the bankruptcy case, which may also list information relevant to these categories. You should only use information from these documents if your expenses have not changed since you filed them.

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(b) Housing Costs[4]

| | | |
|---|---|---|
| i. | Mortgage or rent payments | $_____ |
| ii. | Property taxes (if paid separately) | $_____ |
| iii. | Homeowners or renters insurance (if paid separately) | $_____ |
| iv. | Home maintenance and repair (average last 12 months' amounts) | $_____ |
| v. | Utilities (include monthly gas, electric water, heating oil, garbage collection, residential telephone service, cell phone service, cable television, and internet service) | $_____ |

(c) Transportation Costs

| | | |
|---|---|---|
| i. | Vehicle payments (itemize per vehicle) | $_____ |
| ii. | Monthly average costs of operating vehicles (including gas, routine maintenance, monthly insurance cost) | $_____ |
| iii. | Public transportation costs | $_____ |

(d) Other Necessary Expenses

i. Court-ordered alimony and child support payments (if not deducted from pay) $_____
[You may refer to line 19 of Form 122A-2 or 122C-2 or Schedule J, line 18]

ii. Babysitting, day care, nursery and preschool costs $_____
[You may refer to line 21 of Form 122A-2 or 122C-2 or Schedule J, line 8][5]

Explain the circumstances making it necessary for you to expend this amount:

[4] You should list the expenses you actually pay in Housing Costs and Transportation Costs categories. If these expenses have not changed since you filed your Schedule J, you may refer to the expenses listed there, including housing expenses (generally on lines 4 through 6 of Schedule J) and transportation expenses (generally on lines 12, 15c and 17).

[5] Line 8 of Schedule J allows listing of expenses for "childcare and children's education costs." You should not list any educational expenses for your children here, aside from necessary nursery or preschool costs.

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iii. Health insurance $_____
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Does the policy cover any persons other than yourself and your family members? YES☐ / NO☐

iv. Life insurance $_____
(if not deducted from pay)
[You may refer to line 25 of the Means Test or Schedule J, line 15]

Are the payments for a term policy covering your life? YES☐ / NO☐

v. Dependent care (for elderly or disabled family members) $_____
[You may refer to line 26 of the Means Test or Schedule J, line 19]

Explain the circumstances making it necessary for you to expend this amount:

vi. Payments on delinquent federal, state or local tax debt $_____
[You may refer to line 35 of the Means Test or Schedule J, line 17]

Are these payments being made pursuant to an agreement with the taxing authority? YES☐ / NO☐

vii. Payments on other student loans I am not seeking to discharge $_____

viii. Other expenses I believe necessary for a minimal standard of living. $_____

Explain the circumstances making it necessary for you to expend this amount:

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16. After deducting the foregoing monthly expenses from my household gross income, I have _____ [no, or amount] remaining income.

17. In addition to the foregoing expenses, I anticipate I will incur additional monthly expenses in the future for my, and my dependents', basic needs that are currently not met.[6] These include the following:

## III. FUTURE INABILITY TO REPAY STUDENT LOANS

18. For the following reasons, it should be presumed that my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☐ I am age 65 or older.

☐ The student loans I am seeking to discharge have been in repayment status for at least 10 years (excluding any period during which I was enrolled as a student).

☐ I did not complete the degree for which I incurred the student loan[s].

Describe how not completing your degree has inhibited your future earning capacity:

☐ I have a disability or chronic injury impacting my income potential.

[6] If you have forgone expenses for any basic needs and anticipate that you will incur such expenses in the future, you may list them here and explain the circumstances making it necessary for you to incur such expenses.

[Updated January 2023]

Describe the disability or injury and its effects on your ability to work, and indicate whether you receive any governmental benefits attributable to this disability or injury:

☐ I have been unemployed for at least five of the past ten years.

Please explain your efforts to obtain employment.

19. For the following additional reasons, my financial circumstances are unlikely to materially improve over a significant portion of the repayment period (answer all that apply):

☐ I incurred the student loans I am seeking to discharge in pursuit of a degree from an institution that is now closed.

Describe how the school closure inhibited your future earnings capacity:

☐ I am not currently employed.

☐ I am currently employed, but I am unable to obtain employment in the field for which I am educated or have received specialized training.

Describe reasons for inability to obtain such employment, and indicate if you have ever been able to obtain such employment:

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☐ I am currently employed, but my income is insufficient to pay my loans and unlikely to increase to an amount necessary to make substantial payments on the student loans I am seeking to discharge.

Please explain why you believe this is so:

☐ Other circumstances exist making it unlikely I will be able to make payments for a significant part of the repayment period.

Explain these circumstances:

## IV. PRIOR EFFORTS TO REPAY LOANS

20. I have made good faith efforts to repay the student loans at issue in this proceeding, including the following efforts:

21. Since receiving the student loans at issue, I have made a total of $_____ in payments on the loans, including the following:

___ regular monthly payments of $_____ each.

___ additional payments, including $_____, $_____, and $_____.

22. I have applied for ____ forbearances or deferments. I spent a period totaling ___ months in forbearance or deferment.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education regarding payment options, forbearance and deferment options, or loan consolidation at least _____ times.

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24. I have sought to enroll in one or more "Income Driven Repayment Programs" or similar repayment programs offered by the Department of Education, including the following:

Description of efforts:

25. [If you did not enroll in such a program]. I have not enrolled in an "Income Driven Repayment Program" or similar repayment program offered by the Department of Education for the following reasons:

26. Describe 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. These may include efforts to obtain employment, maximize your income, or minimize your expenses. They also may include any efforts you made to apply for a federal loan consolidation, respond to outreach from a loan servicer or collector, or engage meaningfully with a third party you believed would assist you in managing your student loan debt.

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V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: _____

_____

_____

Owners:[7] _____

_____

Fair market value: _____

Total balance of mortgages and other liens. _____

28. I own the following motor vehicles:

Make and model: _____

Fair market value: _____

Total balance of Vehicle loans And other liens _____

29. I hold a total of _____ in retirement assets, held in 401k, IRA and similar retirement accounts.

30. I own the following interests in a corporation, limited liability company, partnership, or other entity:

[7] List by name all owners of record (self and spouse, for example)

[Updated January 2023]

| Name of entity | State incorporated[8] | Type[9] and %age Interest |
|---|---|---|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

31. I currently am anticipating receiving a tax refund totaling $_____.

VI. ADDITIONAL CIRCUMSTANCES

32. I submit the following circumstances as additional support for my effort to discharge my student loans as an "undue hardship" under 11 U.S.C. §523(a)(8):

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

_____
Signature:

_____
Name:

_____
Date:

[8] The state, if any, in which the entity is incorporated. Partnerships, joint ventures and some other business entities might not be incorporated.

[9] For example, shares, membership interest, partnership interest.

**SIGNED THIS 1st day of September, 2021**

**THIS MEMORANDUM OPINION HAS BEEN ENTERED ON THE DOCKET. PLEASE SEE DOCKET FOR ENTRY DATE.**

Rebecca B. Connelly
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**

| | |
|---|---|
| **In re:**<br>**WILLIAM MARSHALL BELL,**<br>**Debtor.** | **Chapter 7**<br><br>**Case No. 19-50991** |
| **WILLIAM MARSHALL BELL,**<br>**Plaintiff,** | |
| **v.** | **Adv. P. No. 20-05001** |
| **U.S. DEPARTMENT OF EDUCATION,**<br>**Defendant.** | |

## MEMORANDUM OPINION

This case involves an individual debtor for whom the repayment of his student loan debt is an undue hardship. He filed a complaint to discharge his student loan under Bankruptcy Code section 523(a)(8). For the reasons below, this Court will grant the request in his complaint and order that the student loan debt be discharged pursuant to Bankruptcy Code section 523(a)(8).

*The Parties*

William Marshall Bell filed a chapter 7 bankruptcy petition, *pro se*, in November 2019. *See* Case No. 19-50991, ECF Doc. No. 1. Mr. Bell is the plaintiff in this adversary proceeding.

Mr. Bell owes student loans to the United States Department of Education ("DOE"). The DOE is the defendant in this adversary proceeding.

Mr. Bell is requesting a discharge of his student loans. The DOE opposes his request.

*The Loans*

In the years before he filed bankruptcy, Mr. Bell enrolled in Strayer University: a for-profit university offering bachelor's and master's degrees, primarily by online learning. Mr. Bell incurred student loans to pay the tuition for the online school. Ultimately, he incurred multiple student loans in the years 2011, 2012, 2013, and 2014. *See* Joint Stip. of Facts ¶ 1, ECF Doc. No. 27. According to the parties' stipulation of facts, Mr. Bell was originally issued ten loans. Two of the loans have been paid in full. The final loan appears to never have been disbursed or was cancelled. *Id.* ¶ 12 n.1.

Seven of the student loans are outstanding. *Id.* ¶ 1. They are Direct Stafford Loans. *Id.* The loans were provided in the years 2011–2014. *Id.* The repayment period on the loans was originally ten years.[1]

The interest rates on these outstanding student loans range from 5.41% to 6.80%. *See id.* Daily interest accrues at $14.70 per day.[2] *See id.* ¶ 3. As of December 2020, the total loan balance had grown to $109,983.88,[3] of which $24,710.41 is current interest and $10,892.47 is capitalized

[1] The repayment periods for the loans at issue began in September of 2015. *See* Ex. A. to Joint Stip. of Facts, ECF Doc. No. 27-1. Thus, Mr. Bell would have had approximately four years remaining under the original repayment period.

[2] Due to a combination of legislation and administrative action in response to the COVID-19 pandemic, interest on the loans ceased accruing on March 13, 2020, and at this time is not set to continue accruing until, at the earliest, January 31, 2022.

