THE REVIVAL OF STUDENT LOAN DISCHARGE IN BANKRUPTCY BY THE TENTH AND SECOND CIRCUITS

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† Notes Editor, *Cardozo Law Review*, Volume 43. J.D. Candidate, May 2022, Benjamin N. Cardozo School of Law. B.S. & B.A., Binghamton University, 2019. Thank you to Professor David Carlson for serving as my advisor and pushing me to produce my best work. Thank you to my Notes Editor, Kharis Lund, and the staff of *Cardozo Law Review* for their thorough edits and feedback. Thank you to my mentors, Xinni Liu and Sevil Clifford, for their advice and guidance. Thank you to my friends, Christa, Victoria, Melissa, and Samantha, for being my loudest cheerleaders. Most importantly, thank you to my parents and my brother for always believing in me and supporting my dreams. My accomplishments were possible because I had you all by my side.

INTRODUCTION

As of 2020, the collective American student loan debt was approximately $1.6 trillion, a number that has doubled in the last ten years and is projected to grow to $3 trillion or more in the next ten years.[1] This is not a new phenomenon, and the reasons for its staggering growth have been quite clear: increased cost of attendance, stagnant federal grants, increased enrollment, and increased importance of graduate degrees and professional doctorates.[2] Student loan debt is one of the largest amounts of debt, exceeding credit card and auto loans, and only falling behind mortgage debt.[3]

Meanwhile, the purpose of the Bankruptcy Code is to rehabilitate honest debtors and give them a fresh start to their economic life by discharging their debts.[4] Unfortunately, the Bankruptcy Code does little to provide relief for students who are honest but unfortunate debtors who became victims of predatory private student loans.[5] Section 523(a)(8) of the Bankruptcy Code automatically excepts most student loans from discharge, unless the student can prove that repayment of the loan is an undue hardship.[6] In order to get a student loan discharge,

1 Abigail Johnson Hess, *How Student Debt Became a $1.6 Trillion Crisis*, CNBC MAKE IT (June 12, 2020, 11:33 AM), https://www.cnbc.com/2020/06/12/how-student-debt-became-a-1point6-trillion-crisis.html [https://perma.cc/7P9Q-JNMB]; Daniel M. Johnson, *What Will It Take to Solve the Student Loan Crisis?*, HARV. BUS. REV. (Sept. 23, 2019), https://hbr.org/2019/09/what-will-it-take-to-solve-the-student-loan-crisis [https://perma.cc/5LGR-8ZU2]; Wesley Whistle, *What Is Driving the $1.5 Trillion Student Debt Crisis*, FORBES (Sept. 1, 2020, 2:00 PM), https://www.forbes.com/sites/wesleywhistle/2020/09/01/what-drives-the-15-trillion-student-debt-crisis [https://perma.cc/9BFH-R8Q5].

2 *See* Whistle, *supra* note 1.

3 Zack Friedman, *Student Loan Debt Statistics in 2020: A Record $1.6 Trillion*, FORBES (Feb. 3, 2020, 6:51 PM), https://www.forbes.com/sites/zackfriedman/2020/02/03/student-loan-debt-statistics [https://perma.cc/36D3-95AU].

4 *See* Aaron N. Taylor & Daniel J. Sheffner, *Oh, What a Relief It (Sometimes) Is: An Analysis of Chapter 7 Bankruptcy Petitions to Discharge Student Loans*, 27 STAN. L. & POL'Y REV. 295, 300 (2016).

5 *See* Elizabeth K. Lamphier, *Are Student Loans No Longer the "Third Rail" of Bankruptcy?*, 37 AM. BANKR. INST. J. 56, 56 (2018).

6 *Id.*; *see also infra* Section I.A.1.

debtors must go through an adversary proceeding[7] to prove undue hardship—a standard that has been harshly interpreted by the courts.[8]

Student debtors can avoid the undue hardship standard if their loans are not student loans, and not all loans taken out by students are inherently student loans. Section 523(a)(8)(A)(i) excepts student loans "guaranteed by a governmental unit" from discharge.[9] In 2005, Congress added § 523(a)(8)(B),[10] which rendered nondischargeable private and for-profit student loans that are considered "qualified education loan[s]"[11] under § 221(d)(1) of the Internal Revenue Code.

There is, however, a third concept, besides governmentally guaranteed student loans and qualified education loans. According to Bankruptcy Code § 523(a)(8)(A)(ii), no discharge is available for "an obligation to repay funds received as an educational benefit, scholarship, or stipend."[12]

Recently, the Tenth and Second Circuits adopted narrow readings of § 523(a)(8)(A)(ii), creating more protection for student debtors.[13] In

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7 *See* David Gray Carlson, *The Federal Rules of Bankruptcy Procedure in Reorganization Cases: Do They Have a Constitutional Dimension?*, 84 AM. BANKR. L.J. 251, 254 (2010) ("[A]ccording to the Bankruptcy Rules, certain actions can only be accomplished in an adversary proceeding. Salient on the list is the avoidance of liens. . . . Also on the adversary proceeding list is '(6) a proceeding to determine the dischargeability of a debt.'" (footnote omitted)).

8 *See* Edward Paul Canterbury, Comment, *The Discharge of Student Loans in Bankruptcy: A Debtor's Guide to Obtaining Relief*, 32 OHIO N.U. L. REV. 149, 159 (2006). "Incredibly, only 0.1 percent of student loan debtors who have filed for bankruptcy attempt to discharge their student loans." Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 495 (2012). Iuliano's study found that judges grant full discharges to twenty-five percent of debtors and partial discharges to fourteen percent of debtors. *Id.* at 505, 507. Most students who were granted discharges showed they had difficulty finding employment, had a medical hardship, and had lower annual incomes the year prior to filing for bankruptcy. *Id.* at 501.

9 11 U.S.C. § 523(a)(8)(A)(i). This refers to federal student loans.

10 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified as amended at 11 U.S.C. § 523(a)(8)).

11 "Qualified education loan" is defined as follows:

> [A]ny indebtedness incurred by the taxpayer solely to pay qualified higher education expenses—
>
> (A) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,
>
> (B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and
>
> (C) which are attributable to education furnished during a period during which the recipient was an eligible student.

I.R.C. § 221(d)(1).

12 11 U.S.C. § 523(a)(8)(A)(ii).

13 *See* McDaniel v. Navient Sols., LLC (*In re* McDaniel), 973 F.3d 1083 (10th Cir. 2020); Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 599 (2d Cir. 2021).

McDaniel v. Navient Solutions, LLC (*In re McDaniel*) and *Homaidan v. Sallie Mae, Inc.*, Sallie Mae—later Navient—advanced private loans[14] that were not guaranteed by the government[15] and were not a qualified education loan under Internal Revenue Code § 221(d)(1).[16] Navient therefore appealed to the third idea for nondischargeability in § 523(a)(8).[17] Navient argued that the loan fell under § 523(a)(8)(A)(ii)'s "educational benefit."[18] The claims were rejected by the Tenth and Second Circuits.[19]

The Tenth and Second Circuits' decisions then raise the question: When is a loan to a student not a student loan as described by § 523(a)(8)? If a student debtor can prove that the loan is not government guaranteed nor a "qualified education loan," the student deserves a discharge of their loan obligation, even in the absence of an undue hardship caused by repayment. This Note will answer that question and discuss when a loan is not within § 523(a)(8)'s reach by examining the Tenth and Second Circuits' interpretation of "educational benefit" in *McDaniel* and *Homaidan*.

This Note proceeds in two Parts. First, Part I provides the background regarding student loan discharge in bankruptcy proceedings. It first explains discharges generally, with a brief discussion of the difficult standard for undue hardship for repayment of genuine student loans. Part I then reviews § 523(a)(8)(A)(i)'s government-guaranteed loans. Next, Part I describes § 523(a)(8)(B)'s private qualified education loans as defined by the IRS. Part I closes with a discussion of § 523(a)(8)(A)(ii)'s educational benefits, stipends, and scholarships, focusing on *McDaniel* and *Homaidan*.

Part II gives an analysis of the Tenth and Second Circuits' holdings. First, Part II explains the judicial shift towards the narrow reading of "educational benefit." Then, Part II discusses what the *McDaniel* and *Homaidan* decisions mean for student debtors and explores how past student loan discharge decisions may be different under these decisions. Lastly, Part II looks forward and addresses the impact of *McDaniel* and *Homaidan* on the student loan system.

14 *McDaniel*, 973 F.3d at 1086; *Homaidan*, 3 F.4th at 598.

15 *See* 11 U.S.C. § 523(a)(8)(A)(i).

16 *See id.* § 523(a)(8)(B).

17 *See McDaniel*, 973 F.3d at 1086; *Homaidan*, 3 F.4th at 599.

18 *See* 11 U.S.C. § 523(a)(8)(A)(ii); *McDaniel*, 973 F.3d at 1098; *Homaidan*, 3 F.4th at 599.

19 *See McDaniel*, 973 F.3d at 1104; *Homaidan*, 3 F.4th at 599.

I. BACKGROUND AND PRIOR LAW

A. *What Is a Loan Discharge?*

For many individual debtors, discharge of debt is the end goal of filing for bankruptcy.[20] Bankruptcy Code § 524 lays out the effects of discharge.[21] Under § 524(a)(1), any prepetition judgment against a debtor is rendered void.[22] As a result, a creditor is deprived of the ability to execute on any such judgment.[23] A discharge also operates as a permanent injunction to prohibit creditors from taking any collection or legal action on the debts and from communicating with the debtor about the discharged obligation.[24] However, a loan discharge does not mean the loan obligation disappears completely. Although the creditor can no longer take collection action on the loan, § 524(f) allows the debtor to voluntarily repay the loan.[25] This means that the loan, although discharged, continues to exist, and the debtor may repay the loan if she believes it should be repaid.[26] There is no legally enforceable obligation on her to do so.[27]

20 *See* Mark S. Zuckerberg & Amanda K. Quick, *Bankruptcy: Exceptions to the Bankruptcy Discharge*, RES GESTÆ, Oct. 2013, at 32, 32 ("A personal bankruptcy filing immediately gives debtors relief from their financial burdens by means of the automatic stay. At the end of a bankruptcy case, debtors are able to get a fresh financial start by discharging the vast majority of their debts.").

