23rd Annual

Northern California Bankruptcy Conference

March 21 and 22, 2024
The Kimpton Sawyer
500 J Street
Sacramento, California

Sponsored by
Sacramento Valley Bankruptcy Forum

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23rd Annual

Northern California Bankruptcy Conference

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23rd Annual
Northern California Bankruptcy Conference

Exhibitors

West Auctions
1455 E Kentucky Ave.
Woodland, CA 95776
(530) 661-0490

Paul Boudier
Keller Williams
548 Gibson Drive, Suite #200
Roseville, CA 95678
(916) 919-5775

23rd ANNUAL

NORTHERN CALIFORNIA BANKRUPCY CONFERENCE

SPEAKER BIOGRAPHIES

March 21st and 22nd, 2024

The Kimpton Sawyer

IN ORDER OF APPEARANCE:

WAYNE BLACKWELDER, Clerk of the United States Bankruptcy Court, Eastern District of California: Mr. Blackwelder is the Clerk of the Court for the United States Bankruptcy Court, Eastern District of California. Before joining us in the Eastern District, he served as the Clerk of the Court for the Bankruptcy Court in the Eastern District of Wisconsin. Mr. Blackwelder holds a B.S. in Mathematics from the University of Tampa and a M.B.A. from the University of Oregon.

TRACY HOPE DAVIS, United States Trustee: Tracy Hope Davis was appointed by the Attorney General to serve as U.S. Trustee for Northern and Eastern California and Nevada (Region 17). Prior to her appointment as United States Trustee in Region 17, Ms. Davis was appointed as U.S. Trustee in New York, Connecticut and Vermont (Region 2). She joined the U.S. Trustee Program (USTP) in 1997 as a Trial Attorney before being named as the Assistant U.S. Trustee in the Southern District of New York. She has also served as the Acting Assistant U.S. Trustee in the Eastern District of New York (Brooklyn) and the Acting U.S. Trustee for Region 2. Previously, she practiced bankruptcy law in New York City and served as law clerk to the Honorable Cornelius Blackshear, U.S. Bankruptcy Court, Southern District of New York (retired).

During her tenure as the United States Trustee, Ms. Davis has been closely involved in a wide range of bankruptcy issues in some of the largest and most complex bankruptcy cases in this country's history, including Bethlehem Steel, Adelphia Communications, Lehman Brothers, Chrysler Corporation, General Motors, Lyondell, General Growth Properties, Kodak, Dynegy, MF Global, ResCap, American Airlines, Hostess, Hawker Beechcraft, Dewey LLP, among others.

Ms. Davis received her law degree from Rutgers Law School in Newark, New Jersey and her Bachelor of Arts degree, with honors, from Wells College in Aurora, New York. She has served in various capacities as a Wells College alumna, including as a member of the Wells College Board of Trustees and as a vice president on the Alumnae Board of Wells College. As a bankruptcy practitioner and as the United States Trustee, she has participated in many panels for national, state and local bar associations, including the American Bankruptcy Institute and National Bar Association and has lectured extensively at the National Advocacy Center on bankruptcy issues.

The USTP is the component of the Justice Department that protects the integrity of the bankruptcy system by overseeing case administration and litigating to enforce the bankruptcy laws. The USTP has 21 regions and 95 field offices. Region 17 is headquartered in San Francisco, with additional offices in Fresno, Oakland, Sacramento, and San Jose, Calif., and Las Vegas and Reno, Nevada.

RICK SHARGA, Founder & CEO, CJ Patrick Company: Rick is the Founder & CEO of CJ Patrick Company, a market intelligence and advisory firm for companies in the real estate and mortgage industries. One of the country's most frequently quoted sources on real estate, mortgage and foreclosure trends, Rick has appeared on CNBC, CBS News, NBC News, CNN, ABC

News, FOX, Bloomberg, and NPR. Rick is a founding member of the Five Star National Mortgage Servicing Association, on the Board of Directors of the Asian Real Estate Association of America and the National Association of Default Professionals and was twice named to the Inman News Inman 100, an annual list of the most influential real estate leaders. Rick has over 20 years of experience in the real estate and mortgage industries, including roles as the EVP/Market Intelligence at ATTOM Data, EVP for Carrington Mortgage Holdings, EVP of Marketing at RealtyTrac, and Chief Marketing Officer of Ten-X and Auction.com.

IGOR ROITBURG, Managing Director, Stretto: With over 25 years of combined legal, bankruptcy industry and technology proficiency, Igor brings considerable expertise to his role as Managing Director. Prior to joining Stretto, he served as COO at Default Mitigation Management LLC (DMM). While at the company Igor co-created the DMM Portal, the industry's leading technology platform specifically designed to facilitate mortgage and student loan debt resolution. With Stretto's acquisition of DMM, Igor is responsible for overseeing the day-to-day development and integration of the DMM Portal. He directs a team of subject-matter experts who are focused on expanding adoption of both the mortgage and student loan modification programs with the goal of making debt resolution a more simplified process for an increased number of nationwide borrowers. Having earned his J.D. from Cornell Law School, Igor is respected by Stretto's debtor Attorney clients for having a thorough understanding of the consumer bankruptcy process and the administrative hurdles both lawyers and their clients must navigate to ensure a successful resolution. Internally, his colleagues value his particular expertise and the role he plays in enhancing the company's suite of debtor Attorney products and services.

GEORGE VOGL, Managing Director, Stretto: Leveraging over 15 years of experience as a former bankruptcy and consumer-rights Attorney, George has keen insight into the day-to-day technology and operational needs of this client base. Serving as Managing Director, he works with law firms to streamline their procedures and implement industry best practices. After nearly 10 years of general business, accounting, and financial-analysis experience, George brings a diverse perspective to the unique challenges facing bankruptcy Attorneys and utilizes that strong understanding to outline practical solutions that meet individual firm objectives. Working closely with Stretto's Product Development and Product Management Teams, he offers clients consultative guidance on new tools and resources that maximize productivity while compiling feedback in an effort to continually improve our technology solutions. George is active in the bankruptcy community serving as a member of the Illinois State Bar Association and NACBA, while also presenting webinars and other training courses.

HON. FREDRICK E. CLEMENT, CHIEF JUDGE UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF CALIFORNIA: Fredrick E. Clement is a United States Bankruptcy Judge seated in the Eastern District of California. Prior to appointment, he represented consumers and small to mid-sized businesses before the Eastern and Northern District Bankruptcy Courts. He holds the designation of Certified Specialist, Bankruptcy Law, from The State Bar of California Board of Legal Specialization. Judge Clement is a former Commissioner to the Bankruptcy Law Advisory Commission of the State Bar of California. A regular lecturer on

insolvency and bankruptcy, he has addressed the National Conference of Bankruptcy Judges, American Bankruptcy Institute, National Association of Chapter 13 Trustees, National Association of Consumer Bankruptcy Attorneys, the Southeastern Bankruptcy Law Institute, the Sacramento Valley Bankruptcy Forum, and the Central California Bankruptcy Association. Admitted to the State Bar of California in 1987, Judge Clement is an honors graduate of the University of California, Hastings College of Law. He maintains chambers in Fresno, California.

HON. RONALD H. SARGIS, Judge, United States Bankruptcy Court, Eastern District of California: The Honorable Ronald H. Sargis was appointed to the bankruptcy bench in the Eastern District of California on January 14, 2010. He has served as a member of the Bankruptcy Appellate Panel, two terms on the Ninth Circuit Annual Case Update Committee and is now serving as a member of the California State-Federal Judicial Council. Prior to his appointment, Judge Sargis practiced law with the Sacramento law firm of Hefner, Stark & Marois, LLP, concentrating in the areas of bankruptcy, commercial law, and creditors' rights. During his 26 years of private practice with Hefner, Stark & Marois, he represented creditors, trustees, creditors' committees, individual debtors, and debtors-in-possession. Judge Sargis received his B.A. degree from Stanford University and his J.D. degree, with distinction, from University of the Pacific. While in private practice he was a member of the Commercial Law League of America and was certified through the CLLA as a creditors' rights specialist. As general counsel for the California Association of Collectors, he represented the collection industry, individual collection agencies, and creditors on a wide variety of state and federal legislative and regulatory matters. This included updating the California Fair Credit Reporting Act and Fair Debt Collection Practices Act, enactment and revisions of the civil identity theft statutes, and negotiating and drafting provisions for the child and spousal debt collection practices regulation, hospital charity care and discount medical services statutes, consumer exemptions, *ex parte* writs of attachment, and statutory notice for and limitation of the amount of check dishonor fees and additional damages for dishonored checks.

Judge Sargis served as a director for the Sacramento Valley Bankruptcy Forum for two terms, board member for the ACA International, Inc. Member Attorney Program 1996-1999 (Chairperson for the Board in 1999), and a board member of the ACA Internet Check Services Program 2006-2007. He also served as the Chancellor to St. Michael's Episcopal Church, the Church Attorney for the Episcopal Diocese of Northern California, and on the Board for the church. From 1993-2006, Judge Sargis and his wife served as adult leaders for their church teenage youth group.

HON. JENNIFER E. NIEMANN, ESQ. JUDGE UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF CALIFORNIA: Jennifer E. Niemann is a bankruptcy Judge in the Eastern District of California, Fresno Division where she was appointed in 2020. Prior to being appointed to the bench she was an attorney at Felderstein, Fitzgerald, Willoughby Pascuzzi & Rios LLP in Sacramento. She has over 25 years of experience in bankruptcy and insolvency-related matters and has represented creditor and debtor clients in all types of bankruptcy cases as well as commercial litigation matters. Jennifer previously worked as a long-term judicial clerk for the U.S. Bankruptcy Court for the Northern District of California, San Jose and for the U.S. Bankruptcy Court for the Northern District of California, San Francisco. She has been a

contributing writer and presenter on a wide variety of bankruptcy matters. Jennifer received her B.A. from University of Illinois and her J.D. from Harvard Law School.

ESTELA PINO, Esq. Pino & Associates: Estela Olivia Pino is the founder and principal of Pino & Associates. Ms. Pino has more than three decades of experience in bankruptcy, bankruptcy litigation, and debtor/creditor matters. Ms. Pino has represented Chapter 7 trustees, Chapter 11 trustees, debtors in possession, creditors, and litigants.

Ms. Pino attended the University of Miami and a semester at the University of Texas. Thereafter she attended Oakland University in Rochester, Michigan.

Ms. Pino earned her Juris Doctor degree magna cum laude in 1983 from University of Pacific, McGeorge School of Law. Ms. Pino is a member of the Order of the Coif and the Traynor Honor Society. At McGeorge, Ms. Pino was also a staff writer for, and later an assistant editor of, the Pacific Law Journal and in 1982, her comment "Contra Tufts: The Case Against the Fair Market Value of Limitation on Amount Realized" was published in the Pacific Law Journal. The comment dealt with an insolvency related tax issue.

Ms. Pino joined a boutique bankruptcy firm, Law Offices of Melvyn J. CoBen, after taking the California Bar Exam. Thereafter, Ms. Pino was recruited by, and joined Weintraub, Genshlea, Hardy, Erich & Brown and then Greve, Clifford, Diepenbrock & Paras. In 1995, Ms. Pino founded Pino & Associates.

Ms. Pino has been admitted to practice in: the Supreme Court of the United States of America; the United States Court of Appeals for the Ninth Circuit; the United States District Court for the Eastern District of California; the United States District Court for the Northern District of California; the United States District Court for the Central District of California, and before all the courts of the State of California. She has also been granted permission to practice on a pro hac vice basis before the United States Bankruptcy Court in the Districts of: Nevada; Arizona; Illinois; Alaska; and Florida.

Ms. Pino resides in Placer County with her husband Mike, and their three beloved fur kids.

ERIC J. SCHWAB Esq., Attorney at Law: Eric has been representing small business debtors and creditors in bankruptcy liquidation and reorganization since 1990. Eric has spoken on many panels for SVBF, CBF and even has testified as an expert witness on a Bankruptcy matter in a Placer County divorce case. Eric volunteers his time helping on several Court programs including the Bankruptcy Pro Se Help Desk, The Bankruptcy Dispute Resolution Program, the Clerk's Advisory Committee and as well as consulting with the Office of the Federal Defender as a Bankruptcy Expert, teaching classes at Lincoln Law and holding various board positions on the Sacramento Valley Bankruptcy Forum's Executive Board.

HON. CHRISTOPHER D. JAIME, JUDGE UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF CALIFORNIA: Christopher D. Jaime was sworn as a United States Bankruptcy Judge in the Eastern District of California (Sacramento) on January 5, 2015. Judge Jaime was born in Sacramento, California, and resided primarily in San Jose, California. He attended Saint Mary's College of California in Moraga, California, where he graduated with a Bachelor of Science degree in Psychology in 1989. He received his J.D. in 1992 from Willamette University

College of Law in Salem, Oregon, where he served as an Associate Editor of – and was published in – the Willamette Law Review.

Prior to his appointment to the bench, Judge Jaime was a vice-president and shareholder with the Reno, Nevada, law firm of Maupin, Cox & LeGoy. He was with the law firm for 22 years. He joined the law firm as an associate in 1992 and became a shareholder in 1998. His practice focused primarily on representing and advising domestic and international banks, lenders, financial and financing institutions, and individuals on creditors' rights and insolvency matters both within and outside the bankruptcy context. He appeared in hundreds of contested matters, in all pretrial and trial phases of bankruptcy and non-bankruptcy proceedings before bankruptcy and district courts, and in bankruptcy and non-bankruptcy appeals before federal appellate courts. While a practicing attorney, in 2014 Judge Jaime was recognized by the American Society of Legal Advocates as one of the Top 100 Bankruptcy Lawyers in the State of Nevada.

HON. RENÉ LASTRETO II, Judge, United States Bankruptcy Court, Eastern District of California: Judge Lastreto was sworn as a United States Bankruptcy Judge for the Eastern District of California on September 14, 2015. His chambers is in the Fresno Division.

Before becoming a judge, he was the Managing Partner of Lang, Richert & Patch in Fresno, California and before that, the Chief Financial Officer of the firm. While in private practice for 34 years he emphasized litigation matters involving creditor rights in all courts in California. He also represented all constituencies in bankruptcy matters including creditors (both secured and unsecured), creditor's committees, trustees, asset purchasers, lessees, lessors, debtors, and estate professionals.