[3] Paragraph one of the joint stipulation provides a summary chart of Mr. Bell's Direct Stafford loans. The grand total of the current amount due, adding current interest to current principal as stated in the chart, equals $108,983.88. However, it appears that a mathematical or typographical error occurred for the second loan on the chart. For the second loan listed on the chart, the sum of the capitalized interest amount ($2,870.65) and the disbursement amount ($20,500) is $23,370.65; however, the current principal amount for this loan as listed in the chart is $1,000 less ($22,370.65). As such, this Court will account for this minor error and use the increased grand total of

interest.[4] *See* Ex. A, ECF Doc. 52-1; Joint Stip. of Facts ¶ 1, ECF Doc. No. 27. This means almost 33% of the current loan balance is interest.

*The Debtor*

When Mr. Bell filed his bankruptcy petition in November 2019, he was 67 years old. At that time, he worked as a driver for a limousine and travel service. Transcript at. 14:3–23, ECF Doc. No. 55 [hereinafter Tr.]. After he filed his bankruptcy petition, the COVID-19 global pandemic occurred curtailing travel. Consequently, his employment income plummeted. In response, he picked up work as a substitute teacher while continuing his efforts to obtain permanent full-time employment. *See* Tr. 15:7–16:17.

In the years before filing bankruptcy, Mr. Bell earned a Master of Science degree from the University of Maryland. *See* Pl.'s Mot. for Summ. J. at 7, ECF Doc. No. 37. The education expense for that degree has been paid in full. Tr. at 53:9–23; 57:3–13. Mr. Bell worked full time while in school and qualified for an employer reimbursement program to help pay that education debt. *See* Pl.'s Mot. for Summ. J. at 7, ECF Doc. No. 37; Tr. at 57:3–20.

Mr. Bell worked in customer relations for Hertz Rental Car and later as a processing center manager for the Virginia Department of Motor Vehicles. *See* Pl.'s Mot. for Summ. J. at 7, ECF Doc. No. 37; Tr. at 51: 1–9. While working at the Virginia Department of Motor Vehicles, he learned of an opportunity to increase his income by moving to the D.C. Department of Motor Vehicles. Tr. at 51:21–23. He pursued that opportunity and obtained employment with the D.C. Department of Motor Vehicles. Tr. at 51:21–23. While working at the D.C. Department of Motor

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$109,983.88 for the calculations in this opinion. This Court notes that its analysis remains unaffected even if this Court used the lower grand total.

[4] This amount continues to grow from the original $74,381 that Mr. Bell borrowed. *See* Joint Stip. of Facts ¶ 1, ECF Doc. No. 27.

Vehicles, he began efforts to obtain a job with the federal government with hopes to qualify for retirement benefits. *See* Tr. at 53:24–54:4; Pl.'s Mot. for Summ. J. at 7–8, ECF Doc. No. 37.

In 2011, Mr. Bell enrolled in a Master of Public Administration ("MPA") program online through Strayer University, believing the education from Strayer would lead to full-time employment with the federal government, which he understood would provide him with income for retirement. *See* Pl.'s Mot. for Summ. J. at 7, ECF Doc. No. 37; Tr. at 53:24-54:4. He graduated in 2014, five years before he filed bankruptcy. *See* Pl.'s Mot. for Summ. J. at 7, ECF Doc. No. 37.

Mr. Bell recounted:

> I started this program at Strayer College to enhance my ability to get federal employment. That was the whole purpose . . . . [for] the degree I got with the student loan [Master of Public Administration]. The idea being that it would enhance my ability to get federal employment. I already had a Master's degree in managing, customer service, and marketing, and that kind of thing, sales and all this kind of stuff. I mean, that was already, I already paid, I paid for that. I even got a loan for part of it, but everything was repaid. . . . The thing that I was trying to do, was to get, was to get this federal employment so that I could get the benefits so I could retire at seventy years old . . . .
> [M]y retirement income would have been substantial enough to cover a payment plan that would allow me to repay it. . . . [T]hat's part of the reason why I was seeking the federal employment.

Tr. at 53:7–9, 53:17–54:1, 54:25–55:3.

When asked why he thought he needed an MPA from Stayer University to help him obtain federal employment, Mr. Bell explained:

> [W]hat I had was a Master's in Marketing, so that's customer service. . . . [T]he government people look at that as business related. Okay, you know how to sell. You know how to manage certain types of work flows, private work flows, in the private sector . . . . But government requires an understanding of, of bureaucracy. Government requires an understanding of federal agencies. The government requires an understanding of, the biggest thing was how the money is being dispersed.

Tr. at 56:7–16.

Mr. Bell did obtain some employment with the federal government. In late 2013, he began a temporary position in customer service for the Small Business Administration, Office of Disaster Assistance ("SBA"). Pl.'s Mot. for Summ. J. at 7, ECF Doc. No. 37. He then obtained a position with the Federal Emergency Management Agency ("FEMA") as a program specialist, but at the end of his probationary period, in March 2019, was placed on leave without pay, which continued until June 2019 when his FEMA employment officially terminated. *Id.* at 7–8; Tr. at 14:1–10. In June 2019, he obtained work as a driver for a limousine service. Pl.'s Mot. for Summ. J. at 8, ECF Doc. No. 37.

To obtain the MPA degree, Mr. Bell incurred the student loans he now seeks to discharge. Tr. at 54:14–18, 57:15–17. The repayment period for the loans did not begin until 2015.[5] Mr. Bell recounted, "once you graduate or finish school, there's a year grace period." Tr. at 28:20–21. He went on to explain how his loans were placed in forbearance.

> After this grace period, they say, 'Well, what's your income?' You send in the forms, what's your income, and everything like that. And then they say, 'Okay based on this, if you apply for forbearance you can get forbearance.' . . . [The forbearances were] granted by the Department of Education. . . . [These forbearances are] only good for a year . . . [Y]ear after year I was able to show [my eligibility for a forbearance].

Tr. at 28:21–29:8.

During this period, Mr. Bell's income was insufficient to cover living expenses and the loan payments. The documents filed with this Court show that in March 2015, the loans were approved for a general forbearance for the period April 2015 to April 2016. *See* Ex. B at 5, ECF Doc. No. 52-2. The following year, in March 2016, Mr. Bell reported his monthly income from

[5] For example, according to Exhibit 3 that Mr. Bell attached to his May 3, 2021, supplemental filing, the loan issued on July 10, 2014, did not have a "loan repayment begin date" until September 24, 2015, more than a year after the loan issue date. Pl.'s Exs. at 30, ECF Doc. No. 46. The same exhibit shows that the loan issued on July 10, 2014, had a status of "IN GRACE PERIOD" as of March 24, 2015. *Id.* at 31; *see also id.* at 3, 30–42.

all sources totaled $2,291.47, with a gross pay of $1,057.60 per two-week pay period. Ex. C at 1, 4, ECF Doc. No. 52-3. The DOE approved the loans for a Student Loan Debt Burden Forbearance for the period April 2016 through April 2017. *Id.* at 5. In 2017, Mr. Bell reported no taxable income and requested a temporary forbearance for the period April 2017 until April 2018. Ex. D at 1, ECF Doc. No. 52-4. The DOE granted it. *Id.* at 5. In March 2018, Mr. Bell reported monthly income of $1,326.00. Ex. E at 1, ECF Doc. No. 52-5. The monthly loan payments at that time were $1,004.50. *Id.* The DOE granted Mr. Bell a Student Loan Debt Burden Forbearance for the period April 2018 to March 2019. *Id.* at 6

In 2019, the DOE approved Mr. Bell for a temporary general forbearance for the period April 2019 until May 2019. Ex. F at 1, ECF Doc. No. 52-6. Mr. Bell was then placed in an "Income Driven Repayment" ("IDR") Plan titled "Pay As You Earn" ("PAYE"). *See* Ex. G at 1, ECF Doc. No. 52-7. The DOE wrote, in a letter addressed to Mr. Bell:

> We used your income documentation and family size to determine your new monthly payment of $0.00 which is due on 05/06/2019. Your new monthly payment amount is effective for all payments due between 05/06/2019 and 05/06/2020. . . . If you do not recertify or you no longer have a partial financial hardship (PFH), your payment amount will be $1,176.40.

*Id.*

The "income documentation" referred to includes Mr. Bell's application in March 2019, which revealed annual adjusted gross income of $5,871. *See* Ex. H at 1, ECF Doc. No. 52-8. These numbers are consistent with Mr. Bell's answers in his bankruptcy petition about his current and past income.[6] The DOE wrote to Mr. Bell the following year. Once again, the DOE said,

[6] Mr. Bell's Statement of Financial Affairs (Official Form 107) shows total income from January 1, 2018, to December 31, 2018, of $5845, and total income from January 1, 2017, to December 31, 2017, of $48,369. *See* ECF Doc. No. 1 at 45, Case No. 19-50991 (Bankr. W.D. Va. Nov. 14, 2019). The periods reported on the loan forbearance application to the DOE were based on a different twelve-month period than the Statement of Financial Affairs.

"[w]e used your income documentation and family size to determine your monthly payment of $0.00 which is due on 05/06/2020. Your new monthly payment amount is effective for all payments due between 05/06/2020 and 05/01/2021."[7] *See* Pl.'s Exs. at 48, ECF Doc. No. 46.

Mr. Bell simply did not have the ability to service the loan. He recalled:

> [I]t took almost a year to even get this job with FEMA. Because of doing all the things that you have to do, the applications and waiting time and get the application in March and they make a decision in June, and then they don't hire you on the workforce until, until September or October.

Tr. at 29:11–16.