21 11 U.S.C. § 524.

22 *Id.* § 524(a)(1) ("A discharge . . . voids any judgment at any time obtained . . . .").

23 *See* Zuckerberg & Quick, *supra* note 20, at 32 ("Creditors, on the other hand, are generally left with no recourse against debtors who have obtained a bankruptcy discharge.").

24 11 U.S.C. § 524(a)(2) ("A discharge . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any such debt . . . .").

25 *Id.* § 524(f) ("Nothing . . . prevents a debtor from voluntarily repaying any debt.").

26 *See* William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 401 (1994) ("[M]any debtors have ethical objections to obtaining a bankruptcy discharge for debts to which there is no defense. However, there is nothing about a discharge in bankruptcy that prevents a debtor from repaying loans that the debtor believes should be repaid.").

27 11 U.S.C. § 524(f).

In a Chapter 7[28] case, the court may grant a discharge if there are no objections to discharge or motions to dismiss filed.[29] The whole process, from filing to discharge, usually lasts four to six months, making Chapter 7 the fastest means to receive a discharge.[30] In a Chapter 13[31] case, after the debtor fulfills all the requirements of her repayment plan, the court will grant the debtor a discharge.[32] Discharges in a Chapter 13 case are deferred until the end of the plan.[33] The plan can last from three to five years.[34]

Debtors are not guaranteed a discharge when they file for bankruptcy. A discharge may generally be denied if a debtor commits one of the acts described in § 727(a), such as concealing property or falsifying information.[35] In either a Chapter 7 or a Chapter 13 case, creditors or the trustee have the right to object to a discharge under Federal Rule of Bankruptcy Procedure 4004(a).[36] Creditors must file an

28 Chapter 7 provides for the liquidation of a debtor's nonexempt assets. *See* Taylor & Sheffner, *supra* note 4, at 299–300. There is no repayment plan in Chapter 7 as all repayments are made with the debtor's liquidated assets. *See id.* at 300. Debtors will keep their exempt assets, such as their residence, car, retirement accounts, and any necessary property to earn a living. *See id.*; David Haynes, *What Is Chapter 7 Bankruptcy?*, BALANCE (Feb. 24, 2021), https://www.thebalance.com/what-is-chapter-7-bankruptcy-316202 [https://perma.cc/2TMB-GCU8]. In most Chapter 7 cases, individual debtors will receive a discharge. *See* Taylor & Sheffner, *supra* note 4, at 300–01.

29 *See* 11 U.S.C. § 727(a), (c)(1); *see also* FED. R. BANKR. P. 4004(c)(1) ("In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge . . . .").

30 *See* A. Mechele Dickerson, *Lifestyles of the Not-So-Rich or Famous: The Role of Choice and Sacrifice in Bankruptcy*, 45 BUFF. L. REV. 629, 652 (1997) ("Chapter 7 cases typically are closed fairly quickly . . . ."); Haynes, *supra* note 28 ("[The] [p]rocess generally takes four to six months . . . .").

31 Chapter 13 of the Bankruptcy Code affords individuals receiving regular income an opportunity to obtain some relief from their debts while retaining their property. To proceed under Chapter 13, a debtor must propose a plan to use future income to repay a portion (or in the rare case all) of his debts over the next three to five years. If the bankruptcy court confirms the plan and the debtor successfully carries it out, he receives a discharge of his debts according to the plan.

McDaniel v. Navient Sols., LLC (*In re* McDaniel), 973 F.3d 1083, 1086 n.2 (10th Cir. 2020) (quoting Bullard v. Blue Hills Bank, 575 U.S. 496, 498 (2015)).

32 11 U.S.C. § 1328(a) ("[A]s soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title . . . .").

33 In extenuating circumstances, debtors do not need to wait until the end of the plan and can ask for a "hardship discharge." *See id.* § 1328(b) ("[T]he court may grant a discharge to a debtor that has not completed payments under the plan only if—(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable . . . .").

34 *See id.* § 1325(b)(4)(A).

35 *Id.* § 727(a).

36 FED. R. BANKR. P. 4004(a).

adversary proceeding objecting to discharge within sixty days after the first scheduled meeting of creditors.[37] Bankruptcy Code § 523 states the exceptions to discharge.[38] Section 523(a) does not allow a debtor to discharge debts such as taxes,[39] penalties,[40] certain court judgments,[41]and debts owed under family court orders.[42] Section 523(a)(8) excepts most (but not all) student loans from discharge.[43] Each subsection of § 523(a)(8) will be explained in detail later in this Note.[44]

For regular debtors—that is, debtors not seeking a student loan discharge—after they complete the bankruptcy plan, judges will grant a discharge as soon as possible.[45] A student debtor must file a separate action in bankruptcy court (an adversary proceeding) seeking a student loan discharge.[46] Student debtors must prove repaying the loan imposes an "undue hardship" on them and their dependents.[47]

In a rare instance, the Supreme Court affirmed a discharge of student loans where the debtor did not file an adversary proceeding and the bankruptcy court did not make a finding of undue hardship.[48] In *United Student Aid Funds, Inc. v. Espinosa*, Espinosa's Chapter 13 plan proposed to pay the principal and discharge the interest of the student loan after the principal was fully repaid.[49] The debtor did not initiate an adversary proceeding seeking a discharge and the creditor did not

37 *Id.* ("In a chapter 7 case . . . objecti[ons] to the debtor's discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). . . . In a chapter 13 case, a motion objecting to the debtor's discharge under § 1328(f) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a).").

38 11 U.S.C. § 523.

39 *Id.* § 523(a)(1) (excluding "a tax or a customs duty").

40 *Id.* § 523(a)(7) (excluding "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit").

41 *Id.* § 523(a)(6) (excluding debts incurred due to "willful and malicious injury by the debtor"); *id.* § 523(a)(9) (excluding debts "for death or personal injury").

42 *Id.* § 523(a)(5) (excluding debts categorized as "a domestic support obligation"); *id.* § 523(a)(15) (excluding debts owed "to a spouse, former spouse, or child of the debtor . . . incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record").

43 *Id.* § 523(a)(8).

44 *See infra* Sections I.B–I.D.

45 *See* 11 U.S.C. §§ 727(a), 1328(a).

46 *See* FED. R. BANKR. P. 7001 ("The following are adversary proceedings . . . (6) a proceeding to determine the dischargeability of a debt . . . .").

47 11 U.S.C. § 523(a)(8) (prohibiting discharge "unless excepting such [student] debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents").

48 United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 264–65, 268–70, 276 (2010) (affirming a Chapter 13 plan that discharged student loans without an adversary proceeding).

49 *Id.* at 264.

object to confirmation of the plan.[50] The bankruptcy court confirmed Espinosa's plan without an adversary proceeding or a finding of undue hardship.[51] The Supreme Court did not void the confirmation and found that the bankruptcy court made a legal error by failing to find undue hardship.[52] The creditor had notice of the error and failed to object, thus making the confirmed Chapter 13 plan enforceable and binding.[53] The Supreme Court made clear at the end of its decision that debtors should not hope to recreate *Espinosa* to get an easy discharge and that such bad-faith efforts will be met by penalties.[54] As such, in order to receive a discharge of student loans, debtors will probably need to file an adversary proceeding to show undue hardship, which has been notoriously difficult to prove.

1. The Undue Hardship Standard

The initial burden is on the creditor to prove the existence of the debt. This is accomplished by the filing of a proof of claim, which is prima facie evidence that the debt exists.[55] If a debt falls into one of the statutory exceptions to discharge, it is not discharged. An exception exists when the debt is based on fraud, embezzlement, or willful and malicious injury.[56] In such cases, the creditor must step forward and prove that the debt is not dischargeable; otherwise, the debt is discharged.[57] This shift of the burden of proof to the creditor does not apply to student loans. Rather, the burden shifts to the debtor to prove that the loan imposes an undue hardship.[58] Section 523(a)(8) does not define undue hardship, and Congress has never clarified how a debtor

50 *Id.* at 265.

51 *Id.*

52 *Id.* at 274–75.

53 *Id.*

54 *See id.* at 278–79. To read more about the impact of the *Espinosa* decision on due process and the notice standard in bankruptcy proceedings, see Carlson, *supra* note 7.

55 *See* 11 U.S.C. §§ 501(a), 502(a).

56 *See id.* §§ 523(a), 727(a), 1328(a).

57 *Id.* § 523(c).

58 *See Espinosa*, 559 U.S. at 268–69 ("[T]he Bankruptcy Rules require a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors."); *see also* Taylor & Sheffner, *supra* note 4, at 308 ("The debtor who wishes to have her student loan debt discharged by the bankruptcy court, therefore, must initiate the process by filing an adversary proceeding in the bankruptcy court. To successfully initiate her adversary proceeding, the debtor must file a complaint and serve process on all interested parties. In this procedural posture, the debtor is now a plaintiff, and the student loan lender a defendant." (footnotes omitted)); *id.* at 309.

can meet undue hardship to qualify for a student loan discharge.[59] In its place, courts have adopted one of two tests[60] for undue hardship: the *Brunner* test[61] or the totality of circumstances test.[62]

The *Brunner* test is notoriously stricter than the totality of circumstances test.[63] To qualify for discharge, courts using the *Brunner* test require debtors to have exhausted all means and to show a "certainty of hopelessness" before filing for bankruptcy.[64] If the debtor fails to meet one of the elements of the *Brunner* test, many judges will

59 *See* Kevin J. Smith, *Defining the* Brunner *Test's Three Parts: Time to Set a National Standard for All Three Parts to Determine When to Allow the Discharge of Federal Student Loans*, 58 S.D. L. REV. 250, 250–51 (2013).