Before joining the Lang, Richert & Patch firm in 1999, he was a partner at Dowling, Aaron & Keeler in Fresno and before that a partner at Crossland, Crossland, Chambers, Lastreto & Knudson.

He was trial counsel in many types of cases in both state and federal courts and was primary trial counsel in numerous contested matters representing various interests on agricultural and commercial code issues.

He is a frequent faculty member in many continuing education programs both teaching and writing on various creditor related and agricultural issues. Before becoming a judge, he was on the commercial panel of the American Arbitration Association and arbitrated numerous commercial disputes including construction and contract disputes.

As a judge, he remains a frequent speaker at continuing education programs and has served on the National Association of Bankruptcy Judges Newsletter and Education Committees.

He is a certified by the American Board of Certification in Creditor's Rights law.

His undergraduate degree was conferred by the University of Utah cum laude in 1978. He received his J.D. from the University of San Francisco in 1981.

STEPHEN BETHEL, MAI, MA, MA, BA, National Director - Frazier Capital Valuation & Brokerage: Mr. Bethel is the National Director of Frazier Capital. Having written 10 books on valuing and selling businesses and special use properties, he specializes in the valuation of

private/public equity businesses and financial instruments, commercial real estate investments, and the brokerage of businesses and real estate. He has been interviewed multiple times on NPR's Market Place and by Bloomberg on industry valuation trends in various industries. He received his undergraduate degree in Economics from Occidental College and has two masters degrees in Business and International Finance from St. Andrews University and Glasgow University in Scotland**.**

HEATHER LUZZI, Sacramento District Office, District Director, US Small Business Administration: A former banking executive with over 30 years of Banking and Finance experience. Luzzi oversees the delivery of all SBA products and services in the Sacramento District's 21 county Northern California District.

Luzzi has served as the District Director in Sacramento since 2017. She is an experienced banker and leader who understands the challenges of small business owners who want to start and grow companies in Northern California. Luzzi was previously a Senior Vice President at a community bank where she ran the small business lending division until returning to the U.S. Small Business Administration where she had previously spent seven years working in the Loan Guaranty Processing Center, as a Senior Analyst, underwriting and training lenders across the country on SBA systems. Luzzi is strong advocate for small businesses and the communities that she serves. As the Small Business Administration's Sacramento Director, Luzzi is a champion for the region's entrepreneurs expanding access to capital with SBA lending and contracting programs. With a focus on supporting under-served communities; leading an amazing group of dedicated SBA professionals, Luzzi is also responsible for deploying the SBA funded Resource Partner network of Women's Business Centers, Small Business Development Centers, the Veterans Business outreach Center and SCORE volunteer and Mentors to assure that small businesses in Northern California have the tools and resources they need to succeed. Through her and her team's efforts, they increase the utilization of SBA products across the district's 21 North- Eastern Counties.

She can be reached at Heather.Luzzi@sba.gov or 916-735-1709.

GIL HOPENSTAND, District Counsel, US Small Business Administration: Gil Hopenstand is an SBA District Counsel based in Los Angeles and a Special Assistant U.S. Attorney for bankruptcy matters in the Central District of California. Gil joined SBA in 2015 after more than a decade of practice at bankruptcy firms, mostly representing debtors and trustees. He is a graduate of UCLA and the law school at Washington University in St. Louis.

Created in 1953, the U.S. Small Business Administration (SBA) continues to help small business owners and entrepreneurs pursue the American dream. SBA is the only cabinet-level federal agency fully dedicated to small business and provides counseling, capital, and contracting expertise as the nation's only go-to resource and voice for small businesses.

LILIAN G. TSANG, Chapter 13 Trustee: Lilian G. Tsang was appointed as Chapter 13 Trustee for the Eastern District of California on September 1, 2023. Lilian is successor to retired trustee, Russell D. Greer in the Modesto Division. On January 1, 2024, Lilian took on Fresno and Bakersfield divisions, succeeding retired trustee, Michael H. Meyer. Recently, Lilian was appointed as Chapter 12 Trustee for the Eastern District of California and District of Nevada.

Lilian began her legal career as debtor's counsel, but the majority was as staff attorney for David Burchard, Chapter 13 Trustee for the Northern District of California for over twelve years. In 2021, Lilian worked as staff attorney for Russell D. Greer in Modesto; and right before her appointment as trustee in 2023, she was also staff attorney for Michael H. Meyer in Fresno. Lilian is an active member of the National Association of Chapter 13 Trustees (NACTT), Bay Area Bankruptcy Forum (BABF), and prior to appointment as trustee, she was the co-chair of the Consumer Practices Subcommittee for the Bench Bar Liaison Committee of the U.S. Bankruptcy Court for the Northern District of California.

Lilian grew up in San Francisco. Lilian earned her J.D. degree from U.C. College of the Law, San Francisco (formerly, U.C. Hastings). During law school, Lilian was law clerk for the United States Attorney's office and interned for two federal magistrate judges. She also served as law clerk for the District Attorney's office for San Mateo County. Lilian earned undergraduate degrees in Legal Studies and Political Economy from U.C. Berkeley. Lilian is married and mother of two toddlers.

PAULDEEP BAINS, ESQ., Sacramento Bankruptcy Lawyer: Pauldeep Bains was born and raised in Yuba City, CA, and graduated from Sutter High School in 2002. He then accepted a position at the University of California, Davis, and graduated in 2006, majoring in Economics and completing a minor in Sociology. Upon graduating, Mr. Bains attended Thomas Jefferson School of Law in San Diego, CA. Here, he excelled in his studies and held various internships through his 3 years in law school---the Public Defender's Office in San Diego County, at a prominent Personal Injury Law Firm, and finally at a solo-practitioner wherein the sole-practice was Bankruptcy Law. Upon graduating from law school in 2009, Mr. Bains sat for the Bar Examination in July 2009 and became a first-time Bar passer in November 2009. Mr. Bains then began his legal career at Coggins and Johnston based out of Roseville, CA, and worked there from 2010-2012. In 2012, Mr. Bains accepted a position at Bankruptcy Law Group, PC, where he focused his caseload in both the Sacramento and Fairfield offices. In 2016, Mr. Bains opened his own practice, Bains Legal, PC, with the primary office being in Sacramento, CA, and the primary focus being Consumer Chapter 7 and Chapter 13 Bankruptcy Law. Mr. Bains has since added two additional offices in Roseville, CA, and Modesto, CA. Mr. Bains is married to his lovely wife Serina and they together have two amazing children, their son Avyn and their daughter Amaya.

RUSSELL CUNNINGHAM, ESQ. Desmond, Nolan, Lavaich, and Cunningham: Mr. Cunningham grew up in Honolulu, Hawaii. His parents were journalists from the Pacific Northwest and Northern Nevada. His personal volunteer activities have included serving as a "big brother" to paroled minors, developing projects to stimulate downtown business, and reorganizing a competitive youth soccer club. He plays golf, follows his favorite professional sports teams, enjoys film and music, and fine home cooking.

Mr. Cunningham graduated from UC Berkeley in 1983, majoring in Philosophy, with concentration on language and mind. He received a law degree from McGeorge School of Law in 1987. Since 1988, Mr. Cunningham has been a member of Desmond, Nolan, Livaich & Cunningham, of which he is presently the managing partner and heads the commercial law and bankruptcy department.

Most of his practice has been devoted to representing Chapter 7 and Chapter 11 trustees. The majority of Mr. Cunningham's bankruptcy work has been litigation to recover avoidable transfers, complex asset sales, and objections to exemptions and discharge. His goal as trustee's counsel is to protect the rights of the estate, while keeping an open mind to

developing information, assisting the client in making cost-benefit decisions, and staying above the fray, particularly in situations where a difficult dispute has migrated to the bankruptcy court from another jurisdiction.

Mr. Cunningham has served as a volunteer mediator for the Sacramento County Superior Court (Pre-Trial Settlement Conference Pro Tem), El Dorado County Superior Court (Early Settlement Conference Temporary Judge), Sacramento Bankruptcy Court (BDRP Advocate), and United States District Court (VDRP Neutral).

KIMBERLY HUSTED, Chapter 7 Trustee:

NOVEMBER 2009 – PRESENT
CHAPTER 7 PANEL TRUSTEE, EASTERN DISTRICT OF CALIFORNIA
Successful administration of Chapter 7 cases including converted Chapter 11 and Chapter 13 matters. Occasional acceptance of Chapter 11 cases.
NOVEMBER 2000 – JUNE 2009
DIRECTOR OF OPERATIONS AND FRONTLINE PERFORMANCE LEADER,
ENCOMPASS INSURANCE
Initially oversaw Facilities, Customer Service, Mail and File room, Fiduciary, Telephone and IT areas for the Regional office of Encompass Insurance. Managed staff of 18 in office that oversaw 10 Western States claims teams. Project manager for site move, migrations to integrated support with parent company, Allstate Insurance. Moved to position of Frontline Performance Leader for final 3 years of employment handling Towing and Glass Program, Field Adjuster Dispatch and Subrogation coordination.
FEBRUARY 1998 – November 2000
DIRECTOR OF CUSTOMER SERVICE and TRAINING, DIRECTOR OF PLANNING AND DEVELOPMENT HR LOGIC (BRADENTON FLORIDA)
JANUARY 1990- JUNE 1997 SENIOR DIRECTOR OF OPERATIONS, HOME OFFICE OF ARBITRATION FORUMS INC (TAMPA FLORIDA)
1984 - BACHELORS DEGREE, CALIFORNIA STATE UNIVERSITY STANISLAUS
Post Graduate - Multiple seminars and courses undertaken post Degree with CSUS and with American Management Association, CPCU and Risk Management Societies. Eckerd College of Saint Petersburg Florida - Management Development Program.

WALTER DAHL, Esq. Dahl Law: Walter R. Dahl, the founding principal of Dahl Law, earned his J.D. degree from UCLA School of Law, where he was a member of the UCLA Law Review. He holds a B.A. degree from University of the Pacific. From 1998 through 2020, Walter was an Adjunct Professor at Pacific McGeorge School of Law, teaching Bankruptcy, Secured Personal Property Transactions, and Sales & Leases of Goods.

Walter has extensive experience in bankruptcy, business reorganization, real estate, secured transactions and commercial law matters, and since 1981 has represented thousands of individuals and entities in various capacities under Chapters 7, 9, 11, 12 and 13 of the Bankruptcy Code. He is admitted to practice in all federal courts in California, the 9th Circuit Court of Appeals, and the United States Supreme Court. Walter holds an “AV” rating from Martindale, the national legal directory.

Walter currently serves a Subchapter V Chapter 11 Trustee in small business

reorganizations in the Eastern District of California. He is an Associate Editor of the American Bankruptcy Trustee Journal, a Director of the Sacramento Valley Bankruptcy Forum, and a Mediator for the Eastern District's Bankruptcy Dispute Resolution Program.

DON SNIDER: Don Snider is a state Certified Substance Abuse Counselor, with a BA in Psychology and currently earning a master's degree in psychology. Don brings a wealth of experience of counseling in high-risk environments. His extensive background includes facilitating groups and private therapy sessions in Folsom State Correctional Institution and currently counseling in El Dorado County Psychiatric Health Facility.

CHRISTINE E. JACOB, ESQ., Hansen, Kohls, Sommer & Jacob, LLP: Christine E. Jacob engages in a civil litigation practice emphasizing professional liability defense and business litigation. She has defended insurance brokers and attorneys in professional liability and disciplinary actions for over 20 years. Ms. Jacob obtained a Bachelor's degree in political science from the University of California, Davis, in 1997. In 2001, Ms. Jacob obtained her Juris Doctor degree from the University of the Pacific, McGeorge School of Law. Ms. Jacob began her civil litigation practice in 2001 as an associate at Curtis & Arata emphasizing primarily insurance defense and business litigation. In January 2003, Ms. Jacob joined the firm of Hansen, Boyd, Culhane & Watson as an associate attorney. In May 2003, the firm of Hansen, Boyd, Culhane & Watson reconstituted itself into the firm now known as Hansen, Kohls, Sommer & Jacob, LLP. Ms. Jacob became an equity partner in January 2008. Ms. Jacob is a member of the State Bar of California, the Sacramento County Bar Association, the Placer County Bar Association, California Women Lawyers, and Past President of Women Lawyers of Sacramento.

Northern California's

23rd Annual Bankruptcy Conference

THURSDAY, MARCH 21, 2024

(5.5 hours MCLE)

7:30 a.m. – 8:30 a.m.	Registration and Breakfast- located in Magnolia Ballroom Foyer
	Morning Session
	Located in the Magnolia Ballroom
	Moderator: Gabe Liberman
8:30 a.m. – 8:40 a.m.	Opening Remarks
8:40 a.m. – 8:50 a.m.	Clerk's Report
	Wayne Blackwelder, Clerk of the Court
8:50 a.m. – 9:05 a.m.	US Trustee's Report
	Tracy Hope Davis, United States Trustee
9:05 a.m. – 10:05 a.m.	2024 Outlook: Challenges & Opportunities in the Real Estate Market
	Rick Sharga, President &CEO, CJ Patrick Company
10:05 a.m. – 10:15 a.m.	Break- Magnolia Ballroom Foyer
10:15 a.m. – 11:45 a.m.	Federal Student Loans- News and Guidance
	Igor Roitburg, Managing Director, Stretto
	George Vogl, Managing Director, Stretto
11:45 a.m. – 1:00 p.m.	Lunch w/ State of the District from Chief Judge Clement
	Chief Judge Fredrick E. Clement, Eastern District of California
	Buffet lunch will be set up in the Magnolia Ballroom Foyer and will be eaten in the Magnolia Ballroom while listening to our speaker.