He further reported, "I spent all my money covering living expenses during this time frame when I had the job but had not started to earn income from the job." *Id.* at 29:19–22; *see also* Pl.'s Mot. for Summ. J. at 7–8, ECF Doc. No. 37. At the outset of the trial, he told this Court, "I came to Winchester to work with FEMA. That was the reason for my being here. I'm a native Washingtonian . . . ." Tr. at 8:21–23. As a result, he "packed everything up and moved to Winchester, and took this job with the expectation of continuing this job." Tr. at 9:6–8. He recounted how he "spent all [his] money. [He] spent over like $30,000 or so in just some money spent toward security deposits for moving fees and for everything because [he] thought this was a fix." Tr. at 9:19–22. After spending his savings to move to Winchester, he then lost the job for which he moved. *See id.* at 9:23 ("It didn't work out."); Pl.'s Mot. for Summ. J. at 7–8, ECF Doc. No. 37. In pleadings filed previously with this Court, Mr. Bell lamented that "for three months [he] was borrowing from [his] credit cards to pay [his] living expenses before [he] got a job as a driver with Reston Limousine in June 2019." Pl.'s Mot. for Summ. J. at 8, ECF Doc. No. 37.

[7] Rather than modify the loans, monthly "payments" are temporarily reduced to "zero" until either the debtor certifies that he or she earns sufficient income to pay more per month, or the debtor fails to timely submit his or her annual certification. During the program, interest continues to accrue against any unpaid principal. And so, the debt grows.

Given these facts, it is not surprising the DOE determined, based on Mr. Bell's earnings, his monthly payment for his student loans to be zero. Mr. Bell's earnings reflect an inability to pay the loan payment.

*The Complaint*

After filing bankruptcy, Mr. Bell filed a complaint requesting that this Court determine that repayment of the student loan debt is an undue hardship for him, and therefore, under Bankruptcy Code section 523(a)(8), the student loan debt should not be excepted from discharge. *See* Compl., ECF Doc. No. 1. After repeated efforts, Mr. Bell served his complaint on the United States and the DOE. ECF Doc. No. 16. The United States responded on behalf of the DOE. Ans., ECF Doc. No. 19. In its response, the DOE contends that Mr. Bell has not shown the onerous requirements to permit this Court to find repayment of the debt is an undue hardship because, according to the DOE, he does not satisfy the three-part test established in *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 831 F.2d 395 (2d Cir. 1987).

**ANALYSIS**

*Section 523(a)(8)*

Under Bankruptcy Code section 523(a)(8), student loan debt[8] is excepted from discharge unless excepting the debt from discharge imposes an undue hardship on the debtor. The language of the statute permits a bankruptcy judge to discharge student loan debt. Specifically, a discharge under the Bankruptcy Code does not discharge an individual from student loan debt "unless excepting such debt from discharge would impose an undue hardship on the debtor." 11 U.S.C. § 523(a)(8). If the debt is not discharged, it remains an obligation to be repaid. It follows then, if

[8] This opinion uses "student loan debt" to describe the debts excepted from discharge under section 523(a)(8). Section 523(a)(8) lists various types of educational debts that fall within the 523(a)(8) exception to discharge. Case law has developed on what specific types of debt fall within section 523(a)(8)'s reach. It is undisputed in this adversary proceeding that the student loans Mr. Bell seeks to discharge fall within section 523(a)(8).

repayment of that obligation is an undue hardship on the debtor, under section 523(a)(8) a bankruptcy judge may grant a discharge of the student loan debt. In this way, Congress has authorized a bankruptcy court to decide when repayment of the student loan debt is an undue hardship.

In attempting to apply the undue hardship language, courts have strayed from a natural reading of the statute to develop judicial tests. Most Circuit Courts of Appeal, including the Fourth Circuit, have adopted a version of the test delineated in *Brunner v. New York Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). *See Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 401 (4th Cir. 2005). The United States Court of Appeals for the Eighth Circuit and the Bankruptcy Appellate Panel for the First Circuit, however, have adopted a different test: the "totality of the circumstances" test. *See Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 553 (8th Cir. 2003); *Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon)*, 435 B.R. 791, 800 (B.A.P. 1st Cir. 2010) (concluding "that Brunner takes the test too far").

Under the *Brunner* test, to prove an "undue hardship," the debtor seeking discharge of student loans under section 523(a)(8) must show:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

*Brunner*, 831 F.2d at 396.

By comparison, the totality of the circumstances test requires a debtor to prove by a preponderance of evidence that:

> (1) his past, present, and reasonably reliable future financial resources; (2) his and his dependents' reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case, prevent him from paying the student loans in

> question while still maintaining a minimal standard of living, even when aided by a discharge of other prepetition debts.

*Bronsdon*, 435 B.R. at 798; *see also Long*, 322 F.3d at 554.

On one hand, the first prong of the *Brunner* test lines up with the factors considered under the totality of the circumstances test. On the other hand, "the *Brunner* test imposes two additional requirements [prongs two and three] on the debtor that *must* be met if the student loans are to be discharged." *Bronsdon*, 435 B.R. at 799 (quoting *Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks)*, 331 B.R. 18, 26 (Bankr. D. Mass. 2005)).

The totality of the circumstances test concentrates on the ability to pay the debt. In other words, what factors, if any, on balance prevent the debtor from paying the debt while maintaining a minimal standard of living. Alternatively, the *Brunner* test looks to the debtor's financial condition and life choices along with any potential ability to pay in the future.

Under the totality of the circumstances test, appropriate relevant factors are weighed and no one factor is determinative. By contrast, the *Brunner* test factors are mandatory requirements, and the absence of a single requirement bars a bankruptcy court from concluding that repayment of student loan debt places an undue hardship on a debtor. *See Frushour*, 433 F.3d at 400 ("The debtor has the burden of proving all three factors by a preponderance of the evidence.").

The Fourth Circuit has adopted the *Brunner* test. *See Frushour*, 433 F.3d at 400. This Court therefore will apply the *Brunner* test to determine if Mr. Bell's complaint under section 523(a)(8) may be granted.

Faced with both a statutory directive and an appellate directive, coupled with ranging applications of these directives among the circuits, it is fitting to recall the history of the *Brunner* decision and the progression of the statutory language.

*The History of Bankruptcy Code Section 523(a)(8) and the* Brunner *Test*

The enactment of Title 11 of the United States Code in 1978 provided the first iteration of section 523(a)(8)'s exception to discharge for certain student loan debt:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt— . . .
> (8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless—,
> (A) such loan first became due before five years before the date of the filing of the petition; or
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; . . . .

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591 (1978).

As originally enacted, section 523(a)(8) contained two bases for exception to the exception to discharge of certain student loan debt. First, pursuant to section 523(a)(8)(A), if the first payment on the educational loan had become due more than five year prior to the filing of the debtor's bankruptcy petition, the debt was dischargeable. Second, pursuant to section 523(a)(8)(B), the debt was dischargeable only if excepting the debt from discharge would impose an undue hardship on the debtor and the debtor's dependents.

Stated differently, the general rule was that section 523(a)(8)(A) "declare[d] such [student] loans nondischargeable for five years after they first came due, but § 523(a)(8)(B) create[d] an exception to the general rule if the failure to discharge would 'impose an undue hardship on the debtor and the debtor's dependents.'" *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752, 753 (S.D.N.Y. 1985). Based on the legislative history, these provisions were "designed to remedy abuses of the educational loan system by restricting the ability of a student to discharge an educational loan by filing for bankruptcy shortly after graduation, and to safeguard the financial integrity of educational loan programs." *Santa Fe Med. Servs. v. Segal (In re Segal)*, 57 F.3d 342, 348 (3d Cir. 1995).

In 1979, Congress amended section 523(a)(8) to strike out "to a governmental unit, or a nonprofit institution of higher education, for an educational loan" in the umbrella of section 523(a)(8) and replaced the language with "for an educational 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 a nonprofit institution of higher education." Pub. L. No. 96-56, § 3, 93 Stat. 387, 387 (1979). This amendment had the effect of expanding the breadth of the types of student loan debt that were rendered nondischargeable. The 1979 amendments also clarified that section 523(a)(8)(A)'s five-year prepetition period calculation was "exclusive of any applicable suspension of the repayment period." *Id.*

It was under this backdrop that the United States Bankruptcy Court for the Southern District of New York, in 1983, considered whether a young debtor who sought to discharge student loans immediately after obtaining a graduate degree had shown that repayment of those loans was an undue hardship. At that time, Bankruptcy Code section 523(a)(8) permitted discharge of student loan debt if "such loan first became due before five years before the date of the filing of the petition," as an alternative to the undue hardship basis for discharge.

Ms. Brunner sought to discharge her student loan debt less than a year after graduation. *See Brunner*, 46 B.R. at 753. The bankruptcy judge issued an oral ruling discharging those loans. *See id.* On appeal, the district court identified potential abuse in permitting a recent graduate to obtain such an immediate discharge of student loan debt. In its written opinion, the district court crafted a three-part test to help determine whether repayment of student loans that first came due within five years of the bankruptcy petition date would be an undue hardship for that debtor. Student loans that first came due before five years of the petition date would not fall within the purview of the *Brunner* test because the debt would be dischargeable under what was section

523(a)(8)(A). The district court's ruling in *Brunner* was affirmed, and the three-part test was adopted by the Second Circuit. *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 831 F.2d 395 (2nd Cir. 1987). That three-part test is the *Brunner* test.

A few years after *Brunner*, the Crime Control Act of 1990 made two significant amendments to section 523(a)(8). First, Congress again expanded the scope of the types of debt included in the section 523(a)(8) exception. Specifically, Congress replaced the 1979 amended language starting with "for an education loan" through "unless" with "for 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 for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless." Crime Control Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4789,4964–65 (1990). Second, the Crime Control Act enlarged the five-year period in section 523(a)(8)(A) to a seven-year period and expanded the type of debt from "loan made" to reflect the debts newly inserted into the general coverage of section 523(a)(8).