60 All circuits, except the First and Eighth Circuits, have adopted the Second Circuit *Brunner* test for undue hardship. Rebekah Keller, Note, *The "Undue Hardship" Test: The Dangers of a Subjective Test in Determining the Dischargeability of Student Loan Debt in Bankruptcy*, 82 MO. L. REV. 211, 224–28 (2017). The Eighth Circuit uses the totality of circumstances test. Sarah Edstrom Smith, Note, *Should the Eighth Circuit Continue to Be the Loan Ranger? A Look at the Totality of the Circumstances Test for Discharging Student Loans Under the Undue Hardship Exception in Bankruptcy*, 29 HAMLINE L. REV. 601, 619–20 (2006). The First Circuit has never decided on which undue hardship test to adopt and prefers to leave the decision to the lower courts. Anthony Bowers, Note, *Discharging Student Loans via Bankruptcy: Undue Hardship Doctrine in the First Circuit*, 4 S. NEW ENG. ROUNDTABLE SYMP. L.J. 143, 143 (2009). Most, but not all, bankruptcy courts in the First Circuit have rejected the *Brunner* test in favor of the totality of circumstances test. *Id.* at 145.

61 *See* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam). The *Brunner* test requires the debtor to show: (1) they cannot maintain, with their current income and expenses, a "minimal standard of living," if they are required to repay; (2) additional circumstances that will cause this difficulty to persist throughout a significant portion of the repayment period; and (3) there was a good-faith effort to repay the loans. Paul B. Porvaznik, *Is Discharging Student Loan Debt in Bankruptcy Getting Easier?*, 102 ILL. BAR J. 540, 542 (2014). Under the *Brunner* test, the debtor must provide exceptional evidence of a current and future prolonged inability to repay their loans. Keller, *supra* note 60, at 224.

62 The totality of circumstances test was first set forth in *Andrews v. South Dakota Student Loan Assistance Corp.* (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981). Compared to the *Brunner* test, the totality of circumstances test is more flexible and looks to the particular set of facts and circumstances around each case to make its decision on discharge. Under the totality of circumstances test, the court will look at: (1) the debtor's past, present, and future financial resources; (2) the debtor's and their dependents' living expenses; and (3) any other relevant facts and circumstances. *See* Richard D. Burke III, Note, *Student Loans for Life, the Discharge of Student Loans under 11 U.S.C. § 523(a)(8)—Using the Eighth Circuit's Totality-of-the-Circumstances Test and the Partial Discharge Method*, 41 U. ARK. LITTLE ROCK L. REV. 97, 105 (2018); *see also* Porvaznik, *supra* note 61, at 543.

63 *See* Burke, *supra* note 62, at 104–05; Alan M. Ahart, *How the Courts Have Gone Astray in Refusing to Discharge Student Loans: The Folly of* Brunner*, of Rewriting Repayment Terms, of Issuing Partial Discharges and of Considering Income-Based Repayment Plans*, 95 AM. BANKR. L.J. 53 (2021) (arguing that the *Brunner* test's misinterpretation of § 523(a)(8) has practically precluded debtors from seeking student loan discharges and making suggestions on how to fix *Brunner* issues).

64 G. Michael Bedinger VI, Note, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1825 (2014).

not grant a discharge.[65] There have also been disagreements on how to apply the *Brunner* test among the circuits that have adopted it.[66]

The totality of circumstances test is more flexible than the *Brunner* test. The balancing approach of the test means that failure to meet a single factor will not prevent a debtor from discharge and that a judge is required to weigh all the necessary factors.[67] However, inconsistencies in applying the totality of circumstances test appear in its third factor: the catchall factor that allows courts to look at whatever evidence the debtor presents to show undue hardship.[68] Extenuating circumstances are weighed uniquely in each case, and a list of circumstances that a debtor may present continues to grow, leading to inconsistencies in how judges weigh this factor.[69]

This Note assumes, however, that the student debtor cannot sustain her burden of showing that repayment of the loan constitutes an undue hardship. She should then argue, if she can, that her student loan is not a qualifying educational debt under § 523(a)(8).

B. *Section 523(a)(8)(A)(i): Government-Guaranteed Loans*

Bankruptcy Code § 523(a)(8)(A)(i) excepts any "educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution" from discharge.[70]

65 *But see* Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 919–20 (B.A.P. 9th Cir. 2013) (granting a discharge to a sixty-four-year-old debtor who did not meet the good-faith effort to repay because entering a twenty-five-year repayment plan now would be pointless). In this case, the debtor was extremely lucky to receive a discharge, but in other cases, debtors who do not meet all the elements will be barred from discharge. Michael J. Fletcher & J. Jackson Waste, *Student Loan Discharge Decisions Poke Holes in the* Brunner *Test*, 33 AM. BANKR. INST. J. (2014) ("Each of *Brunner's* three prongs must be satisfied in order to obtain a discharge."). This shows that the court and the judge the debtor is assigned to is just as impactful toward discharge, which further exasperates the inconsistences of the undue hardship tests, even among the circuits that have adopted the same test.

66 *Compare* Educ. Credit Mgmt. Corp. v. Boykin (*In re* Boykin), 313 B.R. 516, 520–21 (M.D. Ga. 2004) (criticizing the Tenth Circuit's lenient application of the undue hardship standard in order to fulfill the Bankruptcy Code's fresh-start principle), *with* Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 947 (9th Cir. 2006) (finding the value of education to the debtor as an important factor of undue hardship to soften the strictness of the *Brunner* test).

67 *See* Ben Wallen, *One Standard to Rule Them All: An Argument for Consistency in Education Debt Discharge in Bankruptcy Proceedings*, 16 HOUS. BUS. & TAX L.J. 232, 243 (2016).

68 *Id.*

69 *Id.*

70 11 U.S.C. § 523(a)(8)(A)(i).

This subsection was designed to protect American taxpayers and nonprofit organizations from bearing the burden of defaulted loans.[71]

Section 523(a)(8)(A)(i) is most frequently applied to student loan programs that are funded and made by a governmental unit.[72] Stafford Loans and Parental PLUS Loans are common examples of federal student loans that fall under the Federal Family Education Loan (FFEL) program.[73] In *Murphy v. Pennsylvania Higher Education Assistance Agency* (*In re Murphy*), the Fifth Circuit decided that loans disbursed through the FFEL program are nondischargeable under § 523(a)(8)(A)(i).[74] Similarly, students who obtain the Graduate PLUS loan[75] through the William D. Ford Federal Direct Loan Program cannot discharge their student loans.[76] Loans disbursed by state universities are likewise nondischargeable because state universities bear the status of a governmental unit.[77]

Additionally, § 523(a)(8)(A)(i) is applied to loans made by nonprofit institutions.[78] For the debt to be excepted from discharge, the lender must establish its nonprofit-institution status, usually decided by courts based on the organization's tax-exemption status.[79] In *Vuini v. Zions Bank* (*In re Vuini*), the lender proved its status by showing that the company was organized and operated as a nonprofit for charitable

71 Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277, 283 (2019) ("This is a straightforward exception that is designed to protect American taxpayers and nonprofit organizations from bearing the burden of widespread student loan defaults.").

72 *See id.*

73 *See* Xiaoling Ang & Alexei Alexandrov, *Choice Architecture Versus Price: Comparing the Effects of Changes in the U.S. Student Loan Market*, 14 J. EMPIRICAL LEGAL STUD. 762, 769 (2017) ("Federal loans include Subsidized and Unsubsidized Stafford Loans, which have universal borrowing limits, and Parental PLUS and Graduate PLUS Loans, which can cover costs up to cost of attendance. Stafford Loans and Graduate PLUS Loans are made in the name of the student, while Parental PLUS Loans are taken out in a parent's name to cover his or her child's undergraduate expenses.").

74 *See* Murphy v. Pa. Higher Educ. Assistance Agency (*In re* Murphy), 282 F.3d 868, 870 (5th Cir. 2002) ("We conclude that the text of the Bankruptcy Code, the Federal Family Education Loan Program ("FFELP"), and Murphy's promissory notes support nondischargeability.").

75 Cooper Murphy, Note, *Side Stepping the* Brunner *Test: An Easier Path to Student Loan Discharge*, 30 S. CAL. REV. L. & SOC. JUST. 453, 460 (2021).

76 *See* Halatek v. William D. Ford Fed. Direct Loan (Direct Loan) Program (*In re* Halatek), 592 B.R. 86, 99 (Bankr. E.D.N.C. 2018) (granting summary judgment in favor of the creditor and declaring that debtor's student loans are nondischargeable).

77 *See* 11 U.S.C. § 101(27); *see also* Columbus Coll. v. Shore (*In re* Shore), 707 F.2d 1337, 1339 (11th Cir. 1983) (per curiam) ("Columbus College is a governmental unit . . . . [A] governmental unit . . . include[s] a state or department, agency, or instrumentality of a state.").

78 11 U.S.C. § 523(a)(8)(A)(i).

