

Written Testimony of

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Before the:

House Judiciary Subcommittee on
Antitrust, Commercial, and Administrative Law

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Witness Background Statement

Dalié Jiménez is a Professor of Law at the UC Irvine School of Law where she teaches courses on bankruptcy, consumer financial regulation, and contracts.

Professor Jiménez is one of three principal investigators in the Financial Distress Research Project, a large-scale, longitudinal, randomized control trial evaluating the effectiveness of legal and counseling interventions to help individuals in financial distress. The project has received generous financial support from the National Science Foundation, the American Bankruptcy Institute, the National Conference of Bankruptcy Judges, and the Arnold Foundation, among others.

A member of the American Bankruptcy Institute's Consumer Bankruptcy Commission, Professor Jiménez has published half a dozen articles examining the bankruptcy system, student loans, and student loans in bankruptcy. She also co-leads the Student Loan Law Initiative at UCI Law, a partnership with the Student Borrower Protection Center aimed at spurring more academic research on the issue of student debt.

Professor Jiménez spent a year as part of the founding staff of the Consumer Financial Protection Bureau working on debt collection, debt relief, credit reporting, and student loan issues. Prior to her academic career, she clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit, was a litigation associate at Ropes & Gray in Boston, and managed consumer protection issues for a Massachusetts state senator.

A *cum laude* graduate of Harvard Law School, Professor Jiménez also holds dual B.S. degrees in electrical engineering/computer science and political science from the Massachusetts Institute of Technology.

Chairman Cicilline, Ranking Member Sensenbrenner, and members of the Subcommittee:

Thank you for the opportunity to speak to you today.

My name is Dalié Jiménez. I am a tenured professor at the University of California, Irvine School of Law, where I teach courses in bankruptcy, consumer financial protection, and contracts. I also co-lead the Student Loan Law Initiative at UCI Law, a project aimed at spurring more academic research on the issue of student debt. The views I express here are my own, however.

Student debt is in the news far more often than any other consumer financial product. And deservedly so. Today, roughly 1 in 5 adults have a student loan.¹ The Federal Reserve Bank of New York estimates that roughly 20%² of the outstanding dollars of student loans are delinquent, a proportion that's higher than all other types of consumer credit in the same quarter. The growth in numbers and amount of debt has also been staggering.

We have copious evidence that this debt is dragging down the economy and that people are suffering. Studies link student debt to lower levels of homeownership and car purchases, higher household financial distress, delayed marriage, and lower probability of going to graduate school.³

Finally, there is abundant evidence that student debt is increasing gender and racial disparities in this country.⁴ Women make up half of the population but owe two-thirds

¹ There are 44.7 million student loan borrowers. The Census Bureau estimates the total US population as 327,167,434 (as of July 1, 2018). Roughly 77.6% of the US population is over 18. Zack Friedman, *STUDENT LOAN DEBT STATISTICS IN 2019: A \$1.5 TRILLION CRISIS* FORBES, <https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/> (last visited Jun 23, 2019). U.S. Census Bureau QuickFacts: United States, , <https://www.census.gov/quickfacts/fact/table/US/PST045218> (last visited Jun 23, 2019)

² The rate reported in the FRBNY charts is 10.9% for the first quarter of 2019. However, they note that “[a]s explained in a 2012 report, delinquency rates for student loans are likely to understate effective delinquency rates because about half of these loans are currently in deferment, in grace periods or in forbearance and therefore temporarily not in the repayment cycle. This implies that among loans in the repayment cycle delinquency rates are roughly twice as high.” NEW YORK FEDERAL RESERVE, CENTER FOR MICROECONOMIC DATA, *QUARTERLY REPORT ON HOUSEHOLD DEBT & CREDIT (Q1 2019)*, at 2, https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q1.pdf.

³ See AMERICAN BANKRUPTCY INSTITUTE, *FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 3* (2018)(collecting studies). See also AMERICAN STUDENT ASSISTANCE, *LIFE DELAYED: THE IMPACT OF STUDENT DEBT ON THE DAILY LIVES OF YOUNG AMERICANS* (2015), https://www.asa.org/site/assets/files/4646/life_delayed_12-2015.pdf; IRENE LEW, HARVARD UNIVERSITY JOINT CTR. FOR HOUSING STUDIES, *STUDENT LOAN DEBT AND THE HOUSING DECISIONS OF YOUNG HOUSEHOLDS* (2015), https://www.jchs.harvard.edu/sites/default/files/lew_research_brief_student_loan_11_2015.pdf.

⁴ Judith Scott-Clayton, *What accounts for gaps in student loan default, and what happens after*, BROOKINGS (2018), <https://www.brookings.edu/research/what-accounts-for-gaps-in-student-loan-default-and-what-happens-after/>; Jason N. Houle & Fenaba R. Addo, *Racial Disparities in Student Debt and the Reproduction of the Fragile Black Middle Class*, SOCIOLOGY OF RACE AND ETHNICITY 2332649218790989 (2018), <https://doi.org/10.1177/2332649218790989>; Susan Adams, *WHITE HIGH SCHOOL DROP-OUTS ARE AS LIKELY*

of outstanding student loan debt.⁵ Department of Education data shows that twelve years after they entered college, the median white borrower had paid down 35% of their original loan balance.⁶ In contrast, the median African American's loan balance had grown 113%.⁷

I want to make four main points in my testimony:

- (1) student debt is a civil rights issue and is exacerbating inequality;
- (2) federal student loans should be dischargeable in bankruptcy;
- (3) private student loans do not deserve special treatment in bankruptcy; and
- (4) the “moral hazard” arguments against these proposals have no empirical basis.

I. Student Debt is a Civil Rights Issue⁸

Student debt is a civil rights issue. Students of color, especially African American students, disproportionately borrow,⁹ borrow larger amounts,¹⁰ do so to attend schools associated with lower graduation rates¹¹ and worse career outcomes,¹² and default at

TO LAND JOBS AS BLACK COLLEGE STUDENTS FORBES, <https://www.forbes.com/sites/susanadams/2014/06/27/white-high-school-drop-outs-are-as-likely-to-land-jobs-as-black-college-students/> (last visited May 24, 2019).

⁵ Women's Student Debt Crisis in the United States: AAUW, <https://www.aauw.org/research/deeper-in-debt/> (last visited Jun 14, 2019).