In 1998, Congress deleted subsection (A) of section 523(a)(8). Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (1998). This left only one basis for debtors to have their student loans determined dischargeable: proving an "undue hardship."

The most recent amendments to section 523(a)(8) occurred in 2005. The amendments restructured the language, striking the then-existing (a)(8) in its entirety, and adding the following:

> (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;

Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2005). In addition to reordering the language, the amendments again expanded the types of student loans subject to the discharge exception beyond those 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. Throughout the evolution of section 523(a)(8), the phrase "undue hardship" has remained.

"Undue hardship" is not a defined term in the Bankruptcy Code. Congress uses the phrase "undue hardship" in the current Bankruptcy Code once in section 523 and eight times in section 524. *See* 11 U.S.C. §§ 523(a)(8), 524(c)(3)(B), (c)(6)(A)(i), (k)(3)(J)(i), (k)(5)(A)–(B), (k)(6)(A), (m)(1). Section 524(c) governs the standards for an enforceable reaffirmation agreement. Salient to the current analysis is section 524(m)(1). This Code section explains the phrase "undue hardship" by providing a presumption that a reaffirmation agreement is an undue hardship "if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt." *Id.* § 524(m)(1). When the presumption is not rebutted, a bankruptcy court has the authority to disapprove the reaffirmation agreement.[9]

The presumption of undue hardship in section 524(m)(1) was added to the Bankruptcy Code when Congress enacted BAPCPA, which became effective on October 17, 2005. Prior to the 2005 amendments, "undue hardship" appeared only three times in the Bankruptcy Code. *See*

[9] *See* 11 U.S.C. § 524(c)(3)(B).

11 U.S.C. §§ 523(a)(8), 524(c)(3)(B), (c)(6)(A)(i) (2000). Although rebuttable, the presumption in section 524(m)(1) provides a comparison of income less expenses to the monthly payments to be made on the debt to be reaffirmed. Stated differently, if the debtor's income less expenses leaves insufficient income to make payments on the debt to be reaffirmed, the statute provides that the presumption of undue hardship arises. On the other hand, if making scheduled payments on the subject debt is within the debtor's budget, no presumption of undue hardship arises.

The Fourth Circuit's opinions applying the phrase "undue hardship" in section 523(a)(8), *Frushour* and *Spence*, were issued after the effective date of BAPCPA. Each opinion, however, was on appeal from decisions entered by the bankruptcy courts in cases filed prior to the enactment of BAPCPA.[10] Since the provisions of BAPCPA did not apply to cases filed prior to October 17, 2005, the statutory language of section 524(m) was not a consideration in the bankruptcy courts' decisions nor in the subsequent decisions on appeal in *Frushour* and *Spence*. Indeed, the Fourth Circuit in each opinion cites to the 2000 edition of the United States Code. *Frushour*, 433 F.3d at 398; *Spence*, 541 F.3d at 541.

In establishing a baseline determination of "undue hardship" for purposes of section 523(a)(8), this Court finds informative section 524(m)(1)'s undue hardship comparison between the debtor's income less expenses, on the one hand, with the repayment of a particular debt, on the other. This Court acknowledges that the inclusion of a calculation of a presumptive "undue hardship" in repaying a debt in one part of the Code does not preclude a completely different understanding of "undue hardship" in another. In applying a statute, courts observe the "there is

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[10] The order discharging the debtor's student loans in the *Frushour* case was issued on July 21, 2004. *See* Order, *Frushour v. Educ. Credit Mgmt. Corp.*, Adv. P. No. 04-80047-wb (Bankr. D.S.C. July 21, 2004), ECF Doc. No. 23. The bankruptcy court in *Spence* issued the order discharging the debtor's student loans shortly after the BAPCPA effective date (on November 16, 2005), but the adversary complaint to determine dischargeability was filed on March 22, 2005. *See* Order, *Spence v. Educ. Credit Mgmt. Corp.*, Adv. P. No. 05-01207-RGM (Bankr. E.D. Va. Nov. 16, 2005), ECF Doc. No. 46.

a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Yet, courts also remain mindful that "the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Id.* Here there appears to be at least some connection between the use of the phrase in section 523 and in section 524.

"Undue hardship" in both section 523(a)(8) and section 524 focuses on the burden for a debtor in repaying a particular debt post-discharge. In both sections, Congress characterized the repayment hardship as "undue." Both sections compel a bankruptcy court to evaluate the facts and circumstances of each debtor's financial situation, and specifically whether the debtor has the ability to repay that particular debt, in determining if the debt should survive the granting of a personal discharge.

If Mr. Bell's student loan debt were analyzed under the language of section 524(m)(1), a presumption of undue hardship would arise. The difference between Mr. Bell's income less expenses is less than the payment amounts necessary to repay his student loans; hence under a section 524 analysis, repayment of the student loans would be presumed to be an undue hardship. If this were the inquiry, then absent rebuttal, this Court would be satisfied that not excepting his student loans from discharge would place an undue hardship on Mr. Bell. The inquiry before this Court, however, is whether, under section 523, excepting Mr. Bell's student loan debt from his bankruptcy discharge would place an undue hardship on him. And so, guided by *stare decisis*, to answer this inquiry, this Court will not look to the language of section 524 and instead will apply

the three criteria of the *Brunner* test to decide if Mr. Bell has shown that excepting his student loan debt from discharge would impose an undue hardship on him.

*Application of the* Brunner *Test to Mr. Bell*

The *Brunner* test requires a debtor to establish by a preponderance of the evidence three "prongs":

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

*Brunner*, 831 F.2d at 396.

Based on the Fourth Circuit's application of the *Brunner* test, Mr. Bell must show all three of the *Brunner* prongs for this Court to discharge the student loan debt.

**A. Prong One**

The first prong of the *Brunner* test requires that the debtor show "that [he] cannot maintain, based on current income and expenses, a 'minimal' standard of living for [him]self and [his] dependents if forced to repay the loans." *Brunner*, 831 F.2d at 396. In this Court's Order dated March 30, 2021, this Court concluded that, after reviewing Mr. Bell's current income and expenses, as a matter of law he had satisfied prong one of the *Brunner* test. *See* Order at 10–11, ECF Doc. No. 44. Mr. Bell put forward evidence and argument demonstrating that he made every effort to reduce his monthly expenses from $4,232 to $3,963. Mr. Bell also showed, however, that his monthly income had decreased from $4,472.25 to $2,738 since the filing of his bankruptcy petition. *Id.* at 11. After reviewing the specifics of Mr. Bell's expenses and determining that, as a matter of law, they were not frivolous, this Court was satisfied that his unbalanced budget made it such that he could not maintain a minimal standard of living based on his current income and

expenses if forced to repay the loans. *Id.* This Court remains satisfied that Mr. Bell has met the requisite showing under prong one of the *Brunner* test, so this Court need not revisit prong one. At trial, the parties focused their arguments and evidence on prongs two and three of the *Brunner* test. This Court will do the same in this Memorandum Opinion.

**B. Prong Two**

Prong two of the *Brunner* test requires the debtor to show "that additional circumstances exist indicating that [the debtor's] state of affairs [under prong one] is likely to persist for a significant portion of the repayment period of the student loans." *Brunner*, 831 F.2d at 396. The test expressly requires a court to consider: (1) the debtor's current circumstances; (2) the likelihood that those circumstances will remain or persist; and (3) whether those circumstances are likely to persist during a significant period of the remaining term of the loan.

The Fourth Circuit has said that this part of the "undue hardship" test requires the debtor to show a "certainty of hopelessness" that he will not be able to repay the loan. *See, e.g*, *Frushour*, 433 F.3d at 401. This language directs a court to consider the reasons the debtor is unable to pay the debt and whether such reasons are certain, rather than merely likely, to persist. It is another way of saying the second prong is met only if it is futile or unreasonable to suggest this debtor will in fact[11] be able to repay this debt during the term of the loans. *Brunner* directs a court to consider "the likelihood" that the debtor's current circumstances will remain not indefinitely but during "a significant period of the remaining term of the loan." In other words, under the *Brunner* test, the debtor is not required to prove that his circumstances will not ever improve. Mindful that the directive from this Circuit is to apply the *Brunner* test, this Court interprets the standard of

[11] This Court construes the language of *Frushour* consistent with a judge's duty to avoid speculation or supposition of possibilities not supported in the case record. Accordingly, this Court will consider the facts in the record without conjecture.

"certainty of hopelessness" for the undue hardship requirement to necessarily pertain to whether it is a "certainty of hopelessness" that the debtor will not be able to repay the debt, not whether it is a "certainty of hopelessness" that a debtor's financial balance sheet will not at some point improve.

In evaluating prong two of the *Brunner* test, this Court will consider the debtor's education, professional licenses, breadth of employment history, previous employment income versus current income, and effort to find a higher paying job. *See Frushour*, 433 F.3d at 401 ("Having a low-paying job, however, does not in itself provide undue hardship, especially where the debtor is satisfied with the job, has not actively sought higher-paying employment, and has earned a larger income in previous jobs."). In so doing, this Court will evaluate whether his circumstances are not likely to improve during a significant portion of the repayment period, such that this Court may find his ability to repay the loans is a "certainty of hopelessness."

Mr. Bell has a Master of Science degree from the University of Maryland and an MPA degree from Strayer University. Mr. Bell has previous and current employment history. His employment, with his education, has at times provided him with income between $40,000 and $50,000. *See* Statement of Financial Affairs, ECF Doc. No. 1 at 45, Case No. 19-50991 (Bankr. W.D. Va. Nov. 14, 2019) (showing that in 2017, Mr. Bell's total income was $48,369; in 2018, Mr. Bell's total income was $5845;[12] from January 1, 2019, to November 2019, Mr. Bell's total income was $40,862); *see also* Resp. at 2–8, ECF Doc. No. 43.