79 *See* Sw. Student Servs. Corp. v. Jong I Ma, 820 N.Y.S.2d 394, 394 (App. Div. 2006) (finding that plaintiff is "a corporation organized under the not-for-profit laws of the State of Arizona").

and educational purposes.[80] Furthermore, the debtor herself acknowledged the lender's nonprofit status when she applied for the loans, making the organization's nonprofit status clear and the loan's exemption from discharge indisputable under § 523(a)(8)(A)(i).[81]

Loans originally disbursed by private for-profit lenders but insured, guaranteed by, or later transferred to a governmental unit or nonprofit are likewise nondischargeable.[82] Section 523(a)(8)(A)(i) explicitly excepts loans that are insured or guaranteed by a governmental unit or nonprofit from discharge.[83] In *McClain v. American Student Assistance* (*In re McClain*), the court found that loans funded by a for-profit bank and conditioned upon a nonprofit's guarantee fell within the scope of § 523(a)(8) because the nonprofit played a significant role in the "procurement of the loans."[84] The final part of § 523(a)(8)(A)(i) further states that the loans do not need to be *fully funded* by a governmental unit or nonprofit to be exempt from discharge.[85] *Keilig v. Massachusetts Higher Education Assistance Corp.* (*In re LaFlamme*) found that although the loans originated from a private bank, the government had in fact paid a *substantial* amount on its guarantee of the loans, making the loan nondischargeable.[86]

80 Vuini v. Zions Bank (*In re* Vuini), Bankr. Case No. 11-bk-07559, Adv. No. 11-ap-00227, 2012 WL 5554406, at *3 & n.33 (Bankr. M.D. Fla. Nov. 14, 2012).

81 *Id.* at *9–10.

82 *See* Siegel v. U.S.A. Grp. Guarantee Servs. (*In re* Siegel), 282 B.R. 629, 632 (Bankr. N.D. Ohio 2002) (finding that the key question is not "whether a private entity made the student loan, but instead whether the loan was insured or guaranteed by a governmental unit").

83 11 U.S.C. § 523(a)(8)(A)(i); *see also* Cleveland v. Educ. Credit Mgmt. Corp. (*In re* Cleveland), 559 B.R. 265, 271 (Bankr. N.D. Ga. 2016).

84 McClain v. Am. Student Assistance (*In re* McClain), 272 B.R. 42, 46 (Bankr. D.N.H. 2002); *see also* O'Brien v. First Marblehead Educ. Res., Inc. (*In re* O'Brien), 419 F.3d 104, 105–06 (2d Cir. 2005) (per curiam) (applying § 523(a)(8) to student loans made by a loan program funded by a nonprofit, which also paid the lender upon debtor's default); Decker v. EduCap, Inc., 476 B.R. 463, 467–68 (W.D. Pa. 2012) (finding student loans made by a private lender nondischargeable where a nonprofit was the disbursement agent as well as the student loan servicer and agreed to pay lender the outstanding balance upon debtor's default).

85 Section 523(a)(8)(A)(i) excepts from discharge "an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or *in part* by a governmental unit or nonprofit institution." 11 U.S.C. § 523(a)(8)(A)(i) (emphasis added).

86 Keilig v. Mass. Higher Educ. Assistance Corp. (*In re* LaFlamme), 188 B.R. 867, 869–70 (Bankr. D.N.H. 1995).

C. *Section 523(a)(8)(B): Qualified Education Loans*

Section 523(a)(8)(B) covers private and for-profit student loans that are considered "qualified education loan[s]"[87] under § 221(d)(1) of the Internal Revenue Code.[88] "Qualified education loan[s]" are used to pay the approved costs of attending an accredited school under Title IV of the Higher Education Act of 1965.[89] In addition, Internal Revenue Code § 6050S requires lenders of "qualified education loans" to issue a 1098-E tax form to all borrowers.[90] Under § 523(a)(8)(B), debtors with private loans that are "qualified education loan[s]" who used the funds to pay for the cost of attendance cannot discharge the debt, unless the debtors can prove undue hardship.[91] On the other hand, the debtor may discharge any funds that covered expenses *exceeding* the cost of attendance, even in absence of a showing of undue hardship.[92]

Section 523(a)(8)(B) was added to the Bankruptcy Code in 2005 through the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).[93] Prior to BAPCPA, federal student loans and government-guaranteed loans were excepted from discharge,[94] and

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87 "Qualified education loan" is defined as follows:

> [A]ny indebtedness incurred by the taxpayer solely to pay qualified higher education expenses—
>
> (A) which are incurred on behalf of the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred,
>
> (B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and
>
> (C) which are attributable to education furnished during a period during which the recipient was an eligible student.

I.R.C. § 221(d)(1).

88 11 U.S.C. § 523(a)(8)(B).

89 *See* Homaidan v. SLM Corp. (*In re* Homaidan), 596 B.R. 86, 91 (Bankr. E.D.N.Y. 2019); I.R.C. § 221(d)(2).

90 *See id.* at 92.

91 11 U.S.C. § 523(a)(8)(B).

92 If the cost of attendance is $50,000 and the student obtains a $60,000 private loan, then the student can only discharge $10,000 of the private loan in bankruptcy. *See id.*

93 *See* Mike Papandrea, *Should We Really Discharge the Student Loan Debt Discharge Exception? Why Reversing the 2005 BAPCPA Amendment Is Not Relief to the Debtor*, 12 RUTGERS J.L. & PUB. POL'Y 555, 556 (2015).

94 *See* Murphy, *supra* note 75, at 462 ("Congress enacted the first restriction on the discharge of student loan debt in the Educational Amendment of 1976. This amendment to the federal bankruptcy code dictated that *federally insured student loans* could not be discharged prior to five years after the loan was first due." (emphasis added) (footnotes omitted)); Siegel v. U.S.A. Grp. Guarantee Servs. (*In re* Siegel), 282 B.R. 629, 632–33 (Bankr. N.D. Ohio 2002) (finding that loans made by a private entity but guaranteed by a governmental unit fell within the scope of 11 U.S.C. § 523(a)(8)).

private student loans were automatically dischargeable.[95] Over time, as college costs increased, more students applied for private student loans, and the perception that these students were seeking discharge of the loans in bankruptcy after graduation with no intention to repay gained traction.[96] In response, lobbyists pushed Congress to amend § 523(a)(8) to create more protection for private lenders in the Bankruptcy Code, as it did for federal lenders.[97] Scholars who supported BAPCPA argued the new law would lower the cost of private loans and, thus, allow more students to attend college.[98] Now, almost fifteen years after BAPCPA took effect, we know it did not in fact lower the costs of private loans.[99]

D. *Section 523(a)(8)(A)(ii): Educational Benefits, Stipends, and Scholarships*

The third method to prevent student loans from discharge is by arguing the loans fall within the scope of § 523(a)(8)(A)(ii). Under this section, any funds that a debtor "received as an educational benefit, scholarship, or stipend" from governmental or nonprofit institutions are excepted from discharge.[100] This section has been broadly applied to benefit payments individuals received and used for noneducational purposes.[101] However, more courts are narrowing § 523(a)(8)(A)(ii)'s application to conditional education grants tied to employment or other obligations, such the G.I. Bill program which gives funds to servicemen to pursue higher education.[102] Any funds that are not used must be paid back to prevent participants from exploiting the program.[103] If the

95 Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL'Y REV. 175, 178 (2017).

96 *See* Justin A. DeAngelis, *Student Loans Beyond Title IV: The Emergence of Private Student Loan Lending and a Profit-Driven System*, 48 SUFFOLK U. L. REV. 637, 643–47 (2015); Emily S. Kimmelman, Comment, *Student Loans: Path to Success or Road to the Abyss? An Argument to Reform the Student Loan Discharge Exception*, 89 TEMP. L. REV. 155, 172 (2016).

97 "Sallie Mae alone spent $9 million on lobbying between 1999 and 2005." DeAngelis, *supra* note 96, at 647.

98 Alexandrov & Jiménez, *supra* note 95, at 178 ("Judge Posner theorized that 'by increasing the rights of creditors in bankruptcy . . . [bankruptcy reform] should reduce interest rates and thus make borrowers better off.'" (alterations in original)).

99 *See id.* ("It is thus easy to argue that BAPCPA was not very helpful to students: they lost the ability to discharge their private student loans, *but received no discount in return*." (emphasis added)).

100 11 U.S.C. § 523(a)(8)(A)(ii).

101 Iuliano, *supra* note 71, at 284–86.

102 *See* Kara J. Bruce, *Recent Developments in Educational-Benefit Discharge Litigation*, BANKR. L. LETTER, Oct. 2018, at 1; *see also* Iuliano, *supra* note 71, at 284.

103 *See* Iuliano, *supra* note 71, at 284.

money was used for unauthorized purposes, the individual must repay the funds and the unpaid balances cannot be discharged.[104]

"Educational benefit" is not explicitly defined in the Bankruptcy Code. As a result, many courts and creditors have broadly interpreted "educational benefit" to cover any debt that was used for "educational purposes."[105] A Massachusetts court held that a debtor who took out a personal loan and then asked for an increase in credit for more money to use for her children's books and supplies, transformed the personal loan into "funds received as an educational benefit."[106] Courts applying the broad reading have ruled that funds borrowed for tutoring services, bar review courses, and vocational schools are "educational benefits" and, therefore, cannot be discharged.[107] Under the broad reading, so long as the purpose of a loan was to finance some facet of education, the loan qualifies as an "educational benefit," and is nondischargeable.[108]

Recently, there has been a push in legal academia for a reinterpretation of § 523(a)(8)(A)(ii) favoring a narrower reading of the provision to create more protection for student debtors.[109] The narrow reading finds an "educational benefit" and an "educational loan" distinct from one another, and that a loan does not equal a benefit under § 523(a)(8)(A)(ii).[110] The narrower reading limits the provision to apply only to educational grants conditioned on some employment or service obligation.[111] It will also allow students with private student loans that do not qualify as "qualified educational loans" under § 523(a)(8)(B) a discharge without having to prove undue hardship.[112]

This push for the narrower reading did not go unnoticed by courts. In 2017, the Bankruptcy Appellate Panel for the Ninth Circuit distinguished student loans from "educational benefits" within the

104 *See id.*

105 *Id.* at 280; *see* McDaniel v. Navient Sols., LLC (*In re* McDaniel), 973 F.3d 1083, 1088 (10th Cir. 2020) ("Navient maintains next that these student loans are nondischargeable because, under 11 U.S.C. § 523(a)(8)(A)(ii), they constitute 'an obligation to repay funds received as an educational benefit.'"); Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 601 (2d Cir. 2021) ("Navient argues that its loan agreement constitutes an 'obligation to repay funds' and that Homaidan obtained those funds for the purpose of advancing his education, thereby deriving from them an 'educational benefit.'").