⁶ Ben Miller, NEW FEDERAL DATA SHOW A STUDENT LOAN CRISIS FOR AFRICAN AMERICAN BORROWERS, CENTER FOR AMERICAN PROGRESS (2017), <https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/>.

⁷ *Id.*

⁸ Portions of this section are borrowed from a draft essay with Jonathan Glater, currently titled “The Civil Rights Case for Student Debt Reform,” forthcoming in volume 55.1 of the Harvard Civil Rights-Civil Liberties Journal.

⁹ Brandon A. Jackson and John R. Reynolds, *The Price of Opportunity: Race, Student Loan Debt, and College Achievement*, 83 SOCIOLOGICAL INQUIRY 335, 351 (2013).

¹⁰ *Id.* [Jackson & Reynolds @ 351]

¹¹ This is so because these students disproportionately attend for-profit providers of postsecondary education. Sandra Staklis, Vera Bersudskaya, and Laura Horn, Department of Education National Center for Education Statistics, STUDENTS ATTENDING FOR-PROFIT POSTSECONDARY INSTITUTIONS: DEMOGRAPHICS, ENROLLMENT CHARACTERISTICS, AND SIX-YEAR OUTCOMES 6 (tbl. 1) (2011), <https://nces.ed.gov/pubs2012/2012173.pdf>. The worse outcomes at for-profit institutions are well documented; see, e.g., David J. Deming, Claudia Golden, and Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. Econ. Perspectives 139, 152-160 (2012) (analyzing higher student loan default rates at for-profit institutions, the lower likelihood of achieving a bachelor's degree at such schools, and the heavier debt burdens borne by students who attend them).

¹² Stephanie Riegg Cellini and Latika Chaudhary, *The Labor Market Returns to a For-Profit College Education*, National Bureau of Economic Research, Working Paper No. 18343, at 4-5 (2012), at www.nber.org/papers/w18343.pdf (finding that returns to for-profit postsecondary education lag those estimated for students of other types of postsecondary institutions).

higher rates,¹³ and have higher unemployment.¹⁴ The decision to make loans a primary way of funding education has had a disparate, negative impact on students who belong to racial and ethnic groups historically subject to explicit, *de jure* and more recently *de facto* discrimination.

Student debt may not have been proposed or developed as a tool of oppression, racial, socioeconomic, or otherwise, but it serves to reinforce preexisting inequality along lines of race and class in at least three ways:

- (1) graduates encumbered by debt do not have the same opportunities as their classmates who are not,¹⁵
- (2) students who do not graduate but did borrow confront significantly greater challenges than students who fail to complete but who did not borrow,¹⁶ and
- (3) some potential students are so fazed by the prospect of indebtedness that they choose to forego higher education entirely.¹⁷

Student debt is exacerbating the racial wealth gap.¹⁸ The vast differences persist even among White and African American households with higher education credentials. “White households with a bachelor’s degree or post-graduate education (such as with a Ph.D., MD, and JD) are *more than three times* as wealthy as black households with the same degree attainment.”¹⁹ What’s worse,

¹³ J. Fredericks Volkwein, Bruce P. Szelest, Alberto F. Cabrera, and Michelle R. Napierski-Prancl, *Factors Associated with Student Loan Default among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206, 215 (1998).

¹⁴ BLACK UNEMPLOYMENT IS RISING AGAIN, AND TRUMPISM COULD BE PLAYING A ROLE FORBES, <https://www.forbes.com/sites/pedrodacosta/2019/05/17/black-unemployment-is-rising-again-and-trumpism-could-be-playing-a-role/> (last visited May 21, 2019).

¹⁵ Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV. 1561, 1582 (2015).

¹⁶ This is so because the student borrower who drops out may not enjoy an income boost that would have been associated with completion of a program of study but will still face a repayment obligation.

¹⁷ Some scholars have found that students from some ethnic groups, such as Latinx students and Asian American students, express an aversion to taking on debt to pay for higher education. ALISA F. CUNNINGHAM AND DEBORAH A. SANTIAGO, *STUDENT AVERSION TO BORROWING: WHO BORROWS AND WHO DOESN’T* 18 (2008), <http://files.eric.ed.gov/fulltext/ED503684.pdf>, accord Pamela Burdman, *The Student Debt Dilemma: Debt Aversion As A Barrier To College Access* 9, Center for Studies in Higher Education, University of California, Berkeley (2005), <https://cshe.berkeley.edu/sites/default/files/publications/rop.burdman.13.05.pdf> (describing lower rates of borrowing by students of Mexican descent).

¹⁸ LAURA SULLIVAN ET AL., *THE RACIAL WEALTH GAP* (Demos) (2015), https://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf; THOMAS SHAPIRO ET AL., *THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE* (Institute on Assets and Social Policy) (2013); WILLIAM DARITY JR ET AL., *WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP* (Samuel DuBois Cook Center on Social Equity) (2018); *THE ASSET VALUE OF WHITENESS: UNDERSTANDING THE RACIAL WEALTH GAP* DEMOS, <https://www.demos.org/research/asset-value-whiteness-understanding-racial-wealth-gap> (last visited May 18, 2019); Louise Seamster, *Black Debt, White Debt*, 18 CONTEXTS 30–35 (2019).

¹⁹ (emphasis added). William Darity Jr et al., *WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP* (Samuel DuBois Cook Center on Social Equity) (2018).

on average, a **black household with a college-educated head has less wealth than a white family whose head did not even obtain a high school diploma.**

It takes a post-graduate education for a black family to have comparable levels of wealth to a white household with *some* college education or an associate's degree.²⁰

It is no surprise then that “[twelve] years after entering college, the typical African American student who started in the 2003-04 school year and took on debt for their undergraduate education owed more on their federal student loans than they originally borrowed.”²¹ And not just a little more: the median African American student owed 13% *more* than what they originally borrowed *twelve years earlier*.²²

Education is not “the great equalizer” for students of color.²³ A bachelor's degree hardly insulates African American students from loan default: 23% of those in the 2003-04 cohort defaulted in their loans, as compared to 6% of White students and a 9% overall default rate for completers.²⁴ In fact, African American student borrowers default on their federal student loans at *more than twice* the rate as their white counterparts, irrespective of whether they obtained a bachelor's, associate, or no degree.²⁵ Professor Abbye Atkinson's bankruptcy research supports these findings. She finds that African Americans with a college degree are just as likely to file for bankruptcy as African Americans without one.²⁶ The same is not true for White students. She concludes that “while a college diploma may help to insulate college graduates in general and White graduates specifically from financial challenges as represented by bankruptcy filings, for African Americans, a college diploma provides little economic insulation from bankruptcy.”²⁷

²⁰ (emphasis added). William Darity Jr et al., *WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP* (Samuel DuBois Cook Center on Social Equity) (2018).