Since obtaining his MPA, Mr. Bell's income has fluctuated while he attempted to obtain higher or more stable income. As of 2013, he had a temporary position in customer service for the

[12] During 2018, Mr. Bell was hired for a position with FEMA, but during the pre-employment process did not receive income. *See* Tr. at 30:2–9, 39:10–11. On the application for mandatory forbearance he signed on March 17, 2018, he reports total monthly taxable income as of that date as $1326. Pl.'s Exs. at 44, ECF Doc. No. 46; Ex. E at 1, ECF Doc. No. 52-5.

SBA. The position was interim and did not include benefits. *See* Tr. at 36:10–19. He supplemented the SBA work with hourly wage work for the Environmental Protection Agency (EPA). *See* Tr. at 37:24–38:7, 38:19–39:5. Still looking for permanent employment with benefits, Mr. Bell engaged in a robust job search for public and private sector jobs ranging from lower skill to higher skill positions. *See* Pl.'s Exs. at 5–26, ECF Doc. No. 46. In 2018, Mr. Bell obtained a job with FEMA. *See* Tr. at 39:10–11. The position required extensive background checks and a lengthy pre-employment process. Tr. at 30:2–9. Mr. Bell described the position with FEMA as one with benefits and one that would "lead to a more permanent status." Tr. at 39:13–18. He thought the position would lead to a greater salary and a more beneficial retirement plan. "It was a GS-9 position, and I'd already had previous government experience so the likelihood was that I was going to be a GS-11 within a year, and so my income would have been like right around $72,000 a year. So that was my goal." Tr. at 9:8–12. In 2019, Mr. Bell started working with FEMA in Winchester, Virginia, but at the end of his probation period, still in early 2019, he was placed on leave without pay. Tr. 14:3–5, 36:10–19. After losing the job with FEMA, he resumed his job search and continued to hunt for better employment even after accepting a position as a driver with Reston Limousine Service. *See* Tr. at 13:9–14:11. During the COVID-19 pandemic, when Mr. Bell's hours at Reston Limousine Service were drastically cut, Mr. Bell began work as a substitute teacher on an as needed basis. Tr. 15:4–10; *see* Pl.'s Mot. for Summ. J. at 8, ECF Doc. No. 37; Resp. at 37–38, ECF Doc. No. 43.

When describing why he was not eligible for advancement or higher income with his current places of employment, Mr. Bell described the need to obtain certifications and licenses. *See* Tr. at 16:1–18:16.; Pl.'s Mot. for Summ. J. at 8, ECF Doc. No. 37. Mr. Bell is not eligible for full-time employment as a teacher (as contrasted from work as a substitute teacher) without

certifications. *See* Tr. at 16:1–9; Pl.'s Mot. for Summ. J. at 8, ECF Doc. No. 37. Mr. Bell is not eligible for a higher salary as a driver without a Commercial Driver's License. *See* Tr. at 18:7–16. Even with such certifications, however, Mr. Bell's income would likely be $40,000–$50,000 per year. *See* Tr. at 17:10–18, 18:17–22.

Obtaining such certifications and licenses requires further education at an expense to Mr. Bell plus time to complete the education. *See* Tr. at 16:18–22:20. Mr. Bell urged this Court to recognize and consider the improbability that a senior citizen, aged 70 years or older, is hired for a long-term, career-track position, let alone actually stays in the workforce long enough to realize the advancement. *See* Tr. at 22:21–25:21, 60:17–61:4; Pl.'s Mot. for Summ. J. at 8, ECF Doc. No. 37.

Mr. Bell's employment history, experience, and current skills render him qualified for work in customer service and employee management. *See* Tr. 51:1–53:4. It is unclear such work would render a salary high enough to permit Mr. Bell to repay his student loans based on his actual earnings from work in these fields. His employment history in this Court's record shows that Mr. Bell's actual earnings, with his skills and experience, did not provide him sufficient income to make the payments on the student loan debt. *See* Ex. C at 4, ECF Doc. No. 52-3; Resp., ECF Doc. No. 43 at 2–9; Statement of Financial Affairs, ECF Doc. No. 1 at 45, Case No. 19-50991 (Bankr. W.D. Va. Nov. 14, 2019).

Mr. Bell provided to this Court support showing the strong but unsuccessful attempt to secure employment income sufficient to permit him to repay the student loans. *See* Pl.'s Exs. at 5–26, ECF Doc. No. 46. Mr. Bell explained his efforts to obtain employment with higher salary potential or career advancement. *See* Tr. at 13:7–15:25. Mr. Bell told this Court about the physical challenges of sustaining work in his later years, as well as the limited opportunities for high income

work in his later years. Tr. at 20:11–25:20. The record shows undeniably that during the nearly ten years since Mr. Bell obtained his student loans, he sought career advancement employment opportunities. The record shows he has had no success, despite his education.

In considering whether Mr. Bell's state of affairs is likely to persist during the remaining years of the repayment period, this Court is persuaded by the uncontroverted evidence[13] showing the salary ranges available to Mr. Bell during this time period. Mr. Bell continues his employment with Reston Limousine service as a contract driver. With additional training and a Commercial Driver's License, he could advance his income to "$40,000 or so a year . . . if [he] could do the job at all." Tr. at 18:22–23. Even at that income, he would be unable to pay the monthly loan payment of $1,176.40, let alone repay the $109,983.88 (and growing) total indebtedness during the remaining years of the repayment period. *See* Joint Stip. of Facts ¶ 1, ECF Doc. No. 27; Ex. G at 1, ECF Doc. No. 52-7.

Mr. Bell is also currently working as a substitute teacher. He is pursuing full-time work as a teacher. Tr. at 15:7–19:21. His income as a substitute teacher is currently $150 per day, four days per week or "right around $2,200 a month" gross income, and "around $1,600 to $1,800" net income. Tr. at 17:19–18:6. Such income is not enough to pay the $1,176.40 monthly loan payment or repay the $108,983.88 debt during the repayment period. *See* Joint Stip. of Facts ¶ 1, ECF Doc. No. 27; Ex. G at 1, ECF Doc. No. 52-7. Mr. Bell emphasized his desire to obtain full-time work and willingness to seek the necessary certifications for such employment, including efforts to obtain a grant to cover the expense. Even if he can do all this, at best, his income will likely be "somewhere around $40,000 or $50,000 a year." Tr. at 17:14–18. Such potential, however, is not

[13] The DOE did not contest the facts or Mr. Bell's evidence. Counsel for the DOE demonstrated patience and leeway in permitting Mr. Bell a full opportunity to prove his complaint. As such, no evidentiary or procedural objections were raised. The DOE instead focused its contest over the application of the law to Mr. Bell's facts.

likely to occur during the remaining years of the repayment period.[14] Even if it does, it is not sufficient to pay the standard monthly payment or repay the loan during the repayment period. Attempting to make such student loan payments, even assuming the most optimistic income projections, would impose an undue hardship on Mr. Bell.

Mr. Bell emphasized his objective to obtain a GS-11 position. Under the GS-11 Pay Scale for 2021, the "[s]tarting salary for a GS-11 employee is $55,756.00 per year at Step 1."[15] This equates to gross monthly income of $4,646.33.[16] He believed such position would render income of $72,000. Even with that income, it is not likely that he could repay the indebtedness during the repayment period, whether that period be the remaining years of the ten-year repayment period or the remaining years of a twenty-year term under the income-based repayment plan. Mr. Bell believed a position with the federal government not only would lead to a GS-11 salary but also would include benefits and a retirement plan. His belief was not realized. It is futile at this point to expect it to occur in his future, given Mr. Bell's age.

Income in the range available to Mr. Bell as a teacher, a limousine or licensed commercial driver, a customer service manager, or a GS-9 federal employee is not sufficient to pay the indebtedness during the remainder of the repayment period, let alone to pay the indebtedness and maintain a minimum standard of living. For example, Mr. Bell's employment with FEMA was at

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[14] The record is unclear as to the term of the repayment period. The loans originally had a ten-year repayment period. The forbearances may have extended this repayment period. Mr. Bell's income-based repayment plan ("IBRP") carries a plan period of 20 years, but it is unclear in this record when that plan period commenced, or whether the IBRP term is the "repayment period" under the *Brunner* test, especially when the IBRP is not a repayment mechanism. The *Brunner* test was written at a time when alternative, income-based repayment plans for federal student loans did not exist; similarly, the Fourth Circuit adopted the *Brunner* test at a time when these repayment plans were unavailable. This new development has added more complexity to prong two's legal analysis, and begs the question—may the Department of Education effectively modify prong two's analysis by developing alternative, extended repayment plans?

[15] *GS-11 Pay -2021 Federal GS Payscale*, FEDERALPAY, https://www.federalpay.org/gs/2021/GS-11.

[16] *Id.*

a GS-9 paygrade. *See* Tr. 37:12–14. Under the GS-9 Pay Scale for 2021, the "[s]tarting salary for a GS-9 employee is $46,083.00 per year at Step 1, with a maximum possible base pay of $59,907.00"[17] The starting pay equates to a gross monthly income amount of $3,840.25.[18] The student loan debt has now become over $100,000 and accrues interest of $14.70 per day. The student loan monthly payments, based on the current principal and interest balance, require monthly payments of at least $1,176.40.[19] Nearly 33% of the loan balance is interest. Payments must first be applied to interest before application to principal, whether under standard repayment terms or an income-based repayment plan; so, it is unclear at what point the payments will repay the principal or what period is necessary to repay the loan. *See* 34 C.F.R. § 682.209(b)(1); 34 C.F.R. § 682.215(c)(1).