106 Liberty Bay Credit Union v. Belforte (*In re* Belforte), Bankr. Case No. 10-22742, Adv. No. 11-1008, 2012 WL 4620987, at *8–9 (Bankr. D. Mass. Oct. 1, 2012); *see also* Iuliano, *supra* note 71, at 284–85.

107 Iuliano, *supra* note 71, at 285–86.

108 *See* Nypaver v. Nypaver (*In re* Nypaver), 581 B.R. 431, 435 (Bankr. W.D. Pa. 2018).

109 *See* Bruce, *supra* note 102, at 1, 4–7; Iuliano, *supra* note 71.

110 *See* Iuliano, *supra* note 71, at 292–98.

111 *See* Bruce, *supra* note 102, at 1.

112 *See id.*

meaning of § 523(a)(8)(A)(ii).[113] Two years later, the Fifth Circuit held that § 523(a)(8)(A)(ii)'s "educational benefit" cannot be construed to include private student loans, and that an "educational benefit" is more akin to the other terms of the subsection—scholarship and stipend—which signify granting over borrowing.[114] Then in 2020 and 2021, the Tenth and Second Circuits joined the other circuits in adopting the narrower reading of Bankruptcy Code § 523(a)(8)(A)(ii).[115]

1. *McDaniel v. Navient*

In 2009, Bryon and Laura McDaniel filed a Chapter 13[116] bankruptcy petition.[117] At the time, they had eleven accounts with Sallie Mae and other debts, owing about $200,000.[118] In their petition, they described their accounts with Sallie Mae as "educational," covering six private student loans that Laura McDaniel used to pay her college expenses.[119] After amending their Chapter 13 petition, they provided that their "[s]tudent loans are to be treated as an unsecured Class Four claim or as follows: deferred until end of plan."[120] In 2010, the bankruptcy court confirmed the McDaniels' amended Chapter 13 plan.[121]

By early 2015, the McDaniels certified that they had carried out all their payments and obligations.[122] At that time, they had paid nearly $27,000 in principal to Navient Solutions.[123] In March 2015, the court granted the McDaniels a discharge of their debts, but did not grant a

113 Kashikar v. Turnstile Cap. Mgmt., LLC (*In re* Kashikar), 567 B.R. 160, 166–67 (B.A.P. 9th Cir. 2017).

114 Crocker v. Navient Sols., L.L.C. (*In re* Crocker), 941 F.3d 206, 218–24 (5th Cir. 2019).

115 *See* McDaniel v. Navient Sols., LLC (*In re* McDaniel), 973 F.3d 1083, 1095–98 (10th Cir. 2020); Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 599 (2d Cir. 2021).

116 Chapter 13 of the Bankruptcy Code affords individuals receiving regular income an opportunity to obtain some relief from their debts while retaining their property. To proceed under Chapter 13, a debtor must propose a plan to use future income to repay a portion (or in the rare case all) of his debts over the next three to five years. If the bankruptcy court confirms the plan and the debtor successfully carries it out, he receives a discharge of his debts according to the plan.

McDaniel, 973 F.3d at 1086 n.2 (quoting Bullard v. Blue Hills Bank, 575 U.S. 496 (2015)).

117 *Id.* at 1086.

118 *Id.*

119 *Id.*

120 *Id.* at 1087 (alteration in original).

121 *Id.*

122 *Id.*

123 *Id.*

discharge for their student loans.[124] From 2015 to 2017, the McDaniels paid Navient an additional $37,460 on their student loans.[125]

In June 2017, the McDaniels moved to reopen their case.[126] They filed a complaint against Navient seeking a declaratory judgment that their private student loans were dischargeable under the Bankruptcy Code.[127] They sought damages based on Navient's collection activities on the loans in violation of Bankruptcy Code § 524(a).[128]

The McDaniels argued that their loans "were not 'qualified education loans'" under Bankruptcy Code § 523(a)(8)(B) because the loans "were not made solely for the 'cost of attendance'" at Laura McDaniel's college.[129] Navient moved to dismiss the complaint, arguing that under res judicata the McDaniels' loans were excepted from discharge based on their previously confirmed plan from 2010.[130] Navient added that the loans were considered nondischargeable under Bankruptcy Code § 523(a)(8)(A)(ii).[131] Navient's motion to dismiss was denied.[132] The case before the Tenth Circuit was an interlocutory review.[133]

The Tenth Circuit began by highlighting the purpose of the Bankruptcy Code: "to aid the unfortunate debtor by giving him a fresh start in life, free from debts."[134] In order to fulfill this purpose, the court must limit discharge exceptions to only the ones plainly expressed in the statute, implying that § 523(a)(8)(A)(ii), with its reference to "educational benefit," should be narrowly read.[135]

Section 523(a)(8)(A)(ii) explicitly excepts funds that qualify as a benefit, scholarship, or stipend from discharge.[136] Despite no mention of the word "loan," some courts broadly interpreted the language "an obligation to repay funds received as an educational benefit" to

124 *Id.* at 1087–88.

125 *Id.* at 1088.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at 1089.

133 *See id.*

134 *Id.* at 1092–93 (quoting Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018)).

135 *See id.* at 1093.

136 11 U.S.C. § 523(a)(8)(A)(ii) (excepting from discharge "an obligation to repay funds received as an educational benefit, scholarship, or stipend").

encompass loans.[137] The Tenth Circuit disagreed and found that it is clear "educational benefit" and "educational loan" are separate.[138]

Congress contrasted loans and benefits in the prior provision—that is, § 523(a)(8)(A)(i)—by using a disjunctive "or."[139] By inserting an "or" between the terms, Congress indicated the terms are referring to different things with separate meanings.[140] Moreover, while Congress plainly included "loan" in the prior subsection, Congress did not do so in the subsection at issue in *McDaniel*.[141] Thus, it was wrong to assume § 523(a)(8)(A)(ii)'s "educational benefit" reached so far as to include "loans."[142] Had Congress wanted "benefit" to encompass "loans," it would have explicitly used language to indicate that intention.[143]

Congress first added the subsection to the discharge exceptions in 1990.[144] During that time, the Supreme Court indicated the ordinary use of "benefit" was an advantageous good, gift, or aid during a time of need, or a cash payment from a pension or insurance plan.[145] Today, native English speakers would refer to "benefits," such as health, unemployment, or retirement benefits, as indicative of a gift that does not need to be repaid.[146] If a student indicated he or she is seeking benefits to attend college, it is assumed the student is interested in the benefits provided by the G.I. Bill, not private student loans.[147] In addition, no one would describe mortgage loans as "housing benefits" nor automobile loans as "transportation benefits."[148]

The distinction between "benefit" and "loan" is further confirmed by the canon of *noscitur a sociis*—the immediate context rule.[149] The

137 *See McDaniel*, 973 F.3d at 1094 n.10.

138 *Id.* at 1095.

139 11 U.S.C. § 523(a)(8)(A)(i) (excepting from discharge "an educational benefit overpayment *or* loan made" (emphasis added)).

140 *McDaniel*, 973 F.3d at 1095.

141 *Id.* at 1094–95.

142 "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion[.]" *Id.* at 1095 (alterations in original) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

143 *Id.*

144 *Id.* at 1096.

145 The Tenth Circuit defined "benefit" as "'something that guards, aids, or promotes well-being: advantage, good'; 'useful aid'; 'payment, gift [such as] financial help in time of sickness, old age, or unemployment'; or 'a cash payment or service provided for under an annuity, pension plan, or insurance policy.'" *Id.* (alteration in original) (quoting Fischer v. United States, 529 U.S. 667, 677 (2000)).

146 *Id.*

147 *Id.*

148 *Id.* at 1097.

149 *Id.*

canon of *noscitur a sociis* directs readers to give words grouped in a list a "related meaning."[150] In § 523(a)(8)(A)(ii), the list is "benefit, scholarship, or stipend."[151] A stipend is a fixed payment, such as a salary.[152] A scholarship is a financial grant to a student.[153] Finally, a benefit is a payment or gift in time of need.[154] The string of words commonly signifies a granting, not borrowing, that does not need to be repaid, and is categorically distinct from an "educational loan."[155]

2. *Homaidan v. Sallie Mae*

Hilal K. Homaidan received two private educational loans, totaling $12,567, from Sallie Mae, later succeeded by Navient, to fund his education at Emerson College.[156] Homaidan filed for Chapter 7 bankruptcy after graduation and received a discharge of his debts.[157] The court's discharge order was ambiguous regarding his student loans to Navient.[158] Navient continued to pursue repayment after Homaidan's discharge, and Homaidan complied, paying the loan off in full.[159] In 2017, Homaidan reopened the bankruptcy case to commence an adversary proceeding against Navient seeking a determination that the loans were in fact discharged and to receive damages for Navient's violation of the discharge order.[160]

Navient argued § 523(a)(8)(A)(ii) prevented the loans from being discharged because the loans were "educational benefits," which

150 "This canon, which instructs that 'a word is known by the company it keeps,' helps us 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving "unintended breadth to the Acts of Congress."'" *Id.* (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)).