Afternoon Session

Located in the Magnolia Ballroom

Moderator: David Cusick

1:00 p.m. – 2:30 p.m.	Case Law Update
	Judge Ronald H. Sargis, Eastern District of California
	Judge Jennifer E. Niemann, Eastern District of California
	Estela Pino, Esq., Pino & Associates
2:30 p.m. – 3:00 p.m.	Break- Magnolia Ballroom Foyer
3:00 p.m. – 4:30 p.m.	Ask the Judges
	Moderated by: Eric Schwab, Esq., Attorney at Law
	Chief Judge Fredrick E. Clement, Eastern District of California
	Judge Ronald H. Sargis, Eastern District of California
	Judge Christopher D. Jaime, Eastern District of California
	Judge Jennifer E. Niemann, Eastern District of California
4:30 p.m. - 4:45 p.m.	Closing Remarks
5:00 p.m. – 7:00 p.m.	Reception- Magnolia Ballroom Foyer

FRIDAY, MARCH 22, 2024

(6 hours MCLE, including 1 hr Ethics and 1 hour of Competency)

8:00 a.m. – 9:00 a.m.	Registration and Breakfast- located in Magnolia Ballroom Foyer

Morning Session

Located in the Magnolia Ballroom

Moderator: Paul Boudier

9:00 a.m. – 10:00 a.m.	What is your case worth? Valuing the business, real estate and equipment and looking at trends in the market.
	Stephen Bethal, National Director, Frazier Capital Valuation & Brokerage

10:00 a.m. – 11:00 a.m.	Meet the SBA at the NCBC…Best practices and what you need to know
	Heather Luzzi, District Director, US Small Business Administration
	Gil Hopenstand, Esq., District Counsel, US Small Business Administration
11:00 a.m.- 11:20 a.m.	Break- Magnolia Ballroom Foyer
11:20 a.m. – 12:20 p.m.	LBR 2016-1: Attorney's Fees in Chapter 13 Cases
	Chief Judge Fredrick E. Clement, Eastern District of California
	David P. Cusick, Chapter 13 Trustee, Eastern District of California
	Lillian Tsang, Chapter 13 Trustee, Eastern District of California
	Paul Bains, Esq., Sacramento Bankruptcy Lawyer
12:20 p.m. – 1:30 p.m.	Lunch- Magnolia Ballroom Foyer

Afternoon Session

Located in the Magnolia Ballroom

Moderator: Matt Gilbert

1:30 p.m. – 2:30 p.m.	Spousal Waiver/Exemption Panel
	J. Russell Cunningham, Esq., Desmond, Nolan, Livaich & Cunningham
	Kim Hustad, Chapter 7 Trustee
	Walter Dahl, Esq. Dahl Law Group
	Gabe Liberman, Esq., Law Offices of Gabriel Liberman, APC
2:30 p.m. – 3:30 p.m.	Competency
	Don R. Snider
3:30 p.m.- 3:45 p.m.	Break- Magnolia Ballroom Foyer
3:45 p.m.-4:45 p.m.	Ethics- Learning the new requirements for the "Snitch" Rule and Trust Account Requirements
	Christine E. Jacob, Esq., Hansen, Kohls, Sommer & Jacob, LLP
4:45 p.m.-5:00 p.m.	Closing Remarks

Sacramento Valley
Bankruptcy Forum
2024

CLERK'S REPORT

TECHNOLOGY UPDATES

PACER servers (Ashburn to El Segundo)

Remote Appearances via Zoom

New Website

CAEB eFiling | Meeting Of Creditors | Pre-Hearings | Self Set Calendar | Court Calendar

For Debtors

- Debtor Home Page
- Online Services
  - Debtor Drop Box
  - Online Installment Payments
  - Online Discharge Order

For Attorneys

- Attorney Home Page
- Certificate of Service & Instructions
- Local Rules / General Orders
- Judicial Opinions
- Roster of Governmental Agencies

Court Information

- Court Information Homepage
- Filing and Statistics

For Creditors

- Creditors Home Page
- To File a Proof of Claim

Court News

The court will be closed on 5/27/2024 in observance of the Memorial Day holiday.

2/9/2024	Updated Procedures for Zoom.gov Hearing Registrations and Public Access Guidelines Effective February 20, 2024
1/25/2024	General Order 24-01
1/17/2024	Judges of the United States Court of Appeals for the Ninth Circuit have reappointed U.S. Bankruptcy Judge Ronald H. Sargis, of the U.S. Bankruptcy Court...

View All

Attorney Home Page

New to the District? Start **here** for Admisson to Practice.

Court Filings

- CAEB e-Filing Site
- PACER Access
- PACER Sign-Up

Judges' Info

- Court Appearances
- Opinions
- Prehearing Dispositions
- Transcripts

Rules and Codes

- 9th Circuit BAP Rules
- Bankruptcy Code
- Federal Rules of Bankrupty Procedure
- Federal Rules of Evidence
- Local Rules & General Orders

Additional Resources

- BDRP Info
- Certificate of Service & Instructions
- Mobile Calendar
- Post Judgment Interest Rates
- Roster of Governmental Agencies
- Poverty Guidelines
- Training

PROCEDURE & POLICY UPDATES

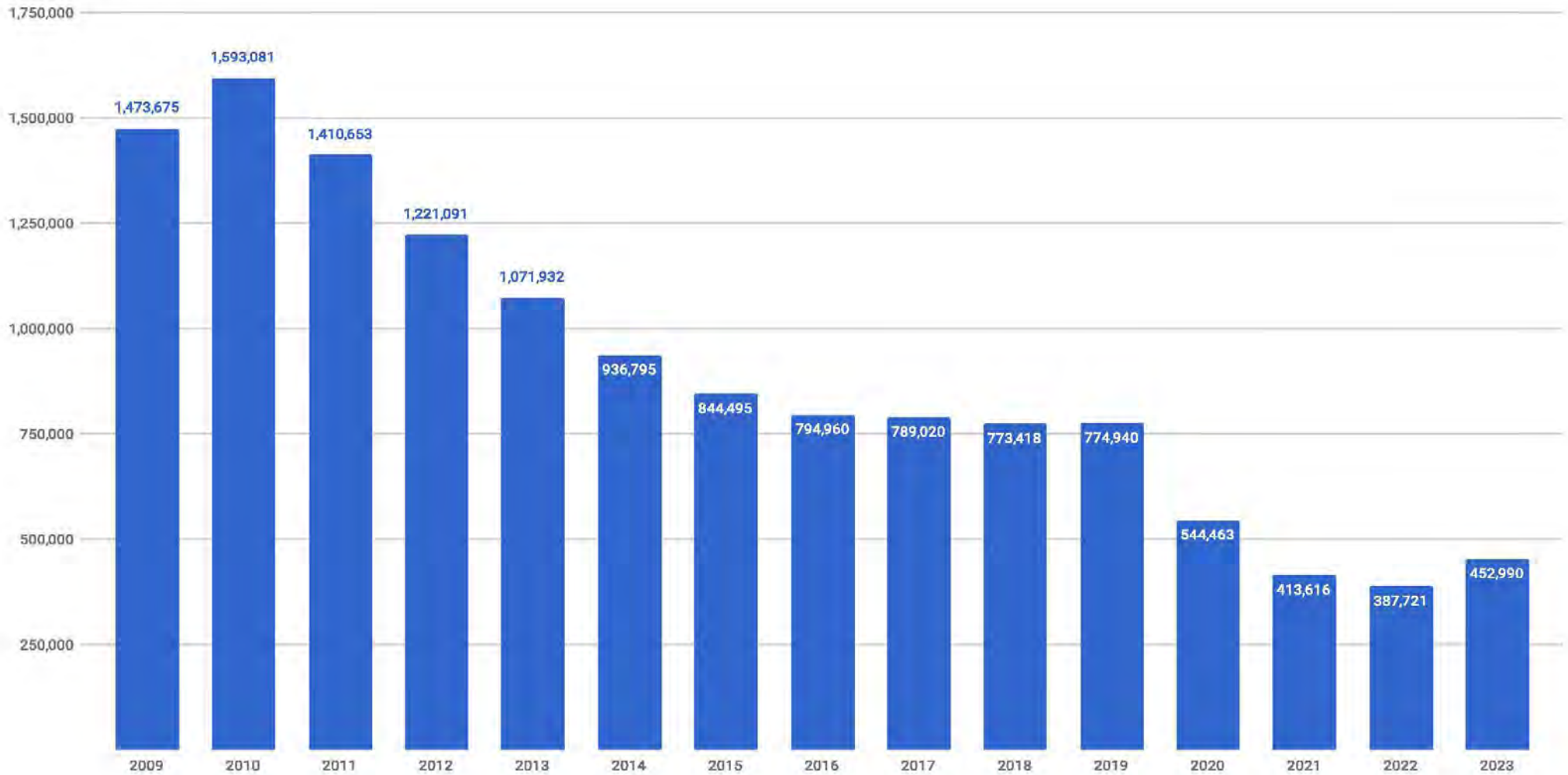
Disclosure of Compensation, LR 2016-4

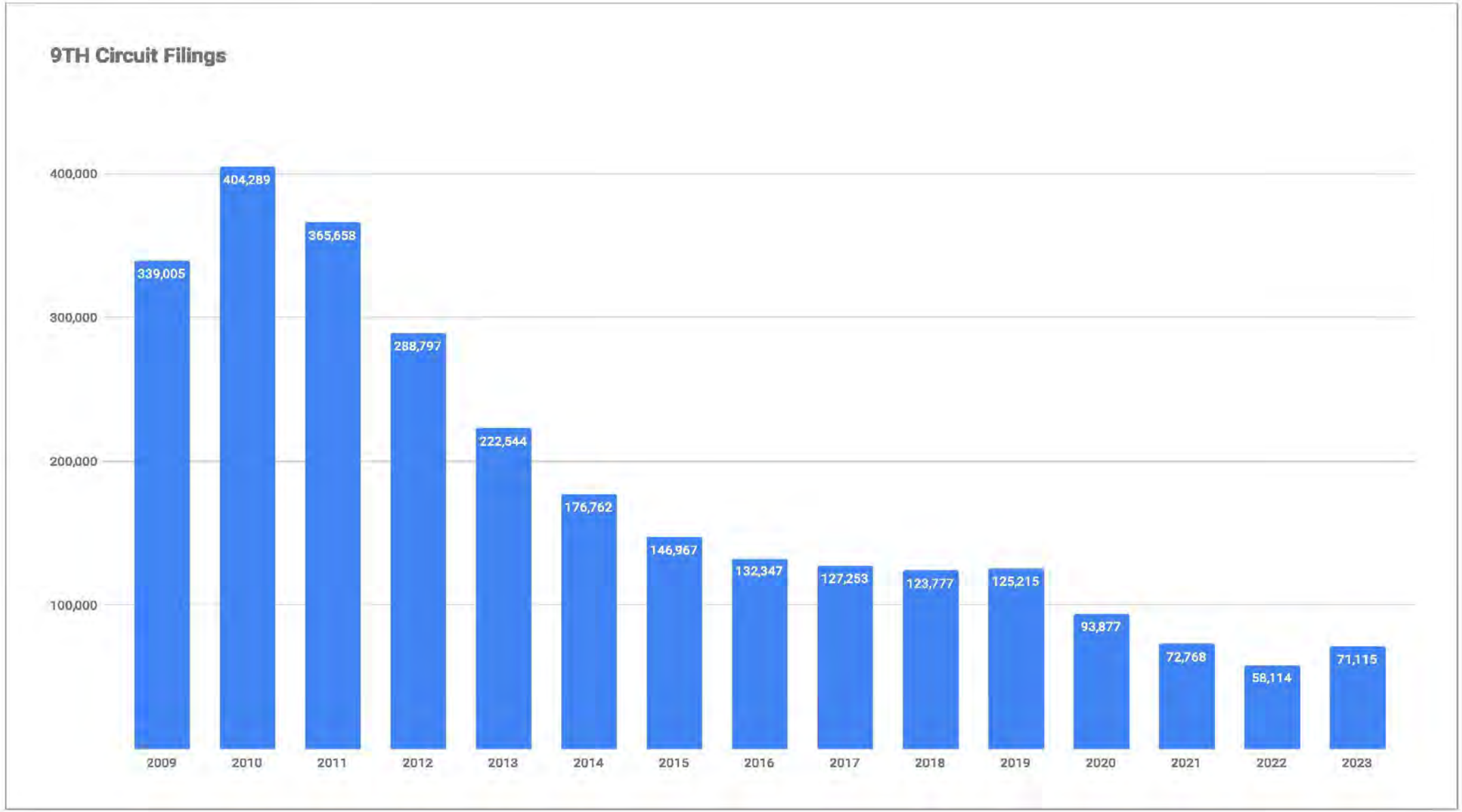
Remote Appearance Procedure

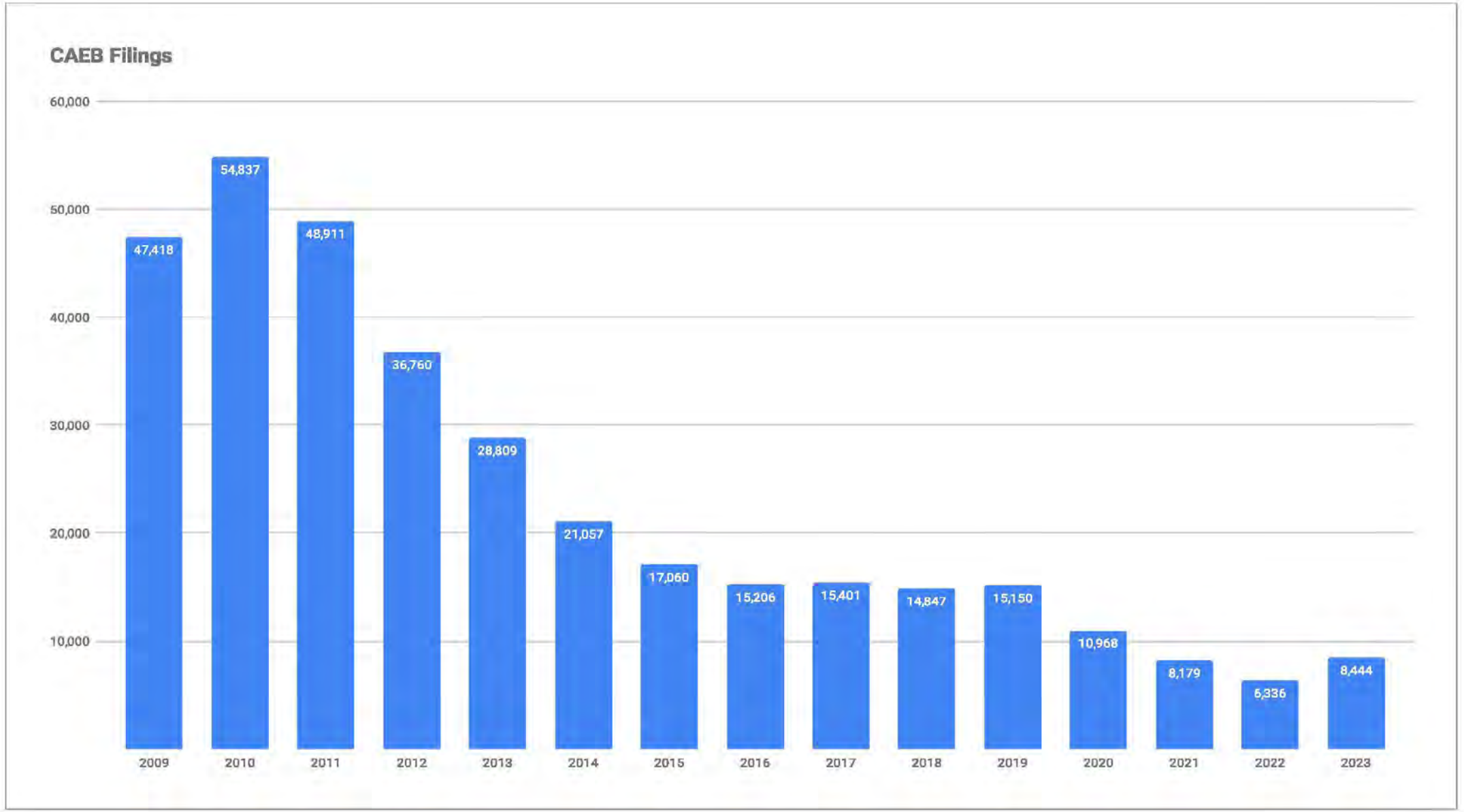
Mandatory Electronic Bankruptcy Noticing (Limits now 25 notices per month)