At the end of the day, the debtor's education, employment history, employment income, current income, efforts to find higher paying jobs, and lack of professional licenses support a finding that Mr. Bell's current financial circumstances are not likely to improve enough to permit him to make loan payments on the debt, much less repay the debt. *See Frushour*, 433 F.3d at 401. The debtor's education by itself has not led to sufficient income to repay the rapidly growing student loan debt, and nothing in the record shows or supports a finding that Mr. Bell's education is likely to lead to a material change. His lack of professional licenses limits his salary options and potential. His employment history and previous income show he has had financial hardship and debt burden rather than an ability to repay the loans. His efforts to find higher paying jobs have been stalwart yet unsuccessful.

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17 *GS-9 Pay -2021 Federal GS Payscale*, FEDERALPAY, https://www.federalpay.org/gs/2021/GS-9.

18 *Id.*

19 This Court uses this figure as an example amount; the DOE's April 3, 2019, letter to Mr. bell noted that this amount ($1,176.40) would be Mr. Bell's monthly payment amount if he failed to recertify or no longer had a partial financial hardship as of May 2020. *See* Ex. G at 1, ECF Doc. No. 52-7.

Mr. Bell's state of affairs has persisted during the entire repayment period to date. The evidence Mr. Bell has filed with this Court coupled with his testimony persuades this Court that his state of affairs is likely to persist during the balance of the repayment period. This Court finds Mr. Bell has satisfied prong two of the *Brunner* test. It is futile to expect Mr. Bell will repay the loans because he will not obtain income in amounts necessary to repay the loans during the balance of the repayment period, and certainly not repay the loans while maintaining a minimum standard of living. Given the outstanding amounts of the loans and the interest rates, even with the best salary Mr. Bell can obtain, and even if he works long into his 70s and 80s, he will not be able to maintain a minimum standard of living and repay the indebtedness, which continues to grow daily. Given these facts, Mr. Bell's ability to repay this debt is certainly hopeless.

The DOE, in both its pleadings and arguments at trial, focused largely on the availability of its income-based repayment plan. Mr. Bell is participating in such a plan. This income-based repayment plan allows Mr. Bell to make payments of zero dollars per month on his student loans based on his current income. Under this plan, Mr. Bell's monthly payment will be zero dollars per month unless his income rises to a level sufficient, in the DOE's opinion, to make payments on his student loans. All the while, interest continues to accrue on the loans. Mr. Bell must recertify every year while he is under this plan. After 240 months in this plan, Mr. Bell may qualify for forgiveness of the remainder of his student loans. *See, e.g.*, Joint Stip. of Facts ¶¶ 5–6, ECF Doc. No. 27. If Mr. Bell receives such forgiveness, he stands to face tax liability on the total amount of debt forgiven (including the interest accrued over the twenty-year period), which he would not face with a discharge of the debt in bankruptcy. *See* 26 U.S.C. §§ 61(a)(11), 108(f), 108(a)(1)(A).[20]

[20] Mr. Bell estimates if he participates in the program for its entirety, the total student loan debt will have increased to approximately $402,576. Whether the total loan balance increases to that amount or stays the same, the discharge of indebtedness income and tax liability will be substantial.

If he does not participate in the program, he must obtain sufficient disposable income to pay the interest and principal to pay the debt during the remaining term of the loan, which will require significantly higher income than he has currently, has had, or will be able to obtain.

The DOE argues that the simple availability of this alternative repayment plan calls for a finding that Mr. Bell does not satisfy prong two. Based on Mr. Bell's current circumstances, the DOE allows him to make monthly payments of zero dollars. In the event his circumstances change for the better, which has been shown to be very unlikely, the DOE will require him to make payments based on his improved circumstances.[21]

The *Brunner* test focuses on repayment of the student loan. Payment of zero dollars a month under a separate program cannot fairly be considered a repayment of the loan. In other words, the inquiry is not whether participation in a repayment program for twenty years for an ultimate forgiveness would be an undue hardship; the inquiry according to the *Brunner* test is whether *repayment* of the loan over the repayment period would be an undue hardship.

Plus, section 523(a)(8) exists for a reason. Congress did not eliminate the ability to obtain a discharge of student loans in bankruptcy under section 523(a)(8) by devising alternative statutory repayment programs for certain federally guaranteed loans. It is hard to imagine a debtor who would qualify for a discharge under section 523(a)(8) but who would not also qualify for an income-based repayment plan at zero dollars per month. If this Court were to accept the DOE's argument on this point, section 523(a)(8) would be rendered essentially meaningless—the DOE

[21] The DOE suggested that Mr. Bell may be able to make partial payments at some point in his future. Even if Mr. Bell submits partial payments, those partial payments will not repay the debt. Partial payments will not stop the interest and growth of the debt. Partial payments will not reduce the burden on the DOE from servicing the debt. Partial payments will not reduce the expense on the DOE for issuing statements, requests for certification and documentation in support, processing the same, reviewing and evaluating the same, and responding on the same. For that matter, zero-dollar monthly payments impose a burden on the DOE without any benefit of repayment.

could prevail in any case involving section 523(a)(8) by simply offering the debtor an alternative repayment plan like it did for Mr. Bell.

Section 523(a)(8) should not be rendered meaningless when the debtor is offered a repayment plan at zero dollars per month. This Court considers Mr. Bell's ability to *repay* the loan, which is not the same as deferring repayment by characterizing current "payments" as zero. Mr. Bell's student loan debt is increasing day-by-day as interest continues to accrue while he participates in this income-based repayment plan at zero dollars per month. This Court joins Judge Benjamin A. Kahn of the Bankruptcy Court for the Middle District of North Carolina in refusing to "jump the logical chasm necessary to conclude that no payment constitutes repayment, regardless of the title that the lenders choose to give to a program that excuses the debtor from repaying [his] loans." *Nightingale v. N.C. State Educ. Assistance Auth. (In re Nightingale)*, 529 B.R. 641, 650 (Bankr. M.D.N.C. 2015).

Moreover, this Court finds that participation in this income-based repayment plan for twenty-years—into Mr. Bell's late-eighties—imposes hardships regardless of whether his minimum payment remains at zero dollars per month. These hardships include the practical difficulties of re-certifying his income and expenses every year as he continues to near the age of ninety and "the continuing growth of the total debt (due to deferral of payment) over the course of the plan, the debtor's ability to obtain future credit, and the mental and emotional impact on the debtor of the mounting debt." *Swafford v. King (In re Swafford)*, 604 B.R. 46, 52 (Bankr. N.D. Iowa 2019).

This Court finds that Mr. Bell has met the second prong of the *Brunner* test. This Court has evaluated the evidence presented by Mr. Bell at trial in determining whether he made an adequate showing to satisfy prong two; the fact that he is participating in an income-based

repayment plan that requires no payments and allows for forgiveness after twenty years is not determinative of his certainty of hopelessness of repayment of the debt. If anything, Mr. Bell's participation in this program—as discussed below—is an indicator of Mr. Bell's good faith in satisfaction of prong three of the *Brunner* test.

**C. Prong Three**

After the debtor has proven the first two requirements of the *Brunner* test, he then must satisfy the third element of the test to permit a bankruptcy court in this jurisdiction to discharge his student loans. Under the third prong of the test, this Court must find that the debtor has "made a good faith effort to repay the student loans." *Frushour*, 433 F.3d at 400; *Brunner*, 831 F.2d at 396.

The parties dispute whether Mr. Bell has satisfied this prong. On the one hand, the DOE points to the accepted fact that Mr. Bell has not made any payments on the student loans at issue at any point since graduating from Strayer University. On the other hand, Mr. Bell points to the accepted facts that he has remained in communication with the DOE, pursued his options to avoid defaulting on the student loans, and has done all that was required of him to ensure his loans remained either in forbearance or under a repayment plan. Mr. Bell submits that the fact he has made no payments towards his student loans is not determinative of his good faith—particularly when the DOE has admitted that Mr. Bell was eligible for the forbearances and zero-dollar payment plans granted to him. On top of this, Mr. Bell notes his unsuccessful attempts to secure employment sufficient to allow him to make payments on the loans.

This Court has been provided with no case law holding that the debtor make a certain number of payments on his loans to demonstrate a good faith effort to repay the loans. This is particularly so when the debtor's circumstances qualify him for forbearance of his loans and a

zero-dollar payment plan. In other words, "[t]he failure to have made any repayments on a student loan is not a litmus test for good faith under the third prong of the *Brunner* test. The good faith determination depends on the reasons why the Debtor did not make the payments." *Roundtree-Crawley v. Educ. Credit Mgmt. Corp. (In re Crawley)*, 460 B.R. 421, 446 n.36 (Bankr. E.D. Penn. 2011).

The DOE granted Mr. Bell's requests for forbearances and placed Mr. Bell into a zero-dollar payment plan because his circumstances rendered (and continue to render) him unable to make payments on the loans. *See* Ex. B at 5, ECF Doc. No. 52-2; Ex. C at 5, ECF Doc. No. 52-3; Ex. D at 5, ECF Doc. No. 52-4; Ex. E at 6, ECF Doc. No. 52-5; Ex. G at 1, ECF Doc. No. 52-7. The DOE now argues, despite this financial hardship, his failure to tender payments while the loans were in forbearance or under a zero-dollar payment plan shows a lack of good faith. The DOE cannot reasonably argue that Mr. Bell has intentionally caused his circumstances rendering him unable to make payments on the loans. This Court finds no indication that Mr. Bell deliberately chose to live on the edge of homelessness to avoid repaying his student loans.

This Court finds Mr. Bell made no payments on the loans because his financial situation simply rendered him unable to do so. Mr. Bell qualified for programs offered by the DOE to allow him to forego making payments so that he could afford to live. Mr. Bell took advantage of those programs. This Court finds that Mr. Bell's efforts to secure employment, continued communication with the DOE with respect to his loans, and his successful requests for forbearances and alternative repayment programs indicate Mr. Bell's good faith efforts to repay the loans. Rather than completely ignoring the loans, Mr. Bell remained on top of the administration of his student loans for the entirety of their existence and only requested a discharge of the student loans when his insolvency forced him to file bankruptcy in this Court.