151 11 U.S.C. § 523(a)(8)(A)(ii) (excepting from discharge "an obligation to repay funds received as an educational *benefit, scholarship, or stipend*" (emphasis added)).

152 *McDaniel*, 973 F.3d at 1097.

153 *Id.*

154 *Id.* at 1097–98.

155 *Id.* at 1098 (quoting Crocker v. Navient Sols., L.L.C. (*In re* Crocker), 941 F.3d 206, 219 (5th Cir. 2019)).

156 Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 599 (2d Cir. 2021).

157 *Id.*

158 *Id.* ("Rather, it observed that some 'common types of debts' including '[d]ebts for most student loans,' are not dischargeable in a Chapter 7 proceeding." (alteration in original)).

159 *Id.* ("These demands for repayment caused Homaidan to assume that the loans had not been discharged; so he paid Navient in full . . . .").

160 *Id.* Homaidan filed the adversary proceeding as a "putative class action," arguing that Navient "employed a scheme of issuing dischargeable loans to unsophisticated student borrowers and then demanding repayment even after those loans are discharged in bankruptcy." *Id.*

allowed the debtor to complete his education at Emerson College.[161] Homaidan argued that although the loans helped him pay for his education, the loans "were not made through Emerson's financial aid office, nor . . . were they made solely to cover Emerson's cost of attendance."[162] Instead, the loans were directly deposited into Homaidan's bank account, and the funds exceeded Emerson's tuition.[163]

Navient's motion to dismiss was denied, and the case went before the Second Circuit as an interlocutory appeal to determine "whether the loans at issue constitute[d] 'an obligation to repay funds received as an educational benefit' and were therefore excepted from discharge under § 523(a)(8)(A)(ii)."[164]

Like the Tenth Circuit did in *McDaniel*, the Second Circuit began its decision with an explanation of the purpose of the federal bankruptcy system: "to 'aid the unfortunate debtor by giving him a fresh start in life.'"[165] In order to fulfill this purpose, courts should interpret the Code narrowly and confine discharge exceptions to those expressly written in the Code.[166] Thus, the Second Circuit affirmed the lower court's discharge of Homaidan's student loans and adopted a narrow reading of § 523(a)(8)(A)(ii)'s "educational benefit."[167]

Navient's broad reading of § 523(a)(8)(A)(ii) that private loans are covered by the subsection "if the debtor obtained the funds to pay for educational expenses" violated several rules of statutory interpretation.[168] First, reading "educational benefit" to include private student loans goes against the statute's ordinary meaning and is an "unconventional way to discuss a loan."[169] If Congress had wanted to except student loans from discharge in § 523(a)(8)(A)(ii), it would not

161 Homaidan v. SLM Corp. (*In re* Homaidan), 596 B.R. 86, 97–98 (Bankr. E.D.N.Y. 2019) ("They urge that the Tuition Answer Loans 'enable[d] him to attend and graduate from Emerson College' . . . and therefore, these loans 'conferred "educational benefits" on him.'" (first alteration in original)).

162 *Homaidan*, 3 F.4th at 599.

163 *Id.*

164 *Id.* at 599–600.

165 *Id.* at 600 (quoting Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018)).

166 *Id.* (quoting Bethpage Fed. Credit Union v. Furio (*In re* Furio), 77 F.3d 622, 624 (2d Cir. 1996)).

167 *Id.* at 599.

168 *Id.* at 601.

169 *Id.* (quoting Homaidan v. SLM Corp. (*In re* Homaidan), 596 B.R. 86, 102 (Bankr. E.D.N.Y. 2019)).

have used such "stilted terms."[170] Instead, Congress would have used the word "loan" expressly, like it had done in the other subsections.[171]

Second, Navient's broad reading of "educational benefit" violates the canon of surplusage that instructs courts to interpret statutes "so that no part [is] inoperative or superfluous."[172] The broad reading renders *any* loan used to further a debtor's education nondischargeable. If this were true, § 523(a)(8)(A)(i) and § 523(a)(8)(B) would become superfluous.[173] The narrow interpretation, on the other hand, allows each subsection to perform its own role: § 523(a)(8)(A)(i) for government and nonprofit loans, § 523(a)(8)(A)(ii) for scholarships, stipends, and conditional grants, and § 523(a)(8)(B) for private student loans.[174]

Third, Navient's interpretation clashes with *noscitur a sociis*, which instructs readers to interpret a term based on its neighboring words.[175] In § 523(a)(8)(A)(ii), "educational benefit" is followed by "scholarship" and "stipend," which are commonly described as "conditional grant payments" that lenders do not generally require repayment for.[176] To satisfy *noscitur a sociis*, "educational benefit[s]" must also be interpreted as "conditional grant payments," rather than general payments used to advance a debtor's education.[177] Under these rules of statutory interpretation, Homaidan's student loans do not fall under § 523(a)(8)(A)(ii) because the funds were not disbursed as conditional grant payments.[178]

Navient's structural arguments to read "loan" into § 523(a)(8)(A)(ii)—although the word is expressly absent from the

170 *Id.*

171 "[W]hen Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Id.* at 602 (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). *Compare* 11 U.S.C. § 523(a)(8)(A)(ii) (word "loan" not present), *with* 11 U.S.C. § 523(a)(8)(A)(i) (excepting from discharge "an educational benefit overpayment or *loan*" (emphasis added)), *and* 11 U.S.C. § 523(a)(8)(B) (excepting from discharge "any other educational *loan* that is a qualified education *loan*" (emphasis added)).

172 *Homaidan*, 3 F.4th at 602 (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

173 *Id.* at 602–03.

174 *See id.* at 603–04.

175 *Id.* at 604 (first citing Freeman v. Quicken Loans, Inc., 566 U.S. 624, 634–35 (2012); and then citing United States v. Dauray, 215 F.3d 257, 262 (2d Cir. 2000)).

176 *Id.*; 11 U.S.C. § 523(a)(8)(A)(ii) (excepting "an educational benefit, scholarship, or stipend" from discharge).

177 *Homaidan*, 3 F.4th at 605.

178 *See id.* at 599 ("Although the loans helped underwrite Homaidan's college education, they were not made through Emerson's financial aid office, nor—Homaidan alleges—were they made solely to cover Emerson's cost of attendance. They went straight to Homaidan's bank account, and the loan proceeds exceeded the cost of Emerson's tuition.").

subsection—were also dismissed by the Second Circuit. Navient argued that "sandwiching" the subsection between two other sections that include the word "loan" meant § 523(a)(8)(A)(ii)'s "educational benefit" encompasses loans.[179] On the contrary, Congress showed intentional and purposeful drafting when it chose to "include[] [loan] in one section . . . but omit[] it in another section of the same Act."[180] Navient then argued that § 523(a)(8)(B)'s "any *other* educational loan" implied § 523(a)(8)(A)(i) and § 523(a)(8)(A)(ii) likewise covered student loans.[181] But Navient failed to recognize that only § 523(a)(8)(A)(i) expressly excepts student loans from discharge; thus, the natural reading of "other" in § 523(a)(8)(B) only references § 523(a)(8)(A)(i).[182] Navient's final structural argument pointed to Congress's use of "obligation to repay" to reference loans in other statutes, which is used in § 523(a)(8)(A)(ii).[183] Congress's use of the phrase in other statutes is irrelevant in determining what Congress meant in the subsection at issue.[184] The Second Circuit believed Congress made its intention to leave student loans out of § 523(a)(8)(A)(ii) clear when it omitted any references to loans in § 523(a)(8)(A)(ii), but mentioned loans several times in § 523(a)(8)(A)(i) and § 523(a)(8)(B).[185]

II. ANALYSIS

A. *The Narrow Reading of Educational Benefit Is Correct*

1. Judicial Trend Favoring Discharge

The growing push for § 523(a)(8) reforms has created a judicial trend shifting away from the traditional reading and toward a relaxed treatment of student loan discharges.[186] Bankruptcy judges are expressing frustration that borrowers are coming into court for relief

179 *See id.* at 602.

180 *Id.* (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

181 *Id.*

182 *Id.*

183 *Id.*

184 *See id.*

185 *Id.* (citing *Russello*, 464 U.S. at 23).

186 *See* Bruce, *supra* note 102.

but are leaving with the same six-figure debts they came in with.[187] Chief Judge Morris of the Southern District of New York opined in *Rosenberg v. New York State Higher Education Services Corp.* (*In re Rosenberg*) that there has been a misreading of § 523(a)(8).[188] In order to fulfill the purpose of the Bankruptcy Code, satisfying the undue hardship standard should be more straightforward.[189] Chief Judge Morris further criticized courts that are perpetuating the myth that it is impossible to discharge student loans through bankruptcy.[190]

2. How Courts Are Deciding on "Educational Benefit"

Before the legislature takes action—either by passing § 523(a)(8) reforms or clarifying undue hardship—judges have taken matters into their own hands by limiting the application of § 523(a)(8).[191] *United Resource Systems, Inc. v. Meinhart* (*In re Meinhart*) was one of the earlier cases, predating the enactment of BAPCPA, within the Tenth Circuit to limit for-profit lenders from raising "educational benefit" arguments to except loans used for an educational purpose from discharge.[192] *Meinhart* involved a private loan made by a for-profit

187 *See* Katy Stech Ferek, *Judges Wouldn't Consider Forgiving Crippling Student Loans—Until Now*, WALL ST. J. (June 14, 2018, 7:00 AM), https://www.wsj.com/articles/judges-wouldnt-consider-forgiving-crippling-student-loans-until-now-1528974001 [https://perma.cc/QR55-MJKE].

188 *See* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454, 458–59 (Bankr. S.D.N.Y. 2020).