²¹ Miller, *New Federal Data*, *supra* note 6.

²² One thought might be that this is due to a larger percentage of dropouts. But one would be wrong: “[r]egardless of whether they graduated or dropped out, the median African American student owed more than they originally borrowed.” *Id.* By comparison, African American borrowers who started college in 1995-96 and owed 101 percent a dozen years later.” *Id.*

²³ THE DECLINE OF THE “GREAT EQUALIZER” THE ATLANTIC, <https://www.theatlantic.com/business/archive/2012/12/the-decline-of-the-great-equalizer/266455/> (last visited May 21, 2019); Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOCIAL CURRENTS 199, 200 (2017) (“Student loans, in other words, may allow an increasing number of black students to pursue a college education, but available evidence suggests that this occurs in a context where differential returns yield much lower returns than those experienced by whites.”).

²⁴ *Id.*; see also Miller, *New Federal Data*, *supra* note 6.

²⁵ Forty-nine percent of African American students and 21% of White students who entered college in 2003-04 and took out federal loans defaulted on them. NEW FEDERAL DATA SHOW A STUDENT LOAN CRISIS FOR AFRICAN AMERICAN BORROWERS CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/> (last visited May 18, 2019) (Table 4).

²⁶ Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICHIGAN JOURNAL OF RACE & LAW 1, 12 (2010).

²⁷ Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 MICHIGAN JOURNAL OF RACE & LAW 1, 12 (2010).

Given these disparities, it is not surprising that we have abundant evidence of large—and rapidly growing—racial disparities in who has student debt and how much they owe.²⁸ “By the time they are in their fourth year of study, 90% of African American and 72% of LatinX undergraduate students have acquired student loan debt, as compared to 66% of white students.²⁹ Four years after earning a bachelor’s degree, black graduates in the 2008 cohort held \$24,720 more student loan debt than white graduates (\$52,726 versus \$28,006), on average.”³⁰

There is also growing evidence that students of color are treated differently while in repayment. The National Consumer Law Center has found that student loan servicers chose to sue defaulted borrowers at higher rates in communities that have a higher density of people of color.³¹ Over 60% of these cases result in a default judgment.³² Given that communities with higher numbers of people of color generally have less wealth, the higher rate of lawsuits in those communities make little economic sense. The Consumer Financial Protection Bureau has reported the difficulties that many students encounter when attempting to enroll in IDR,³³ and now we also have evidence that borrowers of color enroll in IDR at much lower rates than White borrowers (about half for African American borrowers and one quarter for Latinx borrowers).³⁴

Student debt disproportionately and adversely affects communities of color and we must view reforms through a civil rights lens. There are many things Congress could do to reverse this effect, but today I will only speak to the two major reforms being considered by this subcommittee: making all student loans (private and federal) dischargeable in bankruptcy.

²⁸ JUDITH SCOTT-CLAYTON & JING LI, BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION (Brookings) (2016), <https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/>

²⁹ <https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color/>. These numbers were based on 2011-12 NPSAS data, which undercounted the total debt load. Department of Education, *2015–16 National Postsecondary Student Aid Study (NPSAS:16) Student Financial Aid Estimates for 2015–16 First Look* at B-29 (2018).

³⁰ JUDITH SCOTT-CLAYTON & JING LI, BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER GRADUATION (Brookings) (2016), <https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/>

³¹ MARGARET MATTES & YU, PERSIS, INEQUITABLE JUDGMENTS: EXAMINING RACE AND FEDERAL STUDENT LOAN COLLECTION LAWSUITS (2019), https://www.nclc.org/images/pdf/student_loans/report-inequitable-judgments-april2019.pdf.

³² *Id.*

³³ SETH FROTMAN, UPDATE FROM THE CFPB STUDENT LOAN OMBUDSMAN: TRANSITIONING FROM DEFAULT TO AN INCOME-DRIVEN REPAYMENT PLAN (MAY 17, 2017), <https://www.consumerfinance.gov/data-research/research-reports/update-cfpb-student-loan-ombudsman-transitioning-default-income-driven-repayment-plan/>; SETH FROTMAN, CONSUMER FIN. PROT. BUREAU: ANNUAL REPORT OF THE STUDENT LOAN OMBUDSMAN (2015), https://files.consumerfinance.gov/f/201510_cfpb_annual-report-of-the-cfpb-student-loan-ombudsman.pdf.

³⁴ Kristin Blagg, THE DEMOGRAPHICS OF INCOME-DRIVEN STUDENT LOAN REPAYMENT URBAN INSTITUTE (2018), <https://www.urban.org/urban-wire/demographics-income-driven-student-loan-repayment> (last visited May 30, 2019).

II. Federal Student Loans Should Be Dischargeable in Bankruptcy

Our \$1.56 trillion in outstanding student loans and rising defaults are symptoms of much larger problems. To wit, the way we fund higher education is broken and we are perhaps harming more than we are helping those who need it the most. Those are structural problems that bankruptcy cannot solve. Bankruptcy, however, is well suited to bring relief to *individuals* suffering greatly under the weight of this system. **I urge this Subcommittee to act to move legislation forward that would make the bankruptcy discharge available to student loan borrowers.**

It is hard to find *anyone* who's happy with the current state of the law around student loan discharges,³⁵ but I will not rehash the history of how we got here.³⁶ Instead I want to focus on the problems with the arguments against discharge, how we are failing our student borrowers,³⁷ and how the bills you are considering today would put us in the right path going forward.