Mr. Bell's good faith is reflected in his pleas to this Court:

> I took this thing very seriously. . . . I've tried to get the employment to repay the loan. It was never ever an intention of mine to borrow this money and walk away from the loan, get the job and walk away from the loan. Why would a person sixty years old work all day and then work all night to get a job for nothing? I mean, I was earnestly trying my best to get myself in a position to where I would have a decent job with a retirement program . . . .

Tr. at 59:8–16.

Mr. Bell has made good faith efforts to repay the student loans. Thus, Mr. Bell has met prong three of the *Brunner* test.

## CONCLUSION

Section 523(a)(8) does not outright forbid the discharge of student loans; it excepts from discharge student loans the repayment of which would not impose an "undue hardship" on the debtor.

Mr. Bell has shown this Court that he has met the three prongs of the *Brunner* test to show that repayment of the student loan debt would impose an undue hardship on him. Mr. Bell has shown this Court that facts and circumstances prevent him from repaying the student loans in question while still maintaining a minimal standard of living, even when aided by a discharge of other prepetition debts. Mr. Bell has shown that his current circumstances are likely to persist during a significant portion of the repayment period and that he has made a good faith effort to repay the loan. In all, Mr. Bell has proven repayment of his student loans would impose an undue hardship on him. For these reasons, this Court will enter an order granting his Complaint and discharging his student loans.

The Court will issue a separate order based on the conclusions in this opinion.

The Clerk is directed to send a copy of this Memorandum Opinion to the plaintiff by email to wmbell@aol.com and by mail to William Marshall Bell, 761 Front Royal Pike, Apt 304,

Winchester, VA 22602, and to send a copy to counsel for the U.S. Department of Education, Justin M. Lugar, Assistant United States Attorney, P.O. Box 1709, Roanoke, VA 24008-1709.

# Faculty

**Hon. Suzanne H. Bauknight** is a U.S. Bankruptcy Judge for the Eastern District of Tennessee in Knoxville, appointed on Nov. 10, 2014. She previously served as an Assistant U.S. Attorney and Civil Division Chief, representing federal agencies in a variety of matters including bankruptcy and debt collection. During her term as chair of the DOJ's Civil Chiefs Working Group, she was appointed to the Advisory Committee of U.S. Attorney General Eric H. Holder, Jr. Following law school, Judge Bauknight clerked for South Carolina Court of Appeals Judge C. Tolbert Goolsby, Jr., then was an associate at Baker, Donelson, Bearman, Caldwell & Berkowitz, where she practiced in commercial and employment litigation. She is a member of the Tennessee, South Carolina and Knoxville Bar Associations, and served as a member of the KBA Board of Governors and as co-chair of the Government and Public Service Sector Lawyers' Section. She also is an Emeritus Master of the Bench and past president of the Hamilton Burnett Chapter of the American Inns of Court. Judge Bauknight teaches as an adjunct professor at the University of Tennessee College of Law and the Lincoln Memorial University Duncan School of Law, and she is an associate editor of the *American Bankruptcy Law Journal*. She received her B.A. with honors and *magna cum laude* in international studies from the South Carolina Honors College at the University of South Carolina, and her J.D. *magna cum laude* from the University of South Carolina School of Law, where she attended as a Carolina Legal Scholar.

**Hon. Paul M. Black** is Chief U.S. Bankruptcy Judge for the Western District of Virginia in Roanoke, initially appointed in 2014. He previously practiced law in Richmond for several years, then returned to his native Roanoke and joined Spilman Thomas & Battle, PLLC, where he co-chaired its Bankruptcy and Creditor's Rights practice group and focused his practice on commercial litigation, bankruptcy, and banking and finance law. Judge Black was named to *The Best Lawyers in America* in multiple areas related to finance and insolvency, to "Virginia's Legal Elite" by *Virginia Business* magazine in both Civil Litigation and Bankruptcy Law, and as a *Virginia Super Lawyer* in the field of Bankruptcy Law. For many years, he was an active participant in the Boyd-Graves Conference of the Virginia Bar Association, which studies and makes recommendations to the Virginia legislature on improvements to civil practice in Virginia. Judge Black is a past chair of the Litigation Section of the Virginia State Bar, and also chaired the Bankruptcy Section of the Virginia Bar Association. In addition, he served as a member of the Virginia State Bar Disciplinary Board from 2007-13, and he co-chaired the Legislative Committee of the National Conference of Bankruptcy Judges. In addition, he is a frequent speaker to insolvency professionals on matters pertaining to bankruptcy, litigation and ethics. Judge Black received his undergraduate degree from Washington and Lee University in 1982, studied at Cambridge University in England, and received his J.D. from the University of Richmond in 1985, after which he clerked for Hon. Blackwell N. Shelley of the U.S. Bankruptcy Court for the Eastern District of Virginia.

**Hon. Paul W. Bonapfel** is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta and Rome, Ga., appointed in 2002. Prior to his appointment, he practiced law in Atlanta with Lamberth, Bonapfel, Cifelli & Stokes, P.A., now known as Lamberth, Cifelli, Ellis & Nason, P.A. As an attorney, Judge Bonapfel represented all types of parties in bankruptcy cases, including consumer and business debtors in liquidation cases, business debtors in reorganization cases, chapter 7 and 11 bankruptcy trustees, creditors' committees, and creditors in both consumer and business cases. Judge

Bonapfel is a co-author of *Chapter 13 Practice and Procedure* (Thomson Reuters). A Fellow in the American College of Bankruptcy, he has served as chairperson of the Bankruptcy Sections of the State Bar of Georgia and the Atlanta Bar Association and was a director and president of the Southeastern Bankruptcy Law Institute, which presents an annual seminar on bankruptcy law and procedure. In addition, he teaches a course at Mercer Law School in Macon, Ga., on consumer bankruptcy practice. Judge Bonapfel received his B.A. *cum laude* from Florida State University in 1972 and his J.D. *magna cum laude* from the University of Georgia School of Law in 1975, where he was a notes editor of the *Georgia Law Review*. Following law school, he clerked for U.S. District Judge Wilbur D. Owens, Jr., in Macon.

**Hon. Heather Z. Cooper** is the Chief U.S. Bankruptcy Judge for the District of Vermont in Rutland. Prior to her appointment on March 14, 2022, she began her legal career as a briefing attorney to Justice David L. Richards of the Texas Court of Appeals, Second District. She then entered private practice with the firm of Dunn, Kacal, Adams, Pappas & Law, P.C. in Houston, followed by the firm of Murphy & King, P.C. in Boston. In 2004, Judge Cooper moved to Vermont and clerked for former Bankruptcy Judge Collen A. Brown (her predecessor). In 2006, Judge Cooper joined the firm of Facey Goss & McPhee P.C., a Vermont-based law firm, as an associate and then as a partner. Judge Cooper's practice focused on litigation with extensive and diverse bankruptcy law experience, with more than 20 years of experience in the financial and restructuring industry, representing individual and corporate debtors and creditors in loan workouts and restructurings, liquidations, foreclosures, litigation seizures and receiverships. During her partnership at Facey Goss & McPhee P.C., Judge Cooper served as managing partner and became certified in Consumer Bankruptcy Law by the American Board of Certification. She also served as the Bankruptcy Law Section Chair of the Vermont Bar Association from 2014-18 and on various task forces for the U.S. Bankruptcy Court for the District of Vermont since 2011. Judge Cooper received her B.A. from the University of Houston in 1993 and her J.D. *magna cum laude* from South Texas College of Law in 1998.

**Hon. Elizabeth L. Gunn** is a U.S. Bankruptcy Judge for the District of Columbia in Washington, D.C., appointed on Sept. 4, 2020. A COVID-era selection and appointment, she was sworn in by Zoom from her living room. Prior to her appointment, Judge Gunn served as an Assistant Attorney General for the Commonwealth of Virginia as the bankruptcy specialist for the Division of Child Support Enforcement. She also practiced law in Richmond, Va., at Sands Anderson PC and McGuireWoods LLP. In 2017, Judge Gunn was honored as a member of ABI's inaugural class of "40 Under 40." In 2022, she was recognized by the Bar Association of the District of Columbia as its Judicial Honoree and recipient of the BADC's Suzanne V. Richards Foundation Grant. Judge Gunn serves on the advisory board of the *American Bankruptcy Law Journal* and is a coordinating and associate editor of the *ABI Journal*. In addition, she sits on the boards of the Federal Bar Association Bankruptcy Section, International Women's Insolvency & Restructuring Confederation, American Bar Association, National Conference of Federal Trial Judges and the Chesapeake Chapter of the Turnaround Management Association. She also is a member of the Walter Chandler Bankruptcy Inn of Court and is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. Judge Gunn received her B.A. *cum laude* from Willamette University and her J.D. *cum laude* from Boston College Law School.