189 The purpose of the Bankruptcy Code is to provide debtors with a fresh start. Many judges reference the fresh-start principle to justify widening the scope of student loan discharge. *See* Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004) ("[T]o better advance the Bankruptcy Code's 'fresh start' policy . . . the test must be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged."); Crocker v. Navient Sols., L.L.C (*In re* Crocker), 941 F.3d 206, 217 (5th Cir. 2019) ("All exceptions to discharge are to be interpreted narrowly in favor of the debtor to preserve the 'fresh start' the Bankruptcy Code provides for debtors." (citing Hickman v. Texas (*In re* Hickman), 260 F.3d 400, 404–05 (5th Cir. 2001))). Students like Kevin Rosenberg—who have been out of school and struggling to repay their student loans for several years—have met the burden after years of repayment and should be granted a discharge. *See Rosenberg*, 610 B.R. at 459–62.

190 *See* Michael M. Krauss & James Park, *Student Loan Discharged in Bankruptcy—Just a Blip, or Something Bigger?*, NAT'L L. REV. (Jan. 28, 2020), https://www.natlawreview.com/article/student-loan-discharged-bankruptcy-just-blip-or-something-bigger [https://perma.cc/5FDG-AXXT].

191 *See* Sarah Chaney, *Bankruptcy Becomes an Option for Some Borrowers Burdened by Student Loans*, WALL ST. J. (Dec. 27, 2016, 7:15 PM), https://www.wsj.com/articles/bankruptcy-becomes-an-option-for-some-borrowers-burdened-by-student-loans-1482834600 [https://perma.cc/6E94-33WT].

192 United Res. Sys., Inc. v. Meinhart (*In re* Meinhart), 211 B.R. 750, 753 (Bankr. D. Colo. 1997).

truck-driving school to one of its students, and the school argued that the student's loan was nondischargeable under § 523(a)(8)'s educational benefit.[193] However, the court rejected the school's characterization of the loan, holding that it should be characterized as a private loan from a for-profit entity, and granted the debtor a discharge.[194] In a similar decision, *McClure v. Action Career Training* (*In re McClure*), the court held that expanding § 523(a)(8) to include loans made by for-profit businesses would create law that makes previously dischargeable debts nondischargeable.[195] This is as if a credit card company argued that a transaction in a bookstore by a student is nondischargeable because the student used the money to further their education. Furthermore, for-profit businesses do not exist solely to provide educational benefits, and only offer loans to attract customers.[196]

In *Nypaver v. Nypaver* (*In re Nypaver*), a father obtained a Federal Parent PLUS loan to provide financial assistance to his daughter while she attended college.[197] When his daughter filed for bankruptcy, he argued the debt was nondischargeable because it qualified as an educational benefit under § 523(a)(8)(A)(ii).[198] The court disagreed.[199] Although the PLUS loan was the original source of funding, his daughter was not seeking to discharge the PLUS loan—she was seeking a discharge of a debt that arose from a private contract between father and daughter, separate and apart from the PLUS loan.[200] While she could have used the money for educational purposes, the loan did not qualify as a student loan or educational benefit for the purposes of § 523(a)(8).[201]

In *Campbell v. Citibank, N.A.* (*In re Campbell*), the judge limited the application of educational benefit and rejected arguments by

193 *Id.* at 752.

194 *See id.* at 751; *see also* Scott v. Midwestern Training Ctr., Inc. (*In re* Scott), 287 B.R. 470, 471 (Bankr. E.D. Mo. 2002) (finding that a debtor's educational loan funded by a for-profit business and used to pay for truck-driving courses was dischargeable because it did not fall under § 523(a)(8) exemptions).

195 McClure v. Action Career Training (*In re* McClure), 210 B.R. 985, 988 (Bankr. N.D. Tex. 1997).

196 *Id.*

197 Nypaver v. Nypaver (*In re* Nypaver), 581 B.R. 431, 432 (Bankr. W.D. Pa. 2018); *see also* London-Marable v. Sterling, Case Nos. CIV 06-CV-2659-PHX-RCB, BK-5-4339-RTB, Adv. No. 06-00274-RTB, 2008 WL 2705374, at *4–7 (D. Ariz. July 9, 2008) (finding that a debtor's educational assistance from his mother, who funded the loan by taking out a PLUS loan, was dischargeable because it did not qualify as an educational benefit).

198 *Nypaver*, 581 B.R. at 434–35.

199 *See id.* at 440.

200 *See id.* at 432.

201 *See id.* at 434–40.

creditors that the exemptions should encompass loans generally related to education.[202] If § 523(a)(8)(A)(ii) were meant to be this broad, it would render the other subsections essentially useless. There would be no need to enact multiple subsections that specifically exempt different types of educational loans from discharge. This reading of the statute violates the *canon against surplusage*, which requires courts to give effect to every provision to avoid rendering any part of the statute duplicative or superfluous.[203]

Furthermore, § 523(a)(8)(A)(ii) was added to the Code to codify the decision in *United States Department of Health & Human Services v. Smith*.[204] The *Smith* court found a conditional grant to a medical student to be nondischargeable after the student failed to uphold the promise to practice medicine in an underserved area.[205] Codifying the *Smith* decision meant the legislature intended this subsection to apply to only conditional funds, similar to that in *Smith*, and not to ordinary loans used in a general educational manner.[206]

The Fifth Circuit ruling in *Crocker v. Navient Solutions, L.L.C.* (*In re Crocker*) was the first to adopt the narrow interpretation of § 523(a)(8)(A)(ii) in favor of the debtor and find that private educational loans are not statutorily excepted from discharge.[207] In the class action suit, the debtors obtained loans from for-profit corporations and not from any government loan programs, which were all transferred to Navient.[208] Their loans were described as educational private loans.[209] Navient argued that the private student loans fell under the exemptions of § 523(a)(8)(A)(ii), rendering them nondischargeable.[210] The Fifth Circuit disagreed with Navient.[211] The absence of the word "loan(s)" from § 523(a)(8)(A)(ii) showed that Congress was not targeting loans and explicitly intended to exclude

202 Campbell v. Citibank, N.A. (*In re* Campbell), 547 B.R. 49, 54–55 (Bankr. E.D.N.Y. 2016).

203 *See* Corley v. United States, 556 U.S. 303, 314 (2009).

204 *See* Iuliano, *supra* note 71, at 304; U.S. Dep't of Health & Hum. Servs. v. Smith, 807 F.2d 122 (8th Cir. 1986).

205 *Id.* at 123, 125–27.

206 *See* Iuliano, *supra* note 71, at 304.

207 Crocker v. Navient Sols., L.L.C. (*In re* Crocker), 941 F.3d 206 (5th Cir. 2019). Note the difference between *Crocker* and previous cases discussed. *Crocker* addresses a private student loan, whereas prior cases involved ordinary private loans that the debtors used for educational purposes. In those cases, the creditors were attempting to prevent an ordinary private loan from discharge by framing it as an "educational benefit" because the loans were used for educational purposes. It is also important to note that the *McDaniel* court heavily relied on *Crocker*. *See* McDaniel v. Navient Sols., LLC (*In re* McDaniel), 973 F.3d 1083, 1095–1103 (10th Cir. 2020).

208 *See Crocker*, 941 F.3d at 208–09.

209 *Id.* at 209.

210 *Id.* at 218–19.

211 *Id.* at 223–24.

them when it purposefully included the word in other subsections.[212] Navient argued the severance of § 523(a)(8)(A) into § 523(a)(8)(A)(i) and § 523(a)(8)(A)(ii) meant Congress intended § 523(a)(8)(A)(i) to cover public loans and § 523(a)(8)(A)(ii) to cover private education loans, in order to widen the Code's scope of education financing.[213] This argument fails because the severance was only a structural change, and no substantive changes to the language of § 523(a)(8)(A)(i) or § 523(a)(8)(A)(ii) were made.[214] Furthermore, only § 523(a)(8)(B) brought private loans into § 523(a)(8), and it did not apply to the loans in question.[215] Section 523(a)(8)(A)(ii) only applies to payments not obtained as loans, which contain terms that create the obligation to repay upon a debtor's failure to fulfill the conditions of payment.[216]

B. *What* McDaniel v. Navient *Means for Debtors with Student Loans*

Under the broad reading of § 523(a)(8)(A)(ii), "obligation to repay funds received" meant "loan[s]," and "educational benefit" meant any transaction that was related and used to advance one's education.[217] *Roy v. Sallie Mae* held that debts owed to Sylvan Learning Center for tutoring services for the debtor's child were nondischargeable because, pursuant to § 523(a)(8)(A)(ii), the debts were "an obligation to repay funds received as an *educational benefit*."[218]

However, under *McDaniel* and *Homaidan*, the Sylvan debts are dischargeable. The Sylvan debts are unsecured private educational loans and thus do not qualify as a student loan guaranteed by the federal government under § 523(a)(8)(A)(i).[219] Furthermore, Sylvan Learning Center is not an accredited school under the Higher Education Act of

212 *Id.* at 218–19.

213 *Id.* at 223.

214 *Id.* ("All we see is a change to the structure of the overall statute but no real change to the language that controls the case before us."); *see also* Kashikar v. Turnstile Cap. Mgmt., LLC (*In re* Kashikar), 567 B.R. 160, 167 (B.A.P. 9th Cir. 2017) (finding that separation of the subsections through BAPCPA meant that § 523(a)(8)(A)(ii) was distinct from § 523(a)(8)(A)(i) and § 523(a)(8)(B)'s exceptions of educational loans).

215 *See Crocker*, 941 F.3d at 223.

216 *Id.*

217 Iuliano, *supra* note 71, at 284.

218 Roy v. Sallie Mae (*In re* Roy), Bankr. Case No. 08-33318, Adv. No. 09-1406, 2010 WL 1523996 (Bankr. D.N.J. Apr. 15, 2010) (emphasis added).