A. Arguments Against Discharge

There are a few arguments against discharging federal student loans in bankruptcy. A typical one posits that the student has benefited from the education at the expense of the creditor and thus they ought to be obligated to repay despite bankruptcy.³⁸ That argument is specious both because it ignores the public good aspects of education and because it is indistinguishable from an argument against discharging any other kind of government debt in bankruptcy.³⁹

Another category of arguments can be described as worries over opportunism, fraud, or moral hazard. In Part IV of this testimony, I show why those arguments are overstated. It

³⁵ Katy Stech Ferek, *Judges Wouldn't Consider Forgiving Crippling Student Loans—Until Now*, Wall St. J. (June 14, 2018),

<https://www.wsj.com/articles/judges-wouldnt-consider-forgiving-crippling-student-loans-until-now-1528974001>. *But see* Jason Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, 68 Florida Law Review 377, 379 (2016) (“the widespread pessimism regarding the current undue hardship standard should be tempered.”) for a minority view.

³⁶ The American Bankruptcy Institute Consumer Commission Report has a brief history, as do a number of scholarly articles. AMERICAN BANKRUPTCY INSTITUTE, FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 3-9 (2018) [hereinafter ABI COMMISSION REPORT]; Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLORIDA LAW REVIEW (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426744 (last visited Oct 14, 2014).

³⁷ For further discussion of issues with the judicial interpretations of “undue hardship” see Matthew Bruckner, Brook E. Gotberg, Dalié Jiménez, and Chrystin Ondersma, *A No-Contest Discharge for Uncollectible Student Loans*, forthcoming in the Colorado Law Review (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3366707 (proposing that the Department of Education use their powers to acquiesce to undue hardship discharge under certain limited circumstances).

³⁸ Accord John AE Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. LJ 245, 256 (2006).

³⁹ Bear in mind that we discharge federal and state tax debts after a 3-4 year period, and federally-guaranteed mortgage debt immediately. 11 U.S.C. § 523(a)(1).

should be noted here that these moral hazard-type arguments are applicable to most other debts dischargeable in bankruptcy.

The most sensible justification for treating federal student loans differently in bankruptcy than say, mortgages or personal loans, is that making these loans dischargeable would compromise the viability of the student loan program.⁴⁰ But even then, I do not think this argument holds much water. Its viability requires at least two assumptions: (1) that making any kind of discharge available for federal student loans would precipitate mass bankruptcies that would discharge sizable portions of student loan debt; (2) that the funding of the federal student loan program depends on its solvency.

These are both faulty assumptions. First, even at the height of bankruptcy filings, less than 1.5 million people filed annually; these days it is around 750,000.⁴¹ Compare this to the almost 45 million people who currently have a student loan.⁴² The numbers don't add up. If we expected a rush to bankruptcy the likes of which have never been seen,⁴³ we could design the discharge to slow down that rush by, for example, making loans dischargeable only after some period of time. The second assumption is also flawed. The funding of the federal student loan program is a political question. It does not depend on the fiscal solvency of the program itself, anymore than the funding of the Social Security Trust Fund.⁴⁴ The real question (and it's a difficult one) is where do the American people (through their elected representatives) think it is worthwhile to put our dollars. I would argue that higher education is one such place, although we do not necessarily need to do it through loans.

⁴⁰ *Accord* Pottow, *supra* note 38.

⁴¹ In 2018, there were 751,186 nonbusiness bankruptcies. Report F-5A.U.S. Bankruptcy Courts—Business and Nonbusiness Bankruptcy Cases Commenced, by County and Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2018, https://www.uscourts.gov/sites/default/files/data_tables/bf_f5a_1231.2018.pdf.

⁴² *See supra* note 1.

⁴³ *See* Part IV for reasons why this is unlikely.

⁴⁴ Jim Kavanaugh, *Behind the Money Curtain: A Left Take on Taxes, Spending and Modern Monetary Theory*, *Counter Punch* (Jan. 22, 2018), <https://www.counterpunch.org/2018/01/22/behind-the-money-curtain-a-left-take-on-taxes-spending-and-modern-monetary-theory/>; Sean Williams, FACT OR FICTION: SOCIAL SECURITY IS RUNNING OUT OF MONEY? - THE MOTLEY FOOL (2018), <https://www.fool.com/retirement/2018/06/15/fact-or-fiction-social-security-is-running-out-of.aspx>; Sean Williams, FACT OR FICTION: SOCIAL SECURITY IS RUNNING OUT OF MONEY? THE MOTLEY FOOL (2018), <https://www.fool.com/retirement/2018/06/15/fact-or-fiction-social-security-is-running-out-of.aspx>.

B. Bankruptcy as the Last Safety Net

In many ways, bankruptcy functions as the last social safety net in a shrinking field of available alternatives.⁴⁵ All the evidence points to it being inadequate,⁴⁶ and yet even this last resort is unavailable to most student loan debtors.⁴⁷ The current system creates almost insurmountable barriers to justice for any but the “luckiest” of student loan debtors.⁴⁸ In significant part, this is due an access problem.⁴⁹ Few lawyers do this work. Fewer still are willing to take it on without an upfront fee, a challenge for debtors for whom it is an undue hardship to repay the loans. The debtors who most deserve this relief are those least likely to get it.⁵⁰

The plethora of *ex post* schemes that Congress has approved in the last decade are meant to ameliorate the social and economic costs to an individual who lost the educational “bet” when borrowing for education.⁵¹ In theory, they should be working splendidly. Indeed, given that practically all federal student loan borrowers are eligible for some form of IDR, we should have very low levels of defaults. In practice, these interventions are a disaster and we are seeing record levels of preventable defaults.⁵² Fixing these issues should be a priority, but it will take time. In the meantime, students who could find relief in bankruptcy are suffering.

I also want to highlight a forgotten but serious deficiency with our courts’ current interpretations of the statutory standard. Each of the judicial glosses interpreting “undue

⁴⁵ Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill*, 44 Santa Clara Law Review 29 (2004); Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129 (2005).

⁴⁶ Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy’s Fresh Start*, 92 CORNELL LAW REVIEW 63 (2006).

⁴⁷ The numbers are hard to come by, but one study estimates that thirty-two percent of consumers filing for Chapter 7 bankruptcy do so with student loan debt. Mike Brown, *EVEN AFTER BANKRUPTCY, STUDENT DEBT STILL REMAINS FOR MANY*, LENDEDU (June 11, 2019), <https://lendedu.com/blog/student-loans-bankruptcy>.

⁴⁸ In *A No-Contest Discharge*, we recount the story of Mr. Mosley, a homeless veteran who attempted to discharge his student loans. His discharge was ultimately granted, but only after three years of fighting the Educational Credit Management Corporation, representing the Department of Education. *A No-Contest Discharge*, *supra* note 37, at 2-4. He is one of the “lucky” ones.