**Hon. Benjamin A. Kahn** is a U.S. Bankruptcy Judge for the Middle District of North Carolina in Greensboro, sworn in on Feb. 3, 2014. He also is the chair of the Advisory Committee on Bankruptcy Judge Education for the Federal Judicial Center, for which he serves as one of the instructors for Phase I and Phase II Orientation for Newly Appointed Bankruptcy Judges. Judge Kahn is a member of the U.S. Judicial Conference Advisory Committee on the Bankruptcy Rules, and is chair of its Forms Subcommittee. In addition, he is a conferee of the National Bankruptcy Conference, for which he previously served on the Executive Committee and currently serves as chair of the Committee on the Court System and Bankruptcy Administration and on the Nominating Committee. Judge Kahn is a contributing author and member of the board of editors for *Collier on Bankruptcy* and served as the judicial chair of ABI's Southeast Bankruptcy Workshop from 2019-23. Prior to his appointment, he was a member of Nexsen Pruet PLLC and clerked for Bankruptcy Judge Jerry G. Tart of the Middle District of North Carolina. Judge Kahn is Board Certified in Business and Consumer Bankruptcy Law by the American Board of Certification, for which he served as a member of its board of directors until his appointment to the bench. Prior to joining the bench, Judge Kahn was a certified mediator in North Carolina and was recognized as among the Top 10 North Carolina *Super Lawyers* across all practice areas for the two years immediately preceding his appointment, elected to the Legal Elite Hall of Fame by *Business North Carolina Magazine* in 2014 as the category winner in North Carolina for Bankruptcy, and was included among Band 1 bankruptcy practitioners in North Carolina in *Chambers and Partners USA*. He received his B.A. in political science and history in 1990, and his J.D. with honors in 1993, from the University of North Carolina at Chapel Hill.

**Hon. Elizabeth D. Katz** is Chief U.S. Bankruptcy Judge for the District of Massachusetts in Springfield, initially appointed on March 13, 2017, and assigned to the Western and Central Divisions, then named Chief Judge on Sept, 10, 2022. On April 17, 2018, she was appointed to the First Circuit Bankruptcy Appellate Panel. From 1995-2007, Judge Katz was an assistant district attorney for the Northwestern District Attorney's Office, and she was chief of the District Court Prosecutors from 2000-07. She also was an associate at the firm of Katz, Argenio and Powers, PC from 2007-08 and later became an associate at the Ostrander Law Office from 2008-13, where she concentrated her practice on bankruptcy law. At Ostrander Law Office, she represented a chapter 7 trustee in adversary proceedings, counseled individuals and businesses in financial distress, and represented clients in bankruptcy cases. In 2013, she formed and operated The Law Office of Elizabeth D. Katz, focusing on criminal defense and bankruptcy law. Immediately prior to her appointment, she had been a founding partner at Rescia, Katz & Shear, LLP since 2015. An active member of the Hampshire County, Hampden County and Massachusetts Bar Associations, Judge Katz served as president of the Hampshire County Bar Association from 2012-14. She also was co-chair of both the Massachusetts Bar Association's Western Massachusetts Bankruptcy Symposium and the Western Division of the M. Ellen Carpenter Financial Literacy Program. In 2016, Judge Katz was awarded the Massachusetts Bar Association's Community Service Award. In addition, she has been a frequent panelist and lecturer on the topics of both criminal and bankruptcy law. Since 2019, Judge Katz has taught consumer bankruptcy at Western New England University School of Law. She received her undergraduate degree from the University of Vermont in 1991 and her J.D. from Boston University School of Law, where she received the Edward F. Hennessey Award in 1994.

**Hon. Brian F. Kenney** is a U.S. Bankruptcy Judge for the Eastern District of Virginia in Alexandria, appointed on Sept. 1, 2011. Prior to his appointment, he was a principal in the Tysons, Va., office of Miles & Stockbridge. He had represented creditors, debtors and bankruptcy trustees for 28 years.

Judge Kenney is Board Certified in Business Bankruptcy Law by the American Board of Certification. He served two terms as president of the Northern Virginia Bankruptcy Bar Association, and most recently has been serving on its board of directors. He also had served two terms on the board of directors of the Virginia State Bar Bankruptcy Section. Judge Kenney received his undergraduate degree in 1980 from Virginia Commonwealth University and his J.D. in 1983 from the University of Virginia School of Law.

**Hon. Jil Mazer-Marino** is a U.S. Bankruptcy Judge for the Eastern District of New York in Brooklyn, sworn in on Oct. 23, 2020. She previously was a partner at Cullen and Dykman LLP's Bankruptcy and Creditors' rights department, where her practice was nearly entirely bankruptcy-focused. Judge Mazer-Marino has chapter 11 experience representing debtors, creditors and creditor committees in chapter 11 business reorganizations. She also served as a chapter 7 panel trustee for the Southern District of New York for 10 years. Before joining Cullen and Dykman in 2019, Judge Mazer-Marino practiced with Meyer, Suozzi, English & Klein, P.C. from 2008-19, Rosen Slome Marder LLP from 2003-08 and Willkie Farr & Gallagher LLP from 1991-99. She also clerked for former EDNY Chief Bankruptcy Judge Conrad B. Duberstein. Judge Mazer-Marino received her undergraduate degree from the State University of New York at Albany and her J.D. from St. John's University School of Law.

**Hon. Jerry C. Oldshue, Jr.** is Chief U.S. Bankruptcy Judge for the Southern District of Alabama in Mobile. Prior to taking the bench in October 2015, he was a shareholder in the firm of Rosen Harwood, P.A in Tuscaloosa, Ala., where he served as the managing shareholder of the firm's creditor's rights department. While in practice, Judge Oldshue was admitted to practice before the Eleventh Circuit Court of Appeals, all U.S. District Courts in Alabama, and all Alabama state courts. His memberships included the Alabama State Bar (where he served as chairman of its Bankruptcy and Commercial Law Section), the Tuscaloosa County Bar, ABI (for which he served as a member of its Commercial Fraud Task Force, Unsecured Trade Creditors Committee and Consumer Bankruptcy Committee), the Conference on Consumer Finance Law and the Commercial Law League of America. In 2001, Judge Oldshue became one of only seven attorneys in the state to achieve Board Certification in Creditors' Rights Law. He received his B.S. in mechanical engineering in 1985 from the University of Alabama, after which he worked as a manufacturing engineer for General Motors and a design engineer for BellSouth before continuing his educational pursuits at The University of Alabama in 1992. He received his J.D. and M.B.A. as one of only two people invited to participate in the school's joint degree program.

**Hon. Patrick G. Radel** is a U.S. Bankruptcy Judge for the Northern District of New York in Albany, appointed on June 1, 2023. He previously was a partner at Getnick Livingston Atkinson & Priore, LLP, in Utica, N.Y. Prior to joining the firm in 2004, Judge Radel clerked for Hon. William M. Skretny of the Western District of New York. He has bankruptcy law and litigation experience, and has represented creditors in a broad range of commercial and consumer cases. In addition to his bankruptcy practice, Judge Radel maintained a special education practice, representing students with disabilities at Committee on Special Education (CSE) meetings, administrative due process proceedings and in federal court. A frequent panelist and speaker at bankruptcy law-related courses, he is a past president of the Central New York Bankruptcy Bar Association, and a founding member of the Standing Local Rules Committee for the U.S. Bankruptcy Court for the Northern District of New

York. Judge Radel received his undergraduate degree *summa cum laude* from the University at Buffalo and his J.D. *summa cum laude* from the University at Buffalo School of Law.

**Hon. Gregory R. Schaaf** is Chief U.S. Bankruptcy Judge for the Eastern District of Kentucky in Lexington, initially appointed on Oct. 1, 2012, and named Chief Judge on Oct. 1, 2019. Prior to his appointment, he practiced in the areas of commercial reorganizations, including bankruptcies and workouts, and commercial transactions, including energy-related matters. He represented debtors, creditors' committees, trustees and individual creditors. Judge Schaaf is a CPA and worked as a solicitor in London from 1997-99, handling corporate matters and real estate transactions for English, Russian and American clients. He is a Fellow of the American College of Bankruptcy and is Board Certified in Business and Consumer Bankruptcy Law by the American Board of Certification. Judge Schaaf received his B.B. in accounting and his B.S. in law enforcement administration from Western Illinois University in 1984 with high honors, and his J.D. in 1991 from the University of Kentucky College of Law, where he was a member of the Order of the Coif and participated in its national moot court team and on its moot court board, as well as on the school's *Journal of Mineral Law and Policy*.

**Hon. David M. Warren** is Chief U.S. Bankruptcy Judge for the Eastern District of North Carolina in Raleigh, initially appointed on Oct. 4, 2013, and appointed Chief Judge on July 28, 2021. He previously was a partner at Poyner Spruill LLP in Raleigh and Rocky Mount, N.C., for nearly 30 years and concentrated his practice in the areas of bankruptcy and commercial law. Following law school, Judge Warren began a two-year clerkship with the late Hon. Thomas M. Moore, who, with Hon. A. Thomas Small, drafted legislation that became chapter 12 of the U.S. Bankruptcy Code. He served on the panel of chapter 7 bankruptcy trustees for the Eastern District of North Carolina for 24 years and is a past chair of the Bankruptcy Law Section of the North Carolina Bar Association. In addition, he served on the Local Rules Committee for the U.S. Bankruptcy Court for the Eastern District of North Carolina for more than 10 years and served as chair for more than seven years. Judge Warren is Board Certified in Business and Consumer Bankruptcy Law by the North Carolina State Bar Board of Legal Specialization and the American Board of Certification. While in private practice, he was recognized as a Tier 1 attorney in the Bankruptcy/Restructuring area for North Carolina by *Chambers USA* from 2009-13, as a "Legal Elite" in the area of Bankruptcy Law by *Business North Carolina* magazine in 2006, 2008, 2010-12 and 2014, and in *Super Lawyers* from 2009-14. He also was recognized in *The Best Lawyers in America* in the area of Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization law in 2013 and 2014. Judge Warren is a former national president of Kappa Alpha Order, a national college fraternity headquartered in Lexington, Va. He also serves as a trustee of the Kappa Alpha Order Educational Foundation, chair of the Turner W. Battle Scholarship Trust and as a director of DiabetesSisters, a national nonprofit organization supporting women with diabetes. Judge Warren received his B.A. *cum laude* from Wake Forest University and his J.D. from the Wake Forest University School of Law.