219 *See* 11 U.S.C. § 523(a)(8)(A)(i).

1965,[220] so any part of the loan used at the learning center is not a "qualified education loan" under § 523(a)(8)(B).[221] Following the narrow interpretation of § 523(a)(8)(A)(ii) adopted in *McDaniel* and *Homaidan*, the Sylvan debts do not qualify as "educational benefit[s]."[222] As the Tenth and Second Circuits made clear, conditional grants are "educational benefit[s]," and normally, the terms of a private educational loan do not condition payments on a debtor's future services.[223] Educational loans are nondischargeable only if they fall under one of the subsections of § 523(a)(8), but the Sylvan debts do not. Loans subject to the narrower reading of § 523(a)(8)(A)(ii) are military programs,[224] health programs,[225] teacher programs,[226] and similar programs.[227]

By changing the reading of § 523(a)(8), nondischargeable student loans will be limited, giving more opportunity to students who choose to litigate the dischargeability of their loans. *McDaniel* and *Homaidan* chip away at the myth that student loans are inherently nondischargeable in bankruptcy.[228] Pursuing a student loan discharge

220 *See* I.R.C. § 25A(f)(2) ("[An] eligible educational institution . . . is described in section 481 of the Higher Education Act of 1965 (20 U.S.C. § 1088) . . . ."); 20 U.S.C. § 1088(b). Courses at Sylvan Learning Center do not meet the minimum hours of instruction required—six hundred hours for graduate programs and three hundred hours for undergraduate programs. *See Sylvan School Services*, SYLVAN LEARNING, https://www.sylvanlearning.com/resources/sylvan-school-services [https://perma.cc/3GG9-P4Y7]. Sylvan also does not offer graduate or undergraduate programs, which can be found at accredited higher-education institutions. *Id.*

221 *See* 11 U.S.C. § 523(a)(8)(B); *see also* discussion *supra* Section I.C.

222 *See* McDaniel v. Navient Sols., LLC (*In re* McDaniel), 973 F.3d 1083, 1097–98 (10th Cir. 2020); Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 599 (2d Cir. 2021).

223 *See supra* Sections I.D.1–I.D.2.

224 *See generally Army ROTC Scholarships*, GOARMY, https://www.goarmy.com/careers-and-jobs/find-your-path/army-officers/rotc/scholarships.html [https://perma.cc/W5RY-9ASS] (providing scholarships for high school students who commit to "[e]ight years in the Army, Army Reserve, or Army National Guard").

225 *See generally Apply to the Nurse Corps Scholarship Program*, HRSA HEALTH WORKFORCE, https://bhw.hrsa.gov/funding/apply-scholarship/nurse-corps [https://perma.cc/BQ3G-VBS7] ("If accepted, we pay your tuition, fees, and other educational costs. In return, you work at a Critical Shortage Facility (CSF) when you graduate.").

226 *See generally Teacher Programs*, WASH. STUDENT ACHIEVEMENT COUNCIL, https://wsac.wa.gov/teachers [https://perma.cc/62WJ-7CJS] (providing financial aid for teachers to work in "shortage areas" with a requirement to "[r]epay any funding received . . . if the participant fails to fulfill the teaching service obligation").

227 *See* Sensient Techs. Corp. v. Baiocchi (*In re* Baiocchi), 389 B.R. 828, 829 (Bankr. E.D. Wis. 2008) (program providing debtor with fifty percent of tuition for attending law school that included a "requirement that any funds paid to her during the two years prior to her voluntary departure from the company must be repaid").

228 *See* Chris Arnold, *Myth Busted: Turns Out Bankruptcy Can Wipe Out Student Loan Debt After All*, NPR (Jan. 22, 2020, 7:13 AM), https://www.npr.org/2020/01/22/797330613/myth-

will no longer be left to chance if the student debtor does not need to show undue hardship, which was widely applied inconsistently among the courts.[229] Under the new reading of § 523(a)(8), private loans paid to a nonqualified higher-education institution[230]—for example, a vocational school, beauty school, culinary school, or bar prep class—do not fall under the discharge exceptions listed in § 523(a)(8), and thus do not need a showing of undue hardship to qualify for a discharge. Students can pursue bankruptcy—keeping in mind the consequences of filing for bankruptcy—if they are having a hard time repaying their student loans.

C. *Looking Forward: Addressing the Impact of* McDaniel v. Navient *on Student Loans*

Before BAPCPA, § 523(a)(8) did not prevent private student loans from being discharged.[231] The 2005 reforms to add private loans were influenced by the growth of commercial lending and the push for protection for private lenders.[232] During the following school year, private student lending jumped to $17.3 billion.[233] The privilege of being nondischargeable skewed lenders' incentives to approve loans responsibly and consider a borrower's ability to repay.[234] Many students taking out loans are young, fresh out of high school, and not informed

busted-turns-out-bankruptcy-can-wipe-out-student-loan-debt-after-all [https://perma.cc/9X69-J9GH]; Alexander Gladstone, *Appeals Court Weakens Bankruptcy Protections for Private Student Loans*, WALL ST. J. (Sept. 1, 2020, 4:57 PM), https://www.wsj.com/articles/appeals-court-weakens-bankruptcy-protections-for-private-student-loans-11598993841 [https://perma.cc/UV53-RGPK].

229 *See* Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 503 (2020) ("If a student loan does not fall within at least one of [the Section 523(a)(8) exemptions], the inquiry ends, and the debt is discharged through the normal bankruptcy process." (footnote omitted)); *supra* Section I.A.1.

230 *See supra* note 220.

231 *See supra* Section I.C.

232 *See* Crocker v. Navient Sols., L.L.C. (*In re* Crocker), 941 F.3d 206, 222–23 (5th Cir. 2019).

233 Diana Jean Schemo, *Private Loans Deepen a Crisis in Student Debt*, N.Y. TIMES (June 10, 2007), https://www.nytimes.com/2007/06/10/us/10loans.html [https://perma.cc/2FAL-W4PJ]. "[At] the end of 2019, there was $128 billion in private student loans . . . ." Delece Smith-Barrow, *More Students Are Taking out Private Loans as College Costs Rise*, HECHINGER REP. (May 8, 2020), https://hechingerreport.org/more-students-are-taking-out-private-loans-as-college-costs-rise [https://perma.cc/X8GZ-A8NY].

234 *See* Kayla Webley, *Is Forgiving Student Loan Debt a Good Idea?*, TIME (Apr. 20, 2012), https://business.time.com/2012/04/20/is-forgiving-student-loan-debt-a-good-idea [https://perma.cc/8DPF-F9UM].

of the risks they are about to incur.[235] Nondischargeability status made it easier for private lenders to exacerbate poor lending practices and contribute to the growth of the student loan bubble.[236] The *McDaniel* decision may influence student lenders to grant loans proportionate to the student's ability to repay and limit whom they grant loans to.[237] As a result, this incentive could create a self-sustaining private lending system and healthier lending practices, both of which will have long-lasting effects on the national economy.[238]

There is a concern that if private lenders limit their lending pool, it could harm students who mainly, or at least sometimes, rely solely on private loans to pay for school. Federal loans, scholarships, and grants come with borrowing or granting caps to limit the amount that each student receives.[239] Furthermore, not all students are eligible for federal loans; these loans are not available to students who are not citizens or permanent residents.[240] In these situations, students turn to private lenders to cover the remaining tuition and attendance costs.[241] In light of the *McDaniel* and *Homaidan* decisions, however, it is likely that private lenders will increase interest rates and change borrowing terms to create more favorable protections for themselves.[242] Where are students, who have maxed out or do not qualify for federal loans, to go?

235 *See Student Loans: Trading Your Life for a Degree*, 15 ILL. BUS. L.J. 72, 72–73 (2012); Camilla E. Watson, *Federal Financing of Higher Education at a Crossroads: The Evolution of the Student Loan Debt Crisis and the Reauthorization of the Higher Education Act of 1965*, 2019 MICH. ST. L. REV. 883, 946.

236 *See* Webley, *supra* note 234.

237 *See* Preston Mueller, Comment, *The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?*, 32 EMORY BANKR. DEVS. J. 229, 256 (2015).

238 *See id.* at 256–57 (arguing that by removing discharge protection of private student loans and lowering private lending limits, schools may lower tuition, and prevent the burst of the student loan bubble).

239 Currently, a student is capped at $31,000 for undergraduate studies, but on average a public four-year college costs approximately $40,000, which is more than the federal loan limit. Anna, *Why Do Some Students Borrow Traditional Private Student Loans?*, MERATAS (Aug. 7, 2020), https://www.meratas.com/blog/why-students-borrow-private-student-loans [https://perma.cc/CW4T-984F].

240 Elyssa Kirkham, *Your Guide to FAFSA and Eligibility Requirements for Financial Aid*, STUDENT LOAN HERO (Jan. 28, 2021), https://studentloanhero.com/featured/do-i-qualify-for-financial-aid-eligibility-requirements [https://perma.cc/XWV9-3S93].

241 *See* Anna, *supra* note 239.

242 *See* Papandrea, *supra* note 93, at 575–76.

CONCLUSION

The purpose of the Bankruptcy Code is to provide struggling debtors with a fresh start.[243] Debtors who are struggling the most are those with student loans, but the area of law that is supposed to provide them solace is not available to them. After *McDaniel* and *Homaidan*, student debtors in the Tenth and Second Circuits are seeing more options in dealing with their student loan debt.[244] For the rest of the country, the discontent with the strict interpretation of the Bankruptcy Code and the urge for the Code to once again favor debtors is growing. Before Congress takes any real steps toward reform, students can only hope that other circuits will follow the Tenth and Second Circuits in reinterpreting the Code to favor discharge.

243 *See supra* text accompanying note 4.

244 *See supra* Section I.D.