⁴⁹ Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLORIDA LAW REVIEW (2014).

⁵⁰ Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASHINGTON LAW REVIEW 1115 (2016) (noting that “prior research suggests that individuals who have attained at least an undergraduate degree constitute a greater percentage of bankruptcy debtors who seek to discharge their educational debt than of debtors in the general bankruptcy population.”).

⁵¹ Income-Driven Plans, FEDERAL STUDENT AID (2018), [/repay-loans/understand/plans/income-driven](https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven) (last visited Jun 24, 2019); Forgiveness, Cancellation, and Discharge | Federal Student Aid, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation>; Deferment and Forbearance | Federal Student Aid, <https://studentaid.ed.gov/sa/repay-loans/deferment-forbearance>.

⁵² CONSUMER FINANCIAL PROTECTION BUREAU, *STUDENT LOAN SERVICING 10* (2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf; CONSUMER FINANCIAL PROTECTION BUREAU, *STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM* (2015), at 10, https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.

hardship” focuses on the student and their ability to repay the debt. But this focus on the individual ignores systemic issues that would make repayment *undue*. Students with winning fraud, misrepresentation, or consumer protection claims against their school are not able to use undue hardship to repay their loan because the current framework does not fit that situation. Those students should not be saddled forever with this debt,⁵³ but as it stands the fact that they were mistreated by a school that accreditors and the Department of Education thought was worthy leaves many with little recourse.⁵⁴

Some of those students may have borrower defense arguments that they can make to the Department of Education, but many will not find relief with that avenue. The Department’s borrower defense rule may not cover their situation.⁵⁵ Or worse, they may face a Department unwilling to follow its own rules.⁵⁶ Under their current authority, the Department of Education could help student loan borrowers who file bankruptcy by deciding not to fight against students who want to discharge their loans in certain situations. Several members of Congress, academics, and the ABI Consumer Commission report have argued that it should do so in certain circumstances.⁵⁷

C. Bills before the Subcommittee and Possible Alternatives

The subcommittee has two bills before it that would remove all student loans from the list of exceptions to bankruptcy discharge, H.R. 2648 and H.R. 770. The Senate is considering a similar bill, S. 1414. These bills are simple and get at the heart of the problem. They treat federal student debt in the same way that we treat mortgages

⁵³ As effectively can happen with federal loans given that they do not have a statute of limitations. See PUB. L. No. 102-26, 105 Stat. 123 (Apr. 9, 1991), amending 20 U.S.C. § 1091a. See also Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUSTON LAW REVIEW 609 (2017).

⁵⁴ Suing the school or officials who committed the fraud is theoretically an option, but one unlikely to yield monetary relief even if successful.

⁵⁵ Improved Borrower Defense Discharge Process Will Aid Defrauded Borrowers, Protect Taxpayers | U.S. Department of Education, , <https://www.ed.gov/news/press-releases/improved-borrower-defense-discharge-process-will-aid-defrauded-borrowers-protect-taxpayers>; but see *Partial Borrower Defense Denials Violate Due Process, Privacy Act: Injunction Sought Against DeVos*, Department of Education, HARVARD PROJECT ON PREDATORY STUDENT LENDING (2018), <http://www.legalservicescenter.org/partial-borrower-defense-denials-violate-due-process-privacy-act-injunction-sought-against-devos-department-of-education/>.

⁵⁶ Data Show No Action on Borrower-Defense Claims | Inside Higher Ed (Apr. 1, 2019), <https://www.insidehighered.com/quicktakes/2019/04/01/data-show-no-action-borrower-defense-claims>; *Review of Federal Student Aid’s Borrower Defense to Repayment Loan Discharge Process* | Oversight.gov (Dec. 8, 2017), <https://www.oversight.gov/report/ed/review-federal-student-aids-borrower-defense-repayment-loan-discharge-process>; Steven Chung, THE DEPARTMENT OF EDUCATION APPROVED A SHOCKINGLY LOW NUMBER OF FEDERAL STUDENT LOAN FORGIVENESS APPLICATIONS ABOVE THE LAW, <https://abovethelaw.com/2018/09/the-department-of-education-approved-a-shockingly-low-number-of-federal-student-loan-forgiveness-applications/>.

⁵⁷ See Press Release, *Cohen, 6 Members of Congress Urge Education Secretary to Bring More Fairness to Struggling Students* (May 16, 2014), <https://cohen.house.gov/press-release/cohen-6-members-congress-urge-education-secretary-bring-more-fairness-struggling>; ABI Commission on Consumer Bankruptcy Response, <https://www.regulations.gov/document?D=ED-2017-OPE-0085-0378>; *A No-Contest Discharge*, *supra* note 37.

backed by the Federal Housing Administration or Veterans' Affairs. These bills recognize that for the vast majority of individuals, declaring bankruptcy is declaring failure, and that they do not do this lightly.

I imagine that some members of Congress may be reluctant to vote for such a sweeping change. In that case, I want to comment briefly about a possible compromise. I was a member of the American Bankruptcy Institute Commission on Consumer Bankruptcy. This seventeen-member group was comprised of a diverse group of bankruptcy experts ranging from academics like myself to consumer advocates, judges, trustees, and a fair number of creditor lawyers.⁵⁸ The student loan issue was one of the first ones we took up and a supermajority of this group agreed on a set of recommendations.⁵⁹ Among other relevant proposals, the Commission recommended limiting the scope of 523(a)(8).⁶⁰ Specifically, the recommendations would limit the exception to bankruptcy discharge to educational loans that meet three criteria:

- (1) They were made, insured, or guaranteed by a governmental unit (such as a state or the federal government),
- (2) They were incurred for the debtor's own education, AND
- (3) They first became due less than seven years before the bankruptcy case was filed, regardless of any suspension of payments.

All other "student" loans would be treated like most other debt is treated in bankruptcy—dischargeable if the debtor gets a discharge. A student that obtained a governmental loan could not discharge that loan within seven years of the beginning of repayment unless they could meet the undue hardship standard.

Three major things to highlight to bring the recommendation home: (1) private student loans would be treated like credit cards (as I urge this Committee to do in the next Part of this testimony); (2) parent PLUS loans would be automatically dischargeable, and (3) we would return to the pre-1998 version of this section which made them immediately dischargeable if the loans had been outstanding for 7 years (70% of the typical period of repayment).