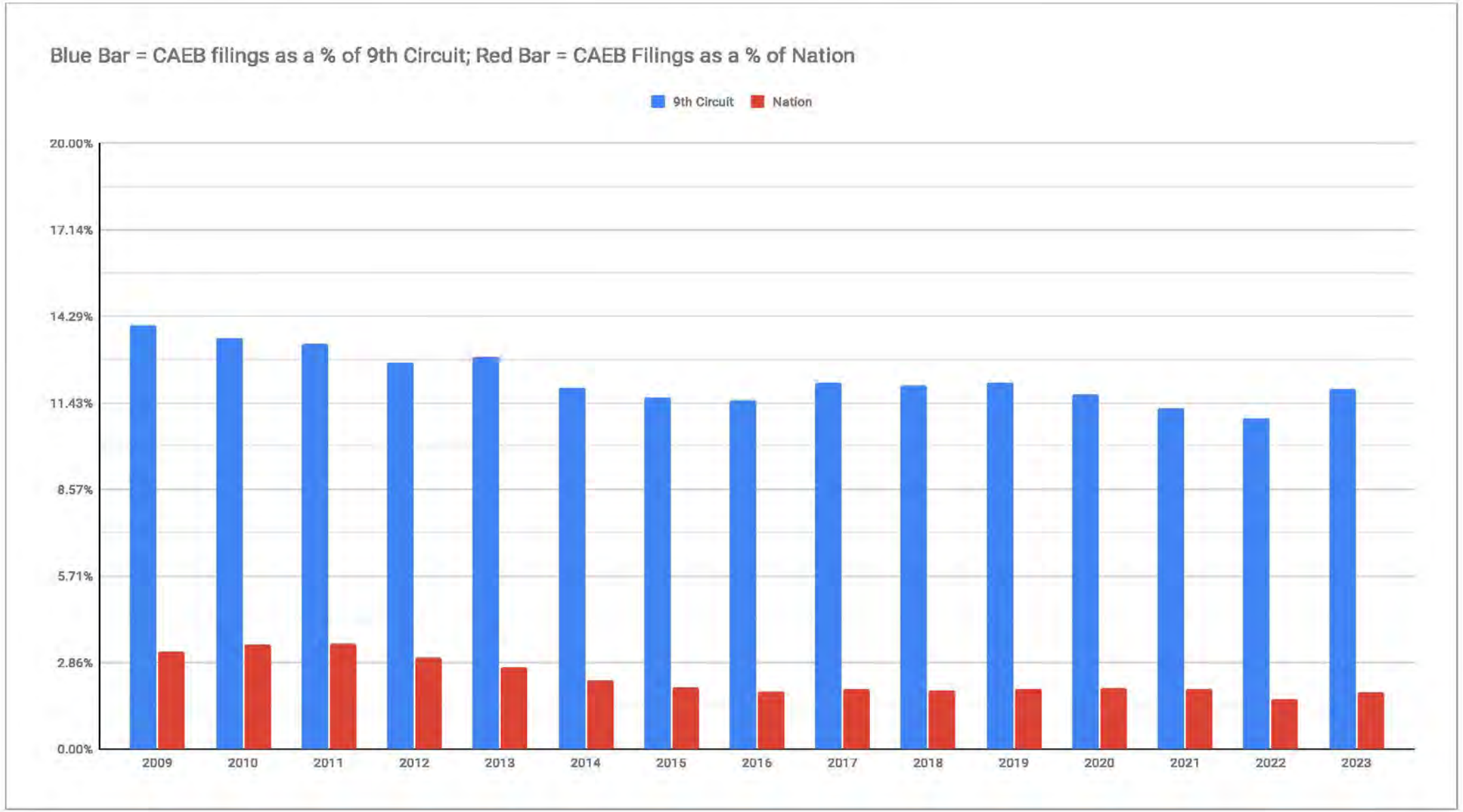
BANKRUPTCY FILINGS

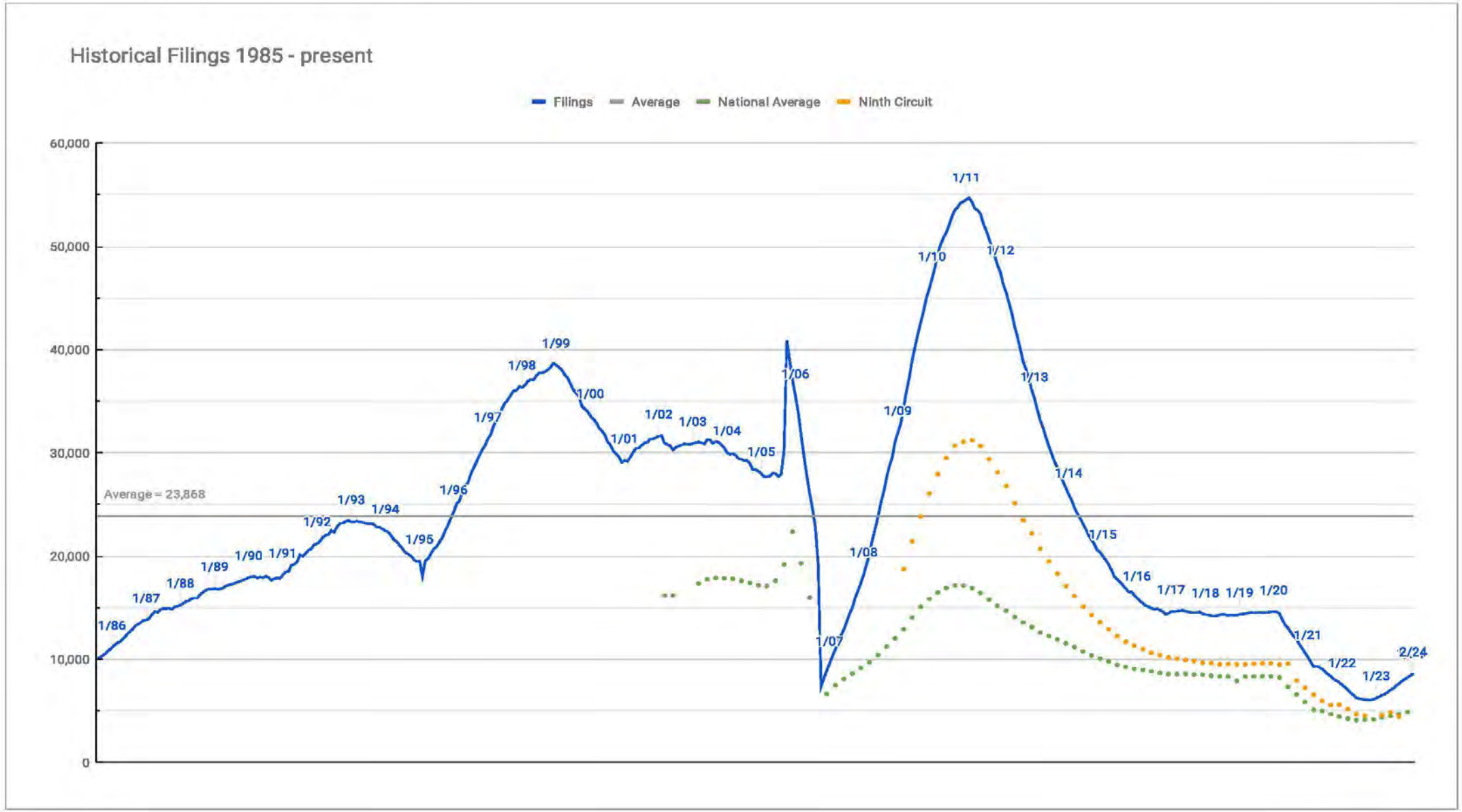
National Filings



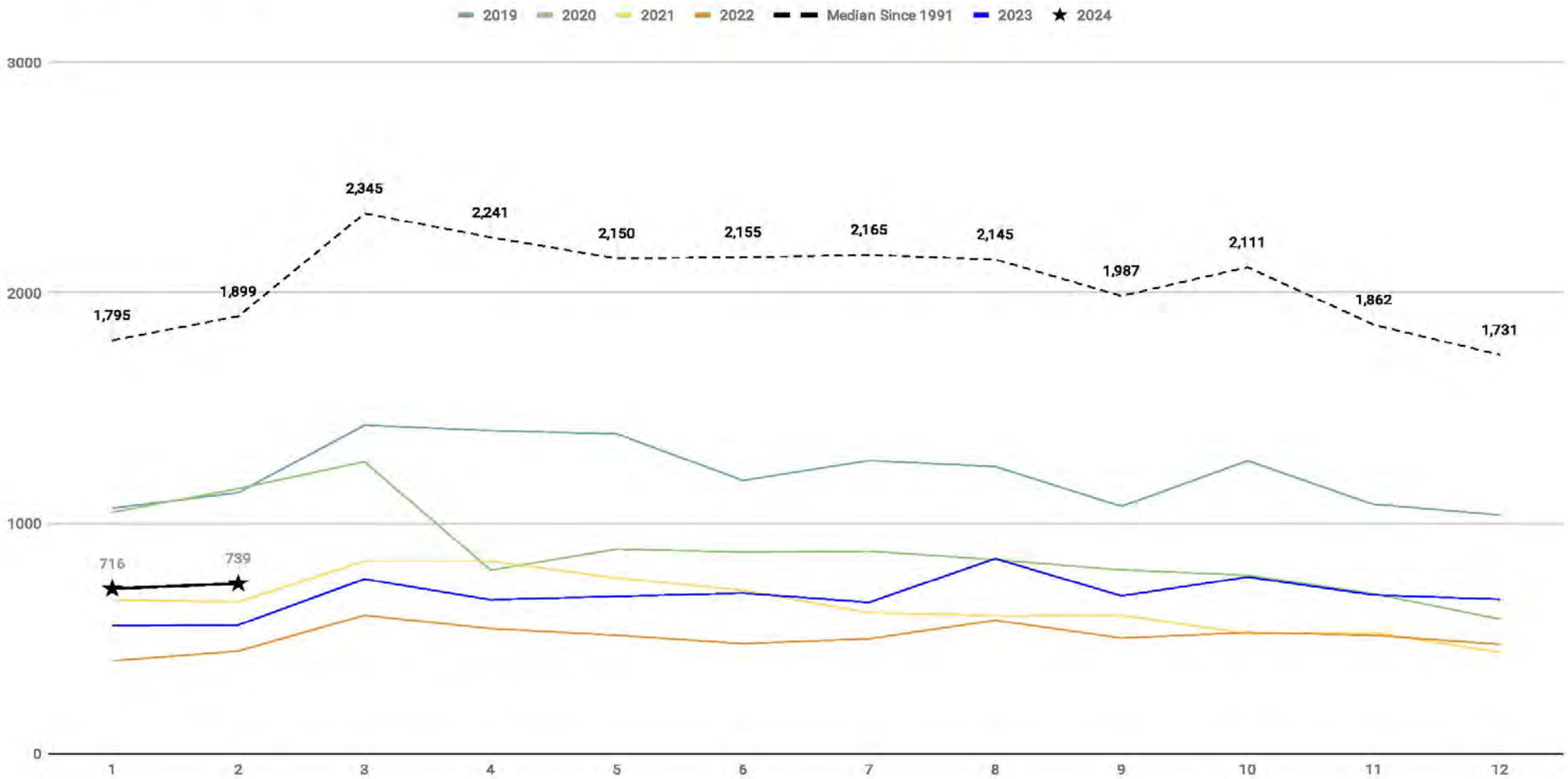

9TH Circuit Filings
400,000
300,000
200,000
100,000
339,005
404,289
365,658
288,797
222,544
176,762
146,967
132,347
127,253
123,777
125,215
93,877
72,768
58,114
71,115
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023


CAEB Filings
60,000
50,000
40,000
30,000
20,000
10,000
47,418
54,837
48,911
36,760
28,809
21,057
17,060
15,206
15,401
14,847
15,150
10,968
8,179
6,336
8,444
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023