I want to note that the ABI Commission proposal would not fix the problems with the undue hardship standard.⁶¹ In particular, it would not fix the issues affecting students who were lied to and fraudulently induced to take out federal loans by their schools. I

⁵⁸ Members, American Bankruptcy Institute Commission on Consumer Bankruptcy, <https://consumercommission.abi.org/commission-members>.

⁵⁹ Two-thirds affirmative votes from members were required before a proposal would make it into the Commission Report.

⁶⁰ I do not have time to discuss the other statutory proposals and regulatory proposals but I do believe that they work best as a package (in particular the statutory proposals (1)-(4)). See . AMERICAN BANKRUPTCY INSTITUTE COMMISSION ON CONSUMER BANKRUPTCY REPORT, *supra* note 36 at 3-5.

⁶¹ To ameliorate some of that, the Commission report had another set of recommendations aimed at judges but that could also be implemented through statute or regulation. AMERICAN BANKRUPTCY INSTITUTE COMMISSION ON CONSUMER BANKRUPTCY REPORT, *supra* note 36 at 2.

view this as a significant problem and so my preference is for one of the aforementioned bills before the committee.

III. Private Student Loans Do Not Deserve Special Treatment

I now turn to the utterly indefensible treatment of private student loans in bankruptcy.⁶² Enacting any of the proposals discussed above would also solve the private student loan problem, but it is important to discuss it separately. In 2005, holders of private student loan (PSL) debt received a tremendous gift: the roughly \$55.9 billion of student loans originated under a Bankruptcy Code that allowed immediate discharge of those loans suddenly became presumptively nondischargeable.⁶³ There was no economic justification for this. None.

The only common feature between private and federal student loans is that they are extensions of credit for educational purposes.⁶⁴ Unlike with federal loans, private lenders pick and choose their borrowers, adjusting the loan price to the individual borrower.⁶⁵ This often results in private loans charging two and three times the federal loan interest rate. In addition, private loan borrowers lack the statutory protections afforded to federal student loan borrowers, posing an even higher risk to their financial well-being.

Since the 2005 amendments to the Bankruptcy Code, private student loan rates have ranged from 0% to almost 20%, depending on perceived borrower risk.⁶⁶ Due in large part this risk-based underwriting, private student loans have enjoyed a low default rate over the last decade. The latest PSL default rate is 2.19%.⁶⁷ This is far more similar to

⁶² Note that most of the arguments in Part II (particularly II.A and II.B) apply to private loans since they are not treated any differently from federal loans in bankruptcy.

⁶³ CONSUMER FINANCIAL PROTECTION BUREAU, PRIVATE STUDENT LOANS REPORT Appendix Figure 4, at 17 (2012), <https://www.consumerfinance.gov/data-research/research-reports/private-student-loans-report/>.

⁶⁴ Note that PSL lenders have sought a very broad reading of 523(a)(8), arguing, despite the statutory language to the contrary, that “‘educational benefit’ should be read to include any funds that the borrower purports to use to pay educational expenses.” Brief of Bankruptcy Scholars as Amici Curiae in Support of Appellees and Affirmance, *McDaniel v. Navient Solutions* (*In re McDaniel*), No. 18–01445 (10th Cir. Apr. 18, 2019).

⁶⁵ The Consumer Banker’s Association, a lender member group, attributes the success of private student loans to “... careful underwriting, which is arguably the best consumer protection of all.” CBA Statement on Department of Education Student Loan Bankruptcy Request for Information | Consumer Bankers Association (Feb. 21, 2018), <https://www.consumerbankers.com/cba-media-center/media-releases/cba-statement-department-education-student-loan-bankruptcy-request> (last visited Jun 15, 2019).

⁶⁶ CFPB PRIVATE STUDENT LOANS REPORT, *supra* note 63, Appendix Figure 2, at 97 (2012), <https://www.consumerfinance.gov/data-research/research-reports/private-student-loans-report/>. These were rates at origination, most private student loans are variable-rate, offloading interest rate risk on the borrower. *Id.*

⁶⁷ Federal and private loans do not have equivalent definitions of default. I am using here the charge-off rate reported for a large proportion outstanding private student loans as of the third quarter of 2018. See DAN FESHBACH ET AL., MEASUREONE: PRIVATE STUDENT LOAN REPORT Q3 2018, at 4 (Dec. 20, 2018), https://docs.wixstatic.com/ugd/0aaff0_0026dfd2506049cb9089731813e32e8f.pdf; CBA Statement on

credit cards (default rate of 2.5% in the same time period)⁶⁸ than to student loans issued by the federal government (10.8% default in a similar time period).⁶⁹ Between 2005 and 2011, the nine largest private student lenders reported that only 0.2-1.1% had a borrower or co-borrower who filed bankruptcy.⁷⁰

A few studies have examined the effect of the 2005 bankruptcy amendments on the private student loan market. I describe them below. The top-line summary is clear, **making private student loans nondischargeable harmed students**. PSLs are just like any other consumer debt and should be treated accordingly.

In one paper, Xiaoling Ang and I examined loans made just before the 2005 amendments and just after. We found that the immediate effects of making PSLs nondischargeable (comparing the quarter before the law went into effect to the same quarter a year later) was that (1) the average borrower's credit score decreased slightly,⁷¹ (2) loan volumes increased temporarily,⁷² and (3) **the costs of the loans increased by an average of 0.35%**.⁷³

In a second paper, Alexei Alexandrov and I once again examined the 2005 bankruptcy changes and found that **subprime students “saw little to no savings from the**

Dept. of Education Student Loan Report | Consumer Bankers Association, , <https://www.consumerbankers.com/cba-media-center/media-releases/cba-statement-dept-education-student-loan-report> (last visited Jun 15, 2019).

⁶⁸ The number quoted is from the third quarter of 2018. FRB: Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks, , <https://www.federalreserve.gov/releases/Chargeoff/delallsa.htm> (last visited Jun 16, 2019).

⁶⁹ National Student Loan Cohort Default Rate Falls | U.S. Department of Education, , <https://www.ed.gov/news/press-releases/national-student-loan-cohort-default-rate-falls> (last visited Jun 15, 2019).

⁷⁰ CFPB PRIVATE STUDENT LOANS REPORT, *supra note 63*.

⁷¹ This indicates a slight expansion in the kinds of borrowers who received credit post-BAPCPA but note “that in terms of less-than-prime borrowers, the credit expansion we observe[d] was modest: the effect on the average credit score was the same as applying for multiple credit cards within a short period.” Xiaoling Ang & Jimenez, Dalie, *Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?*, in *STUDENT LOANS AND THE DYNAMICS OF DEBT* 211 (2015). Additionally, as Darolia and Ritter note in a study of the same time period, “The increased prevalence of cosigners might be one reason that lenders were willing to extend more credit to less creditworthy borrowers even though dischargeability itself does not appear to affect borrower behavior relative to the behavior of borrowers with only federal student loans.” Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, *EDUCATION FINANCE AND POLICY* 24 (2019), https://www.mitpressjournals.org/doi/abs/10.1162/edfp_a_00285 (last visited Jun 16, 2019).

⁷² PSL originations increased after 2005 from 6.6 billion to 7.8 billion in 2006 and a height of 10.1 billion in 2008. After the recession, volumes leveled out at pre-2005 levels (5.6 and 5.7 billion in 2010 and 2011, respectively). See Figure 4 in CFPB PRIVATE STUDENT LOAN REPORT, *supra note 63* at 17.

⁷³ This is the average increase comparing 2005 v. 2006 (right around the law change). The costs increase even further—to an additional 0.50%—when one compares Q1 2006 and Q1 2007. Xiaoling Ang & Jimenez, Dalie, *Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?*, in *STUDENT LOANS AND THE DYNAMICS OF DEBT* 179, 208 (2015).

reduction in bankruptcy protections” in 2005.⁷⁴ We also explored the question of whether students would have been more likely to borrow private loans if prices *had decreased* after 2005. We found that students around the prime/subprime cutoff are not sensitive to price and that “even if BAPCPA had lowered interest rates for students with subprime co-borrowers, even by as much as three percentage points, this interest rate decrease would not have resulted in additional students entering the market due to their inelastic demand.”⁷⁵

It is important to note that another change after 2005 is that the proportion of private loans with a co-borrower has increased dramatically. PSL co-borrowers can be a parent, spouse, or friend. In co-signing for a loan, they become liable for the full amount, should the main borrower (the student) fail to repay. A cosigner multiplies the possibility of recovery for the lender. In 2005, just over 60% of private loans made for a student to attend an undergraduate institution had a co-borrower. By 2010, that number was over 80%.⁷⁶ Today, that number is over 90%.⁷⁷ In other words: **when private student loans were dischargeable in bankruptcy, lenders required fewer undergraduates get a co-borrower than they do now.** Today, when lenders have the added protection of presumptive nondischargeability, they require almost all loans to have a co-borrower.

The last study examining the 2005 changes looked at “whether private student loan borrowers distinctly adjusted their Chapter 7 bankruptcy filing behavior in response” to the 2005 changes.⁷⁸ In other words: The authors note that they could not find evidence of “widespread opportunistic behavior by PSL borrowers” before BAPCPA.⁷⁹ They go on to say that they “interpret these findings as a lack of evidence that the moral hazard associated with PSL dischargeability pre-BAPCPA appreciably affected the behavior of student loan borrowers systematically.”⁸⁰

It is past time for Congress to end the special treatment for private student lenders. H.R. 885 would do just that and I urge this Committee to report this bill favorably.

IV. The Moral Hazard Arguments Against Discharge Are Grossly Overstated

A common objection to proposals that would make some or all student loans dischargeable in bankruptcy is that they will encourage consumers to ‘game’ the system.

⁷⁴ Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL’Y REV. 175, 179 (2017).

⁷⁵ *Id.* at 201.

⁷⁶ CFPB PRIVATE STUDENT LOANS REPORT, *supra* note 63, at 27.

⁷⁷ DAN FESHBACH ET AL., MEASUREONE: PRIVATE STUDENT LOAN REPORT Q3 2018 39 (2018), https://docs.wixstatic.com/ugd/0aaff0_0026dfd2506049cb9089731813e32e8f.pdf.

⁷⁸ Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, EDUCATION FINANCE & POLICY 1 (2019), https://doi.org/10.1162/edfp_a_00285.

⁷⁹ *Id.* at 28.

⁸⁰ *Id.*

That is, won't people just load up on loans, graduate, and file bankruptcy as quickly as possible? This argument is enticing, but it simply doesn't have empirical support.

This objection is rooted in theoretical speculation and “anecdotal”—anecdotal evidence passed as representative facts. These stories of individuals behaving badly are shocking but come with no evidence of anything like widespread abuse. There will always be examples of a minority of individuals who do something extreme, or outside the norm.⁸¹ Those outlandish tales make for good stories, but they make terrible policy fodder. I have yet to see anyone produce evidence that these concerns have played out in bankruptcy in any significant numbers. To the contrary, from the very beginning of the student loan discharge exception, there have been little more than anecdotes from those pushing for them and significant evidence that these were not at all representative of the facts.⁸²

Instead, we have abundant evidence that the overwhelming majority of individuals file bankruptcy reluctantly and only have all options have failed.⁸³ As detailed in Part II, we also do not have evidence that the private student loan borrowers acted opportunistically in attempting to discharge their private student loans before the law was changed.⁸⁴

Second, these arguments assume that the only moral hazard we need be concerned with is that of individual borrowers. But we cannot ignore the other players in the system: student loan issuers/creditors and servicers. In the current system, these players yield tremendous power and thus lack market incentives to improve their processes vis-à-vis students.⁸⁵ This is especially true of the federal government, which has no statute of limitations on collection, can garnish not only bank accounts but social security, disability, and earned income tax credit income.⁸⁶

⁸¹ Lulu Garcia-Navarro, Alligators, Drugs And Theft, Oh My! New List Shows Top 10 'Florida Man' Stories, NPR (Mar. 3, 2019), <https://www.npr.org/2019/03/03/699832548/alligators-drugs-and-theft-oh-my-new-list-shows-top-10-florida-man-stories>.