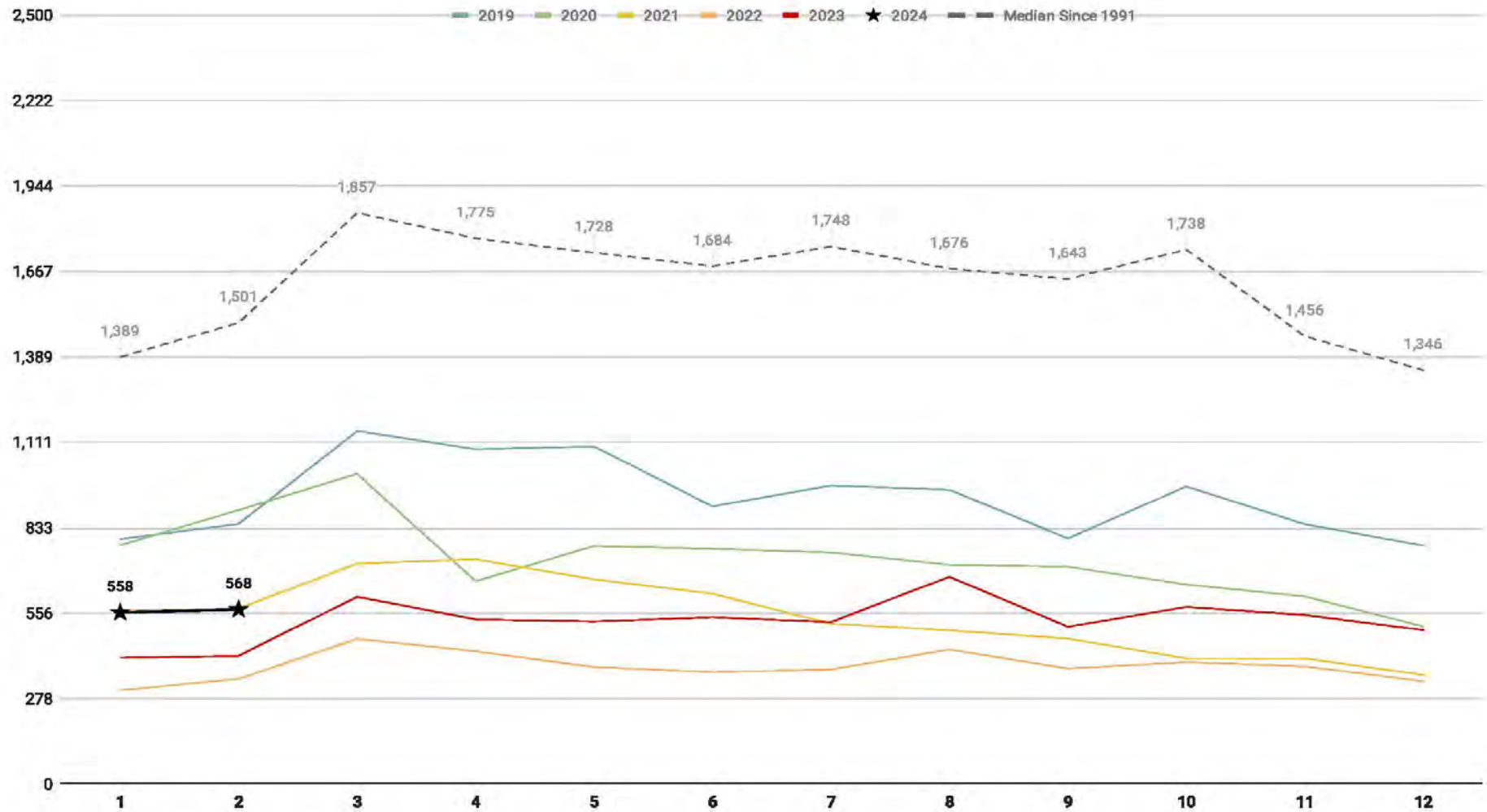

Blue Bar = CAEB filings as a % of 9th Circuit; Red Bar = CAEB Filings as a % of Nation
9th Circuit
Nation
20.00%
17.14%
14.29%
11.43%
8.57%
5.71%
2.86%
0.00%
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023

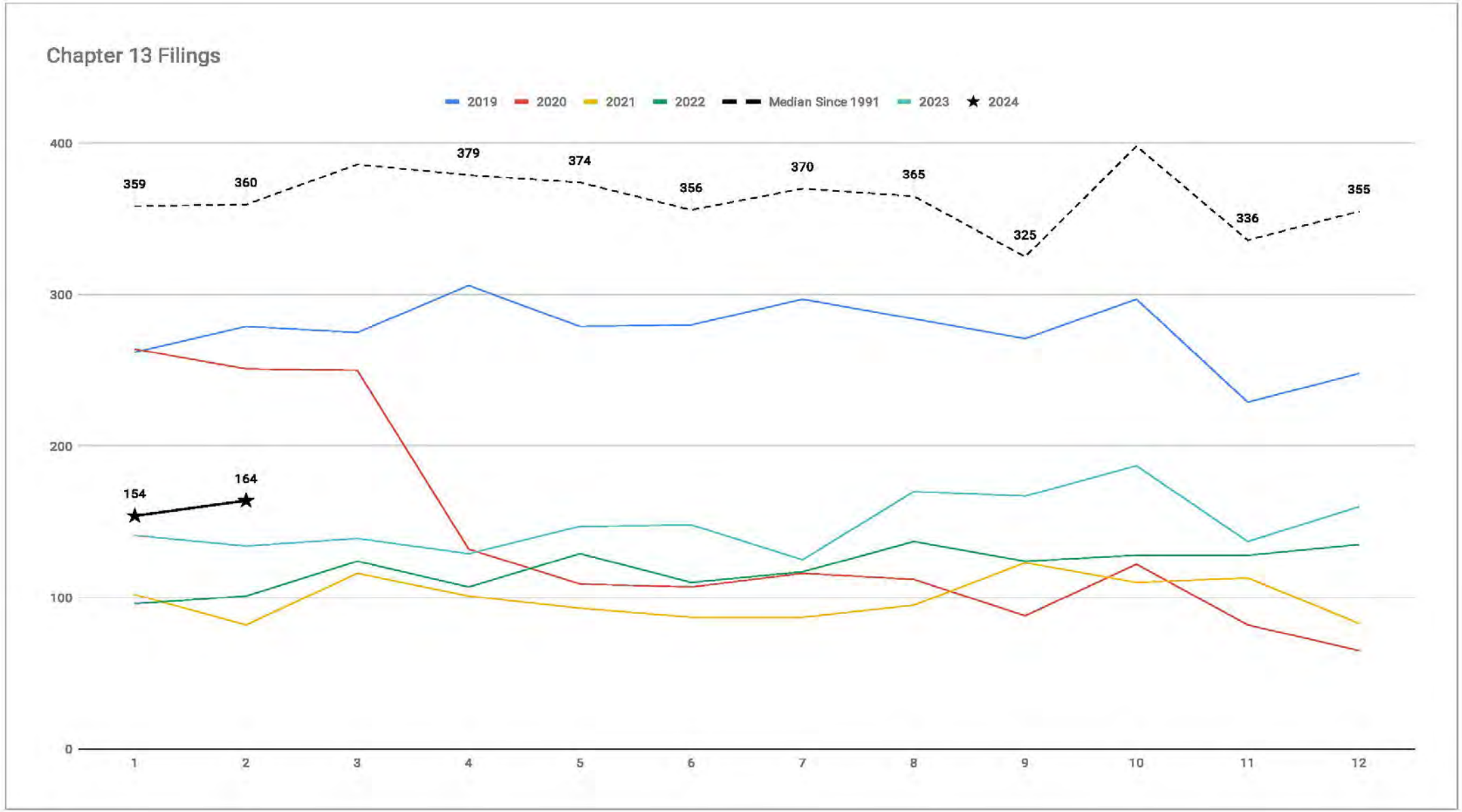

Historical Filings 1985 - present
Filings
Average
National Average
Ninth Circuit
60,000
50,000
40,000
30,000
20,000
10,000
0
Average = 23,868
1/86
1/87
1/88
1/89
1/90
1/91
1/92
1/93
1/94
1/95
1/96
1/97
1/98
1/99
1/00
1/01
1/02
1/03
1/04
1/05
1/06
1/07
1/08
1/09
1/10
1/11
1/12
1/13
1/14
1/15
1/16
1/17
1/18
1/19
1/20
1/21
1/22
1/23
2/24

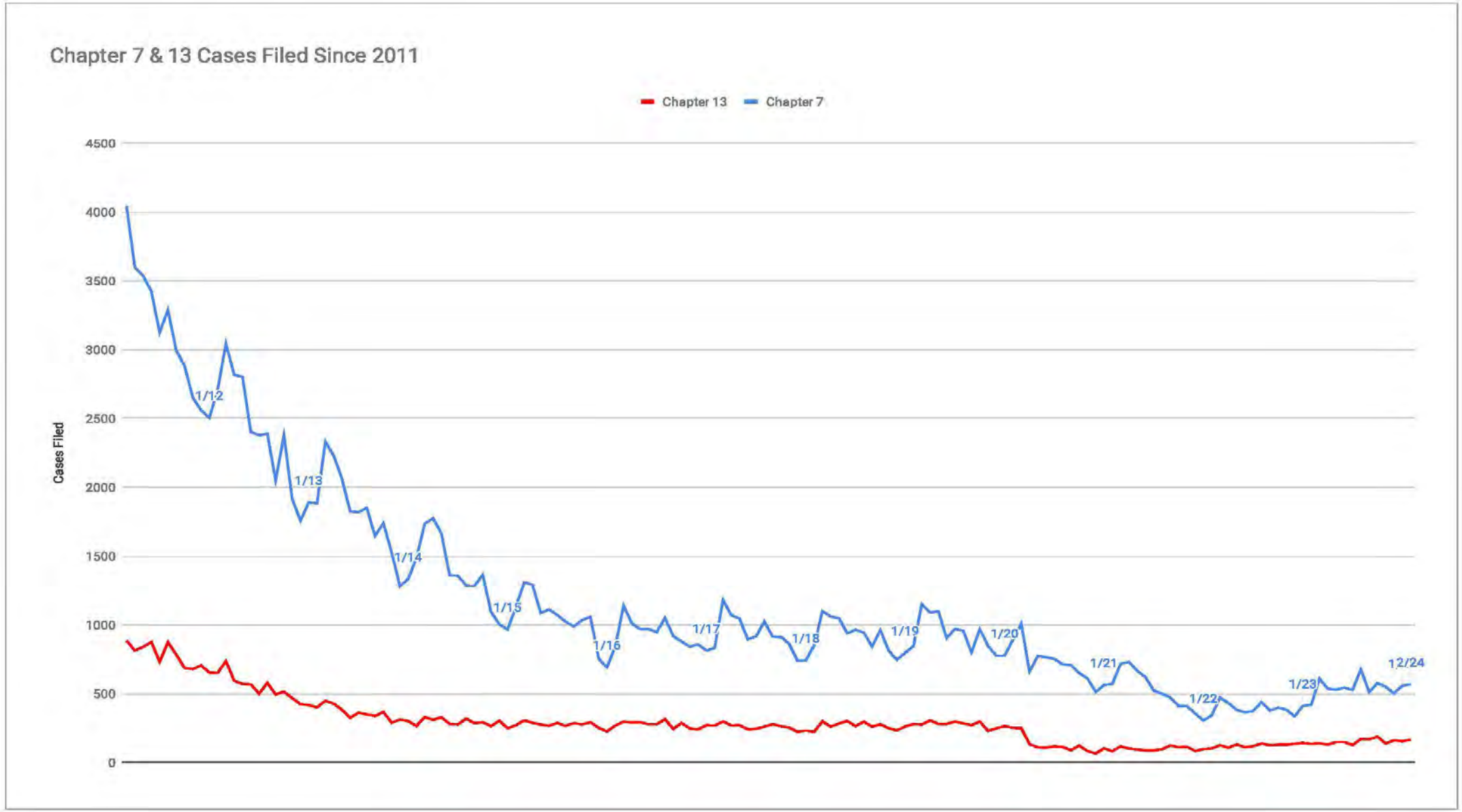
Total Filings by Month

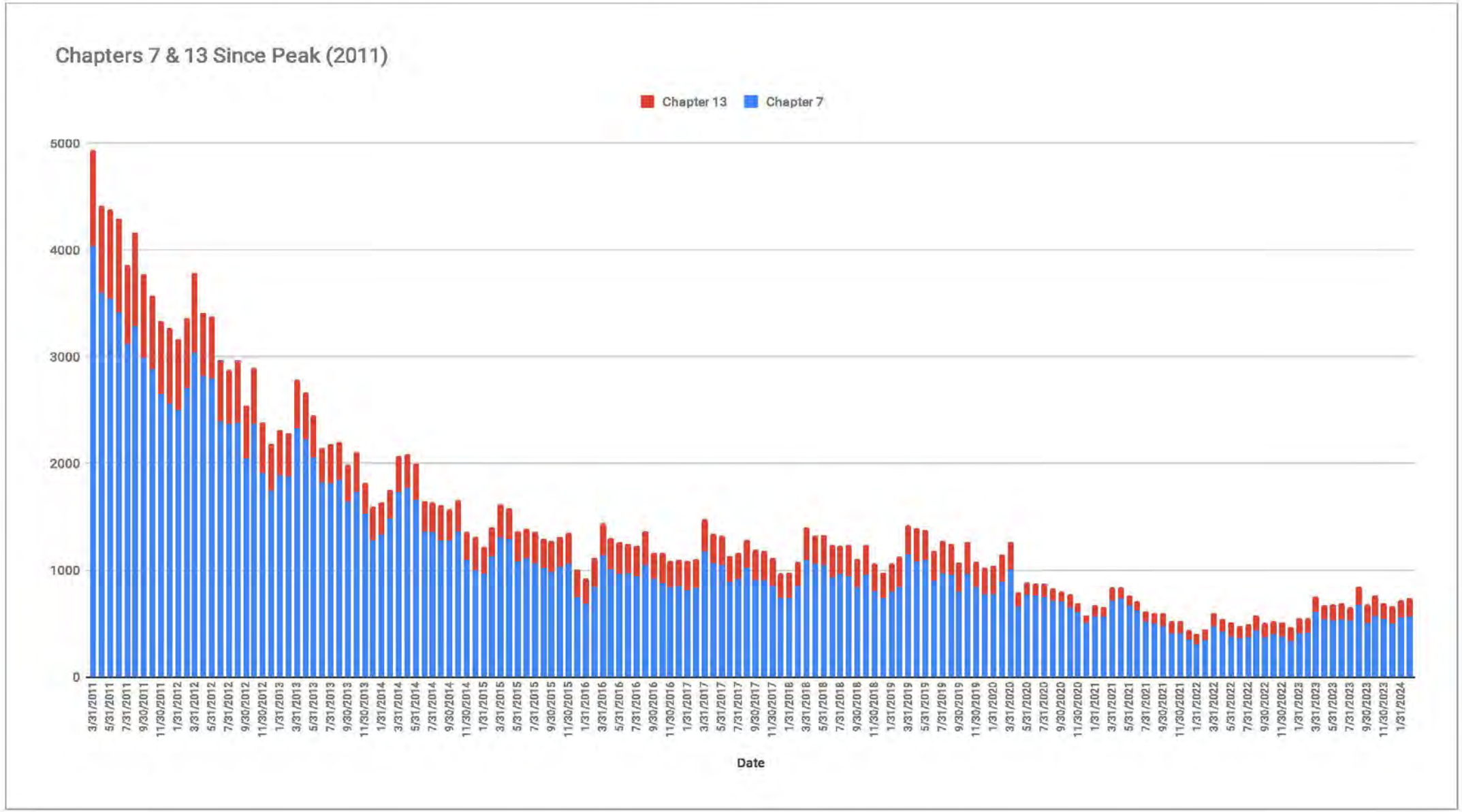


Chapter 7 Filings




Chapter 13 Filings
2019
2020
2021
2022
Median Since 1991
2023
2024
400
300
200
100
0
359
360
379
374
356
370
365
325
336
355
154
164
1
2
3
4
5
6
7
8
9
10
11
12


Chapter 7 & 13 Cases Filed Since 2011
Chapter 13
Chapter 7
Cases Filed
4500
4000
3500
3000
2500
2000
1500
1000
500
0
1/12
1/13
1/14
1/15
1/16
1/17
1/18
1/19
1/20
1/21
1/22
1/23
12/24


Chapters 7 & 13 Since Peak (2011)
Chapter 13
Chapter 7
5000
4000
3000
2000
1000
0
3/31/2011
5/31/2011
7/31/2011
9/30/2011
11/30/2011
1/31/2012
3/31/2012
5/31/2012
7/31/2012
9/30/2012
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11/30/2022
1/31/2023
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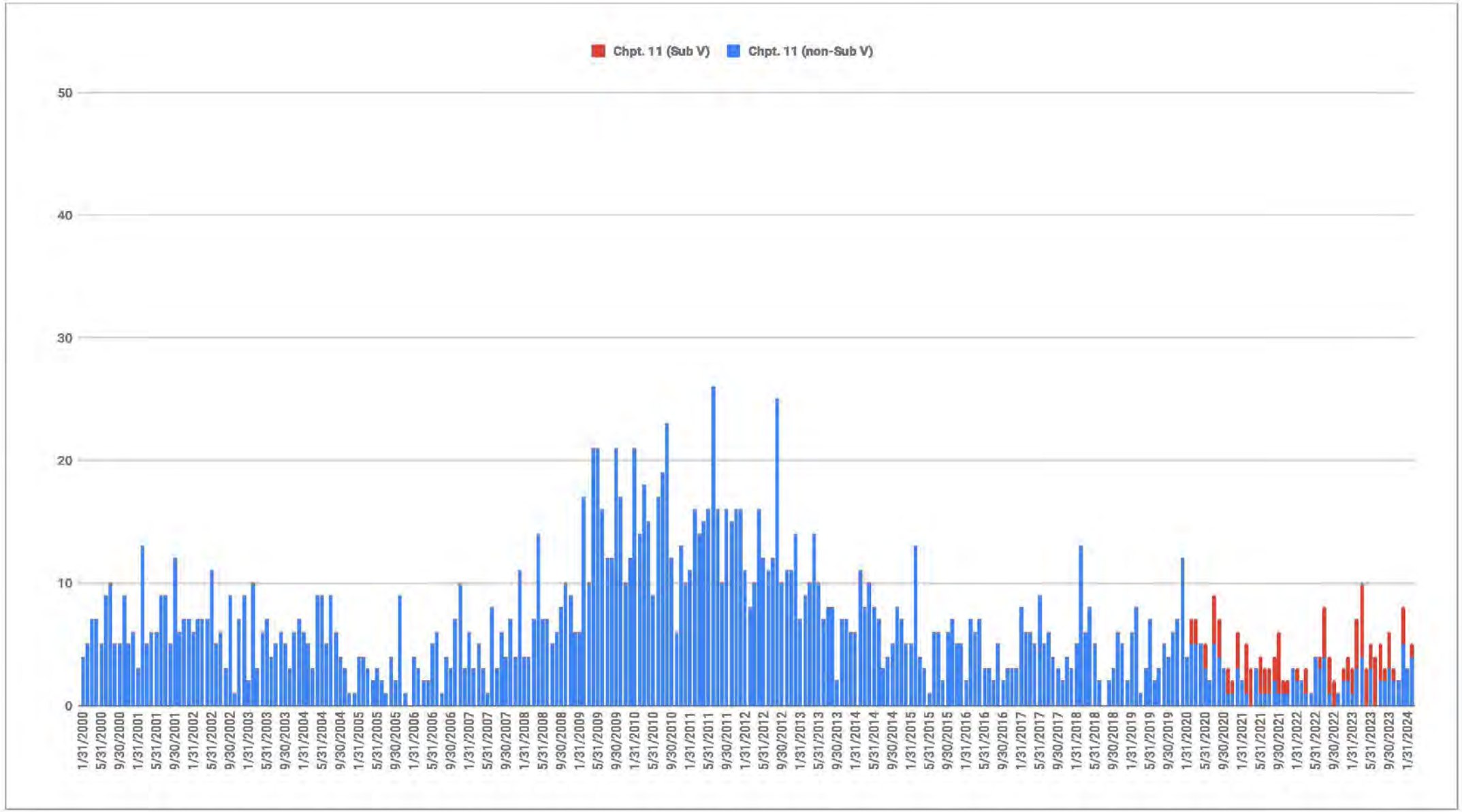
9/30/2023
11/30/2023
1/31/2024
Date


Chpt. 11 (Sub V)
Chpt. 11 (non-Sub V)
50
40
30
20
10
0
1/31/2000
5/31/2000
9/30/2000
1/31/2001
5/31/2001
9/30/2001
1/31/2002
5/31/2002
9/30/2002
1/31/2003
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1/31/2021
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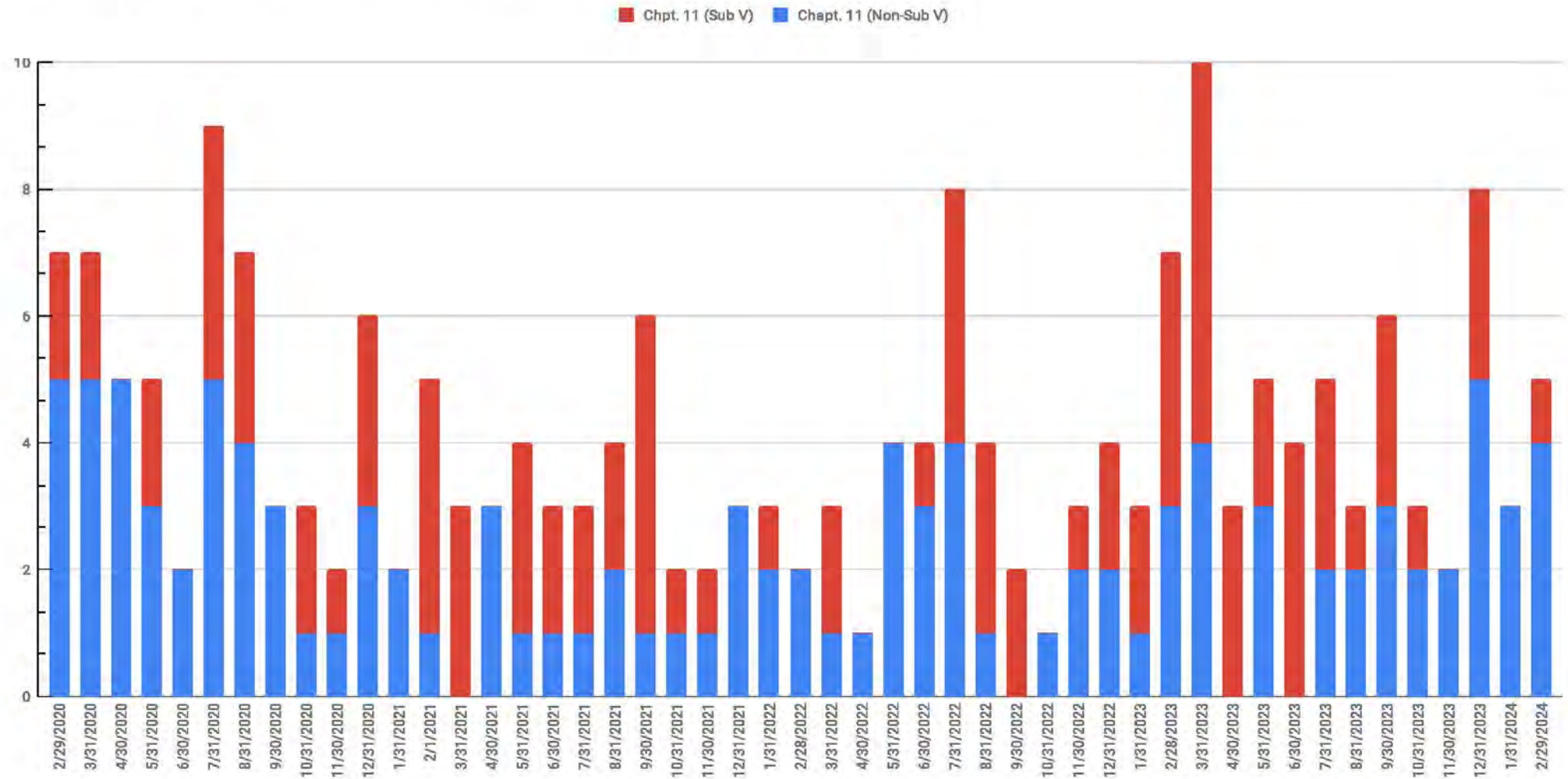
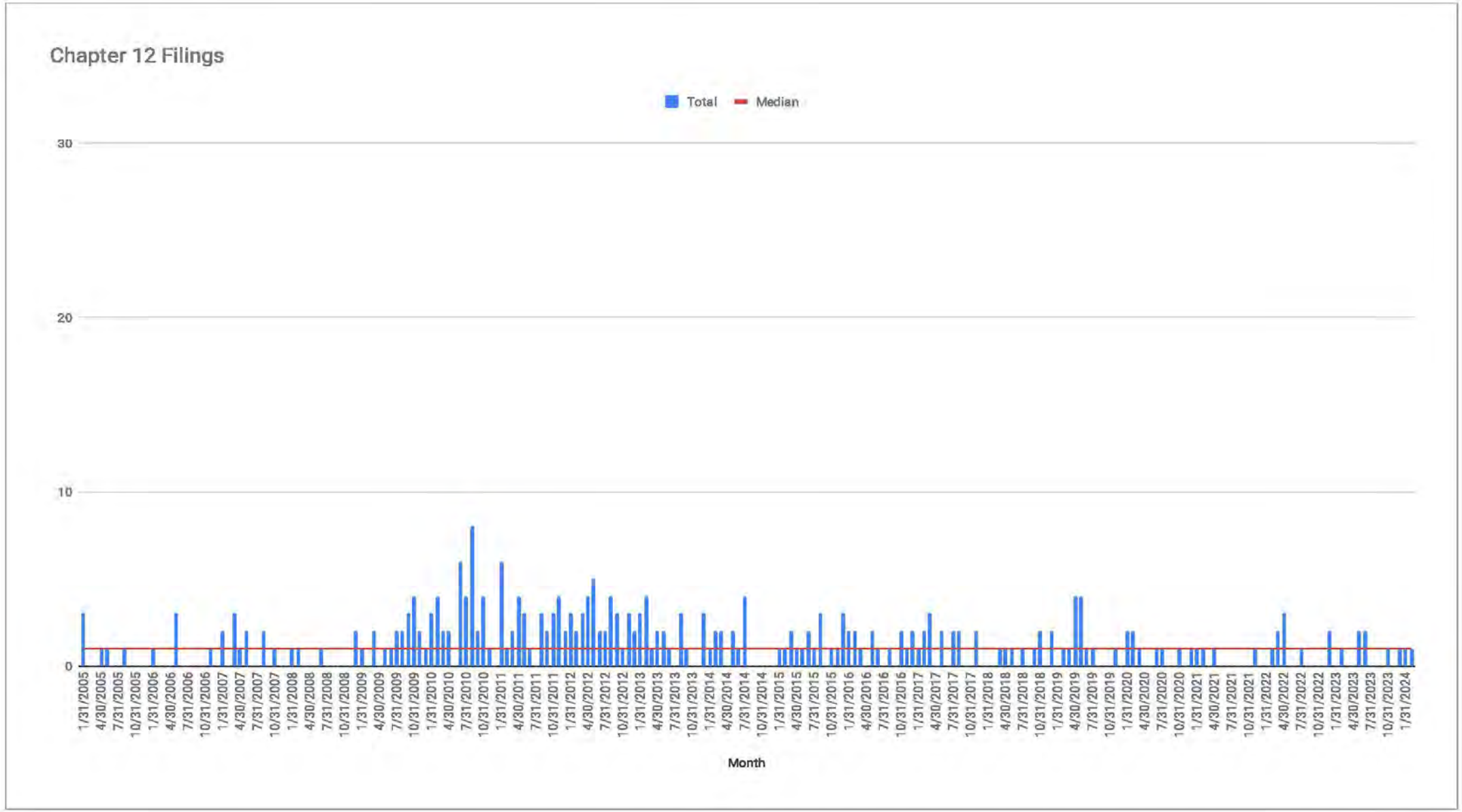
9/30/2021
1/31/2022
5/31/2022
9/30/2022
1/31/2023
5/31/2023
9/30/2023
1/31/2024