⁸² At the same time that the 94th Congress put up the first barrier to dischargeability of student loans, it asked the Government Accountability Office (GAO) to undertake a study of what was actually happening with student loan discharge. The aim was to find abuses, but in fact “The results of the GAO report indicated that less than one percent of all federally insured and guaranteed educational loans were discharged in bankruptcy.” Rafael L Pardo & Michelle R Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 UNIVERSITY OF CINCINNATI LAW REVIEW 405, 422-24 (2005) (recounting the history).

⁸³ See, e.g., Pamela Foohey, Robert M. Lawless, Katherine M. Porter and Deborah Thorne, *Life in the Sweatbox*, 94 NOTRE DAME LAW REVIEW 219 (2018); Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEORGETOWN LAW JOURNAL 289, 314–15 (2010).

⁸⁴ Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, EDUCATION FINANCE AND POLICY 24 (2019), https://www.mitpressjournals.org/doi/abs/10.1162/edfp_a_00285.

⁸⁵ Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA LAW REVIEW 1369, 1399 (2008)

⁸⁶ Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUSTON LAW REVIEW 609 (2017).

Third, filing bankruptcy is a significant event and not something most people do lightly. It is expensive,⁸⁷ wreaks havoc on a person's credit report which in turn affects the cost and availability of important products like obtaining credit, insurance, living arrangements, and job prospects.⁸⁸ It can even affect a person's dating life.⁸⁹ These disruptions will impair a credit report for 7-10 years. And of course, the Bankruptcy Code limits how often someone can obtain a bankruptcy discharge.⁹⁰ Hypothetical explanations of what might happen if student loans became dischargeable in some fashion typically ignore the real-life consequences of filing bankruptcy.

Finally, the bankruptcy system already has significant tools to curb potential abuses. Since 2005 access to Chapter 7 is limited to those who can pass the means test.⁹¹ Anyone who makes above the median for their household size in their state receives additional scrutiny.⁹² In addition, the Bankruptcy Code provides robust tools aimed precisely at ferreting out the opportunistic debtor.⁹³ It is instructive to note that the overwhelming number of "anecdotal" accounts of opportunistic debtors come from bankruptcy court decisions denying those debtors the bankruptcy discharge.

Arguments about debtor opportunism are convenient rhetorical devices that obfuscate the issues. We should reject hypothetical theories and cherry-picked examples that lump and demonize hardworking people. We've listened to those voices before and they help get us here. Now let's listen to the people.

V. Why Congress Should Take Action Now

The likely consequences of enacting one or more of the proposals I've discussed, or something like the ABI proposal—is a temporary uptick in bankruptcy filings, an increase in social welfare, increased economic activity, and more students going to college.

A temporary uptick in bankruptcy filings is only natural: after all, the main reason we are here is that *people are suffering*.

Private loan borrowers often have trouble negotiating workouts with their creditors. In the last decade, almost half of private loan borrowers are actually co-signers: parents,

⁸⁷ Lois R. Lupica, *The Consumer Bankruptcy Fee Study*, American Bankruptcy Institute Law Review (2012).

⁸⁸ Lea Krivinskas Sheppard, *Toward a Stronger Financial History Anti-Discrimination Norm*, 52 Boston College Law Review (2012).

⁸⁹ Jodi Helmer, *Looking for Mr. FICO: Singles Using Credit Score to Filter Dates*, CreditCards.com (June 26, 2013), https://www.creditcards.com/credit-card-news/singles-dating-credit_score-1270.php.

⁹⁰ 11 U.S.C. §§ 727(a)(8),(9).

⁹¹ Charles J. Tabb and Jillian K. McClelland, *Living with the Means Test*, 31 SOUTHERN ILLINOIS L. J. 463 (2006).

⁹² *Id.*

⁹³ *See, e.g.*, 11 U.S.C. §§ 707(b), 1325(a)(7), 727(a).

grandparents, friends of students. Those borrowers would likely very much welcome relief.

There are over 8 million federal student loan borrowers in default.⁹⁴ Many of them do not need to be there, because there is some income-driven repayment or other forgiveness option theoretically available to them under federal law. But laws on the book are not the same as how people experience law and all of the evidence we have is that the Department of Education is failing financially distressed borrowers.

Another (all-but-certain) consequence of enacting one or more of these proposals is an increase in social welfare. It is clear that this issue cuts across parties, age, gender, and even economic status.

Economic activity is also likely to increase. The income freed by a bankruptcy discharge will translate into more spending in the economy. But we are also likely to see indirect effects: as new graduates feel more able to take employment and other risks knowing that—should they need it—there is a safety net available if these risks do not work out. For the same reason we will likely see increased postsecondary enrollment.

We should welcome these outcomes. So long as the Department of Education appropriately manages the schools that receive federal funds,⁹⁵ all we would be doing is increasing entrepreneurship and calculated risk-taking. That is in fact one of the lauded functions of our Bankruptcy Code.⁹⁶

Congress should amend the Bankruptcy Code immediately to allow student loans to be treated like credit cards and medical debt—automatically discharged in bankruptcy—and allow bankruptcy judges to use the statutory tools they already have to prevent bad faith filings.

⁹⁴ It's important to remember that 'default' in federal student loans means that a borrower has failed to make payments over a 270-day period.

⁹⁵ There is certainly room for improvement on that front. *See, e.g.*, FOR-PROFIT COLLEGE KAPLAN TO REFUND FEDERAL FINANCIAL AID UNDER SETTLEMENT WITH UNITED STATES, <https://www.justice.gov/usao-wdtx/pr/profit-college-kaplan-refund-federal-financial-aid-under-settlement-united-states> (last visited May 28, 2019); SCHOOL OWNER PLEADS GUILTY TO \$2 MILLION BRIBERY SCHEME INVOLVING VA PROGRAM FOR DISABLED MILITARY VETERANS, <https://www.justice.gov/opa/pr/school-owner-pleads-guilty-2-million-bribery-scheme-involving-va-program-disabled-military> (last visited May 28, 2019); ATTORNEY GENERAL XAVIER BECERRA SUES FOR-PROFIT ASHFORD UNIVERSITY FOR DEFRAUDING AND DECEIVING STUDENTS STATE OF CALIFORNIA - DEPARTMENT OF JUSTICE - OFFICE OF THE ATTORNEY GENERAL, <https://oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-sues-profit-ashford-university-defrauding-and> (last visited May 28, 2019).

⁹⁶ K. Ayotte, *Bankruptcy and Entrepreneurship: The Value of a Fresh Start*, 23 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 161–185 (2006).