Chapter 11 Since Introduction of Subchapter V Legislation




Chapter 12 Filings
Total
Median
30
20
10
0
1/31/2005
4/30/2005
7/31/2005
10/31/2005
1/31/2006
4/30/2006
7/31/2006
10/31/2006
1/31/2007
4/30/2007
7/31/2007
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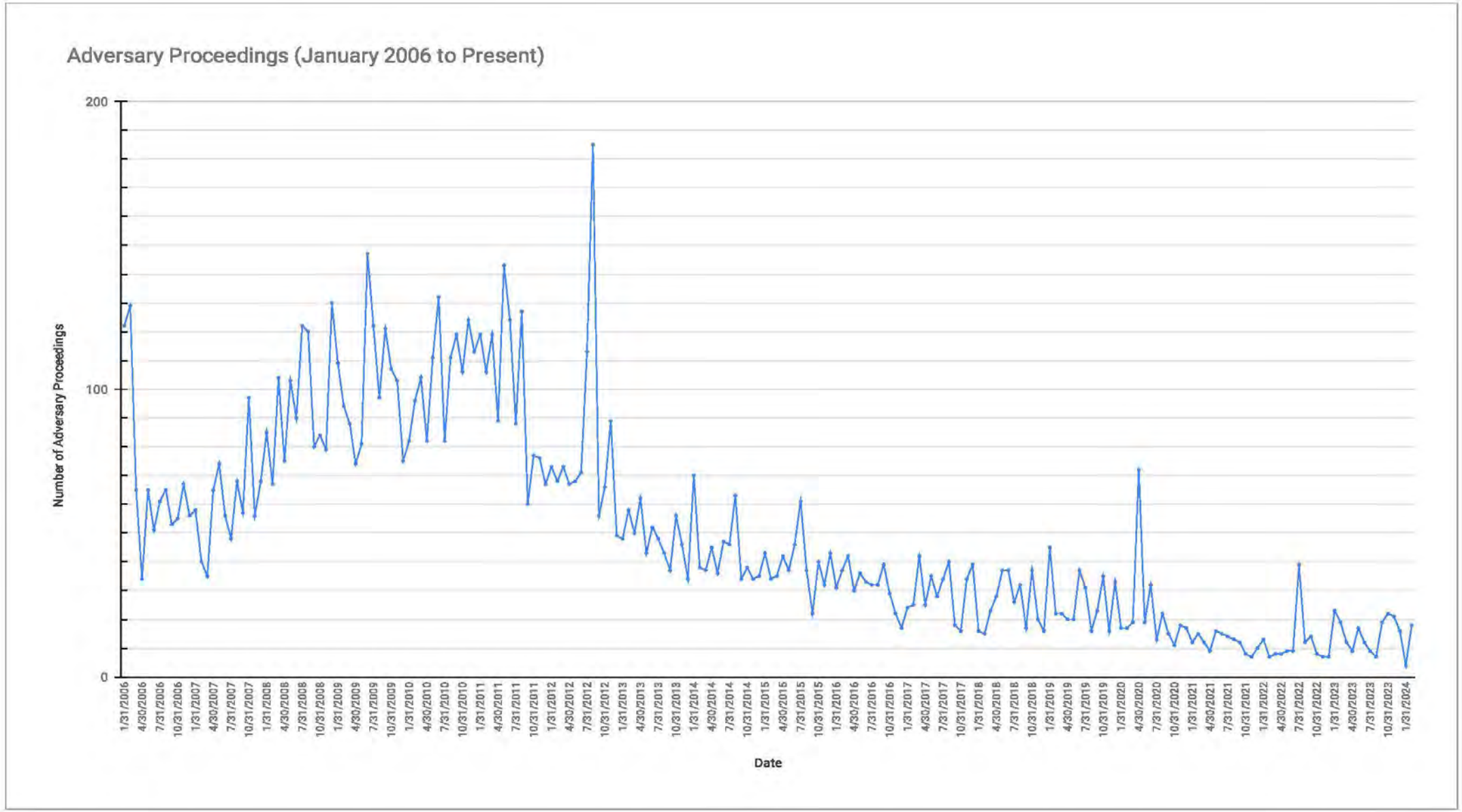
7/31/2022
10/31/2022
1/31/2023
4/30/2023
7/31/2023
10/31/2023
1/31/2024
Month


Adversary Proceedings (January 2006 to Present)
Number of Adversary Proceedings
200
100
0
Date
1/31/2006
4/30/2006
7/31/2006
10/31/2006
1/31/2007
4/30/2007
7/31/2007
10/31/2007
1/31/2008
4/30/2008
7/31/2008
10/31/2008
1/31/2009
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7/31/2009
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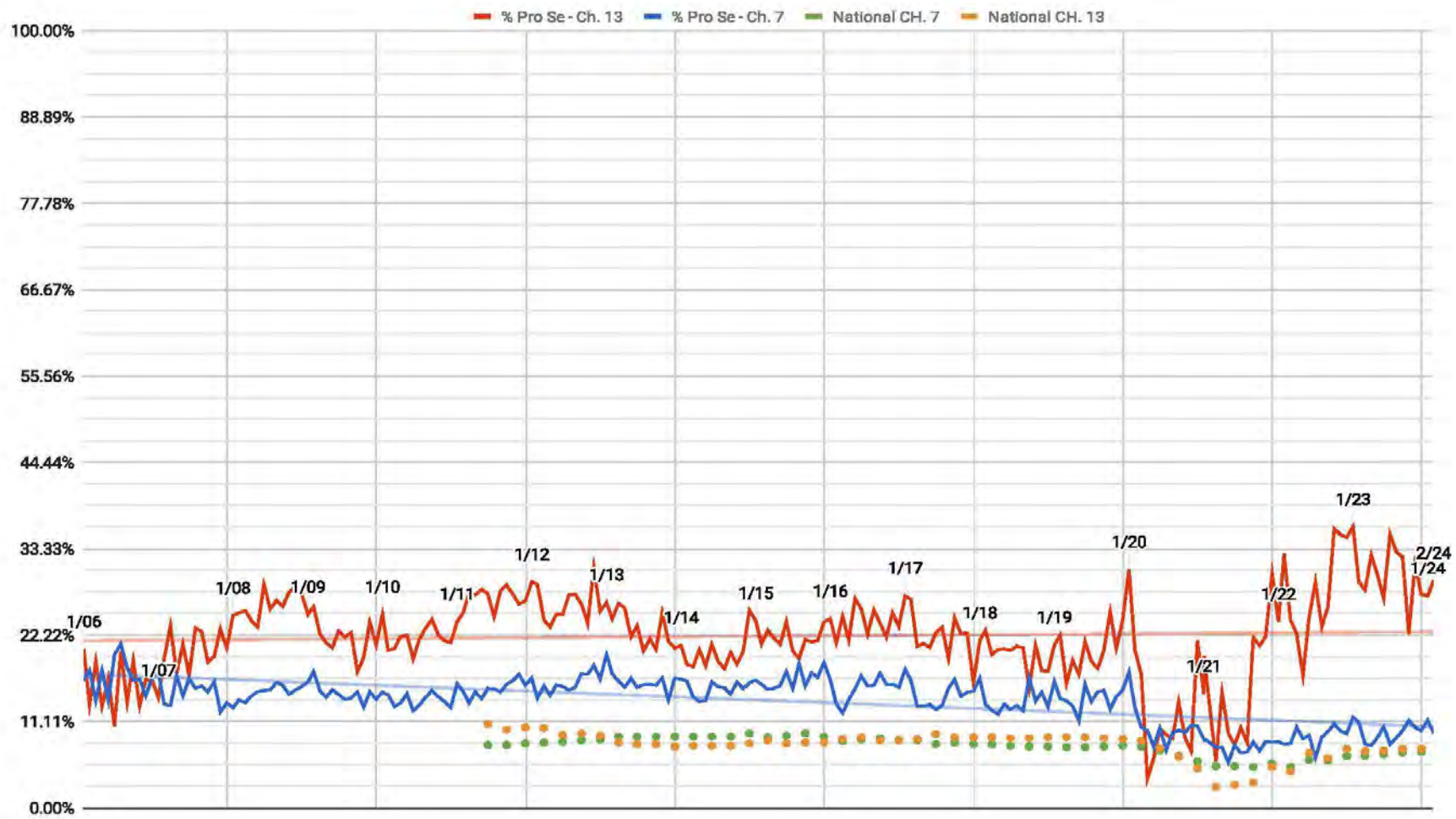
10/31/2021
1/31/2022
4/30/2022
7/31/2022
10/31/2022
1/31/2023
4/30/2023
7/31/2023
10/31/2023
1/31/2024

Pro Se Percentage (Jan. 2006 - Present)



THANK YOU.

Real Estate Market Update & Outlook

A Look Back at 2023 and
Look Ahead to What's in Store for 2024

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What We'll Cover Today

- The Economy
- The Housing Market
- The Commercial Market
- Closing Thoughts

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THE ECONOMY

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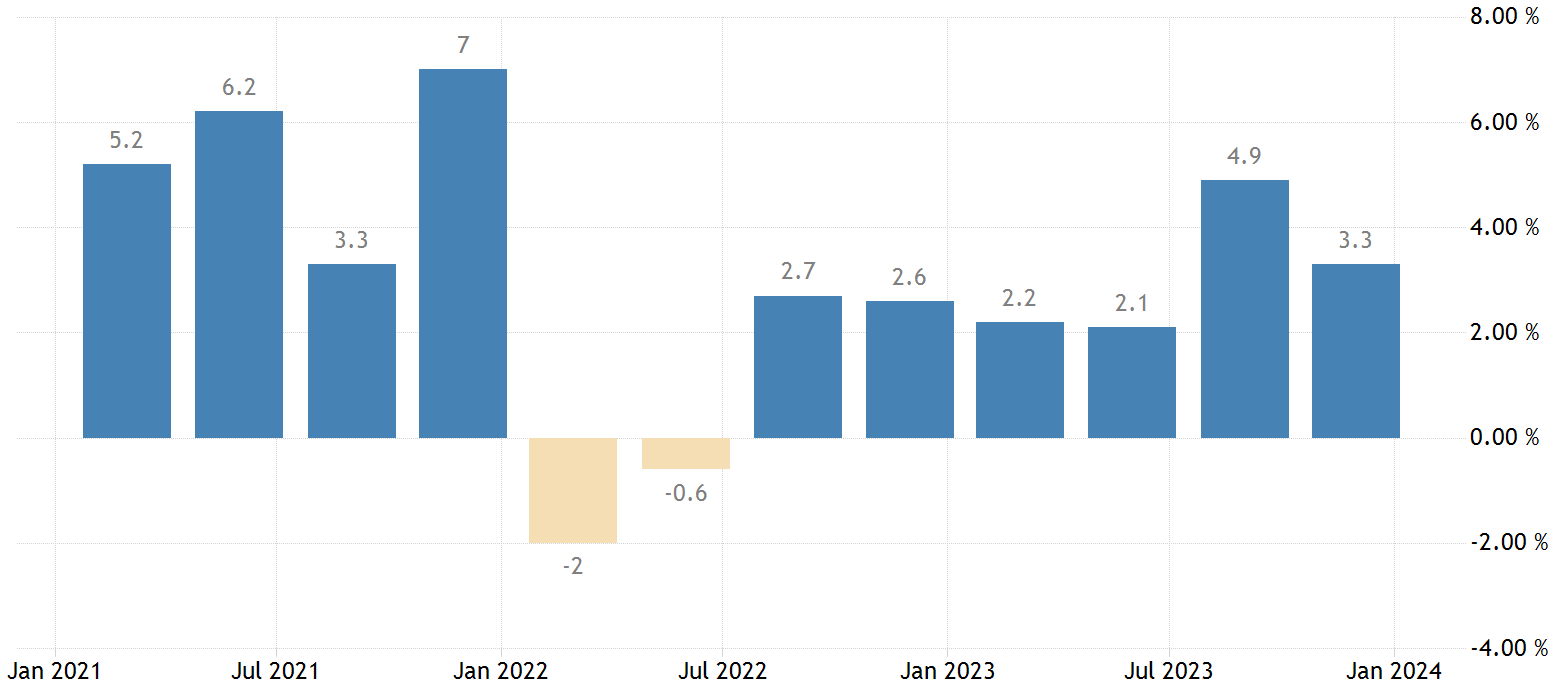
GDP Remains Strong Despite Pessimistic Outlook



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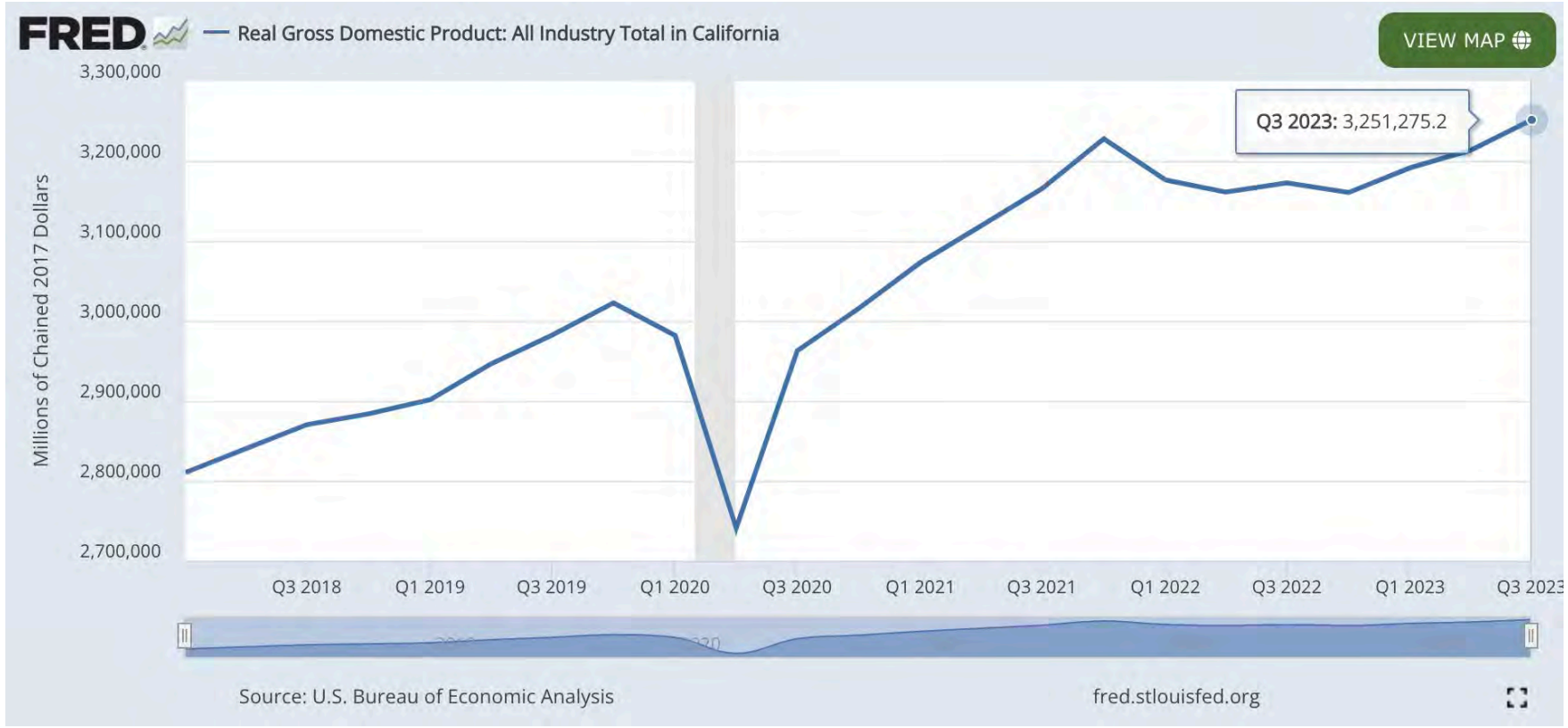
California GDP Continues to Grow at Similar Pace



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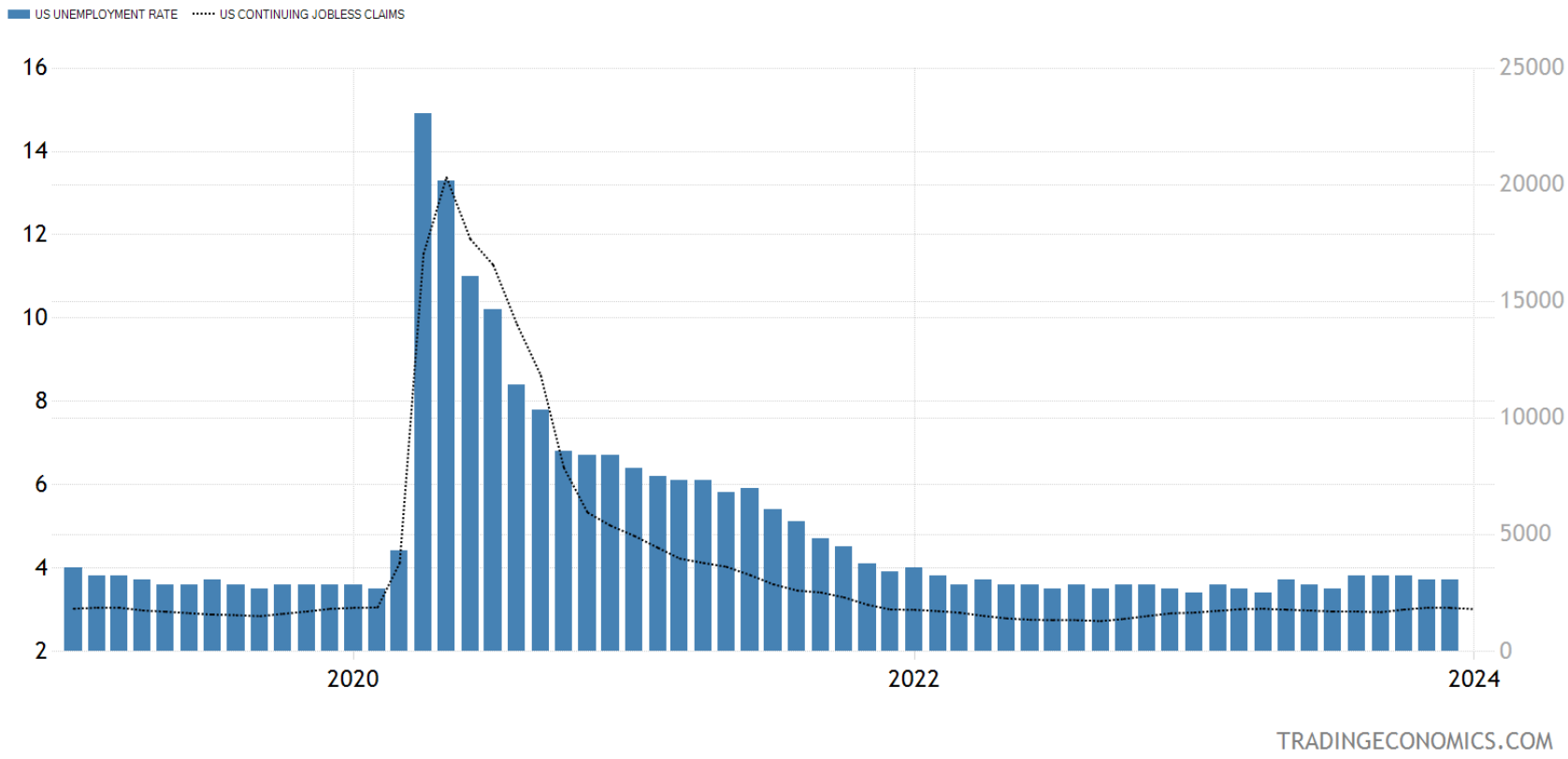
Unemployment Stays Near Historically Low Levels



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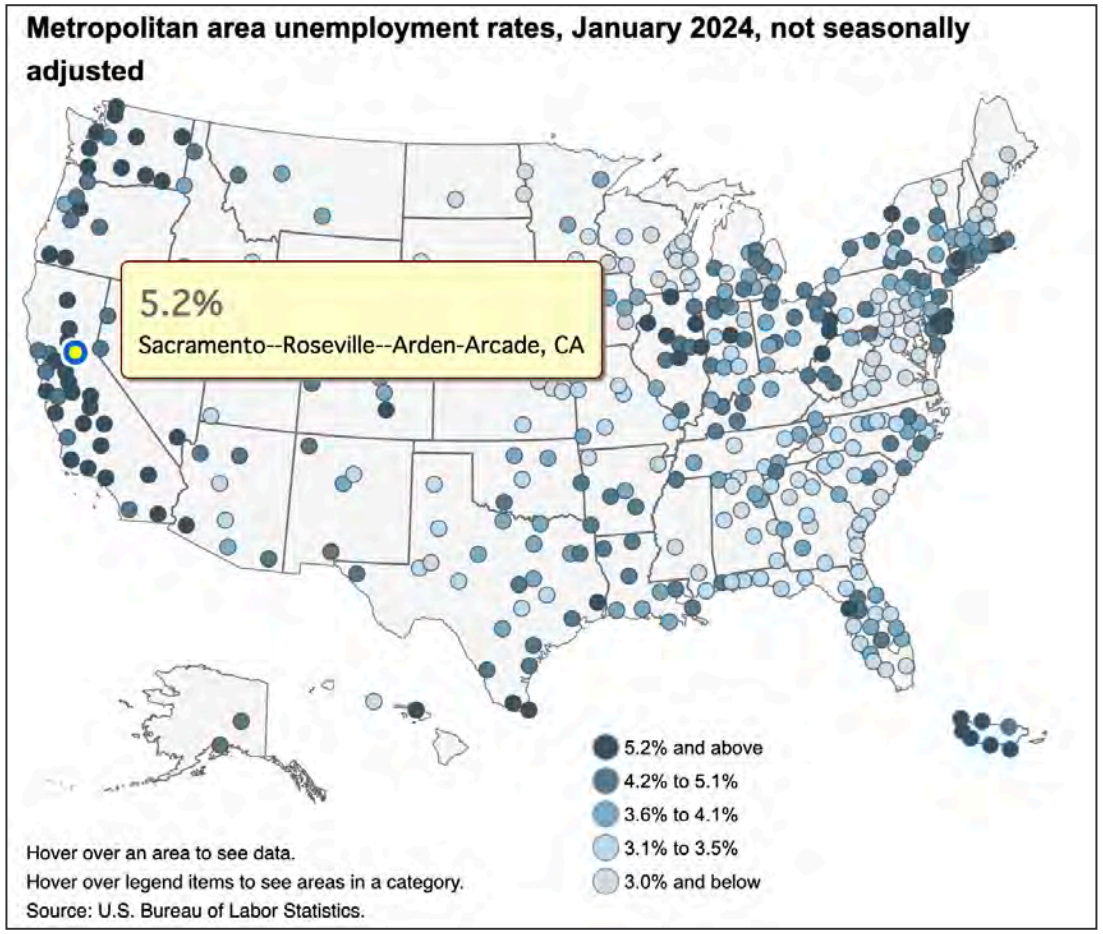
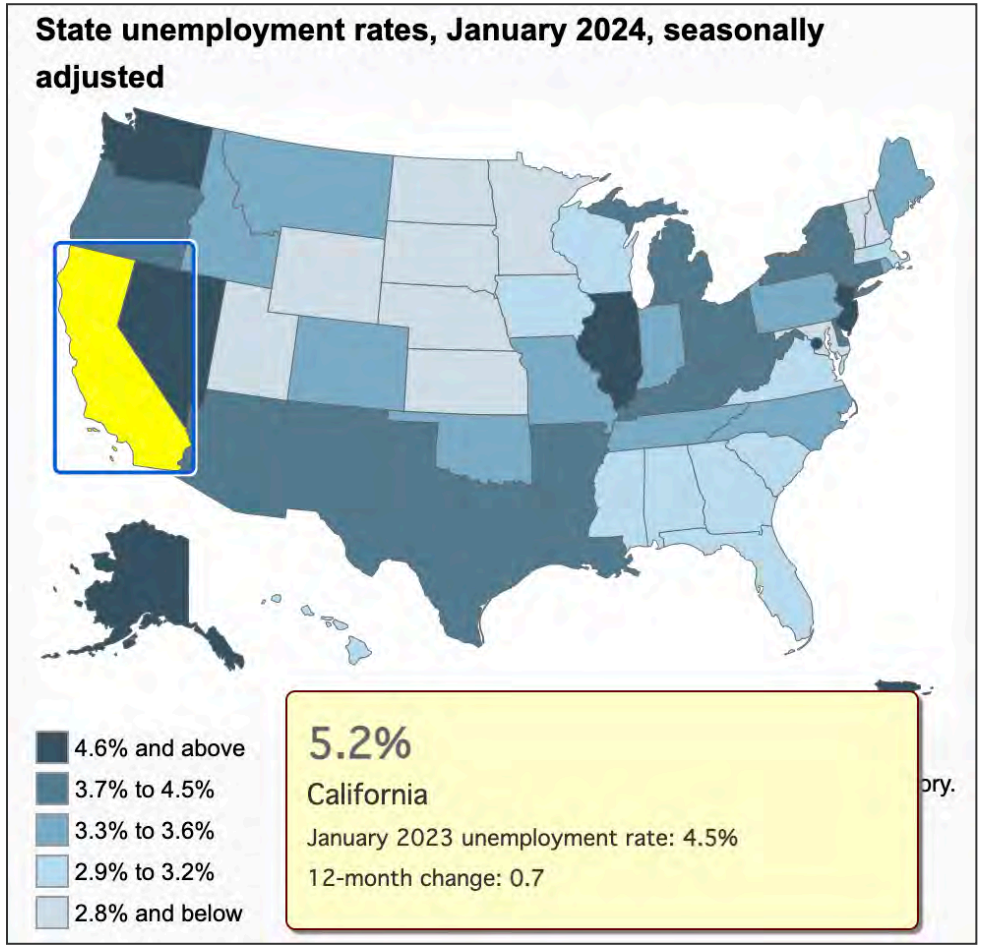
CA State & Regional Unemployment Among Highest in the Nation





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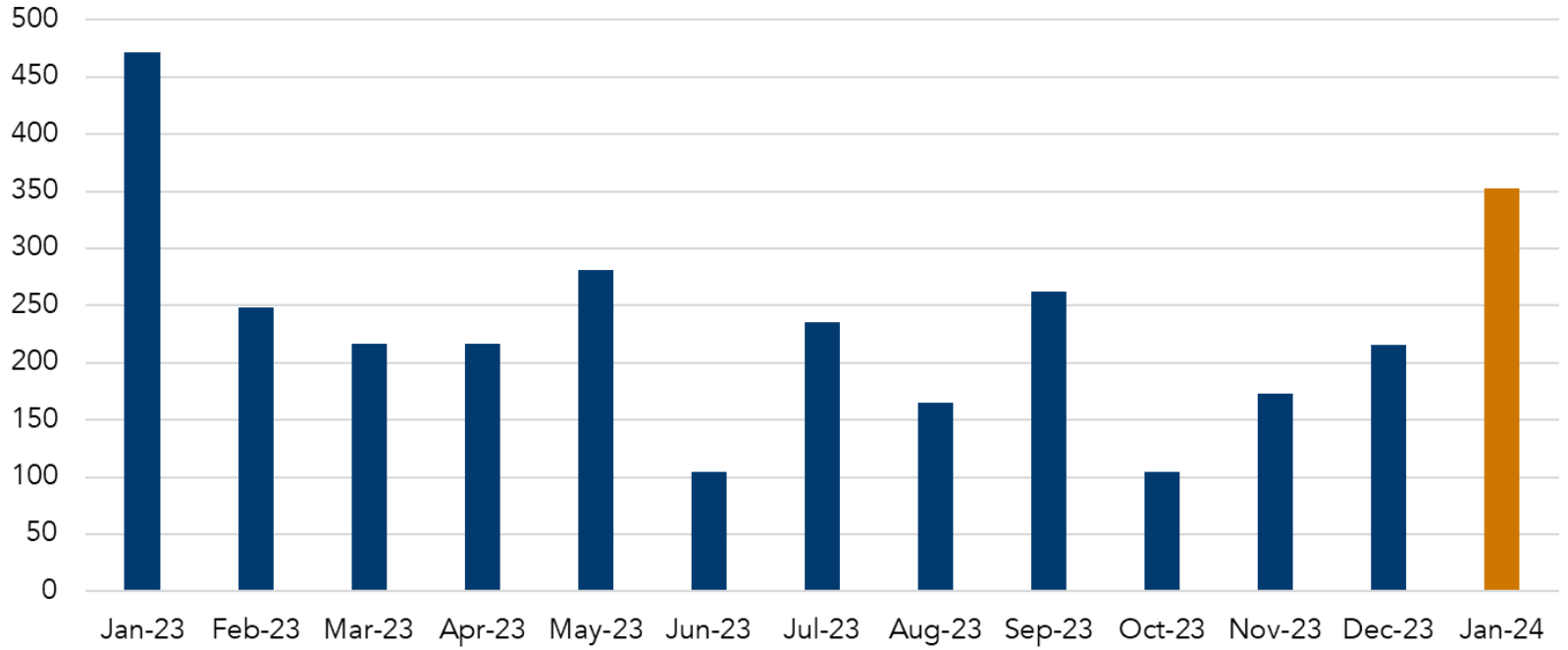
Strong Job Growth, and More Jobs Available Than People Looking for Work

Job Gains Surprise to the Upside

Monthly Change in Total Nonfarm Employment (Thousands, SA)



Source: Bureau of Labor Statistics, Jan. 2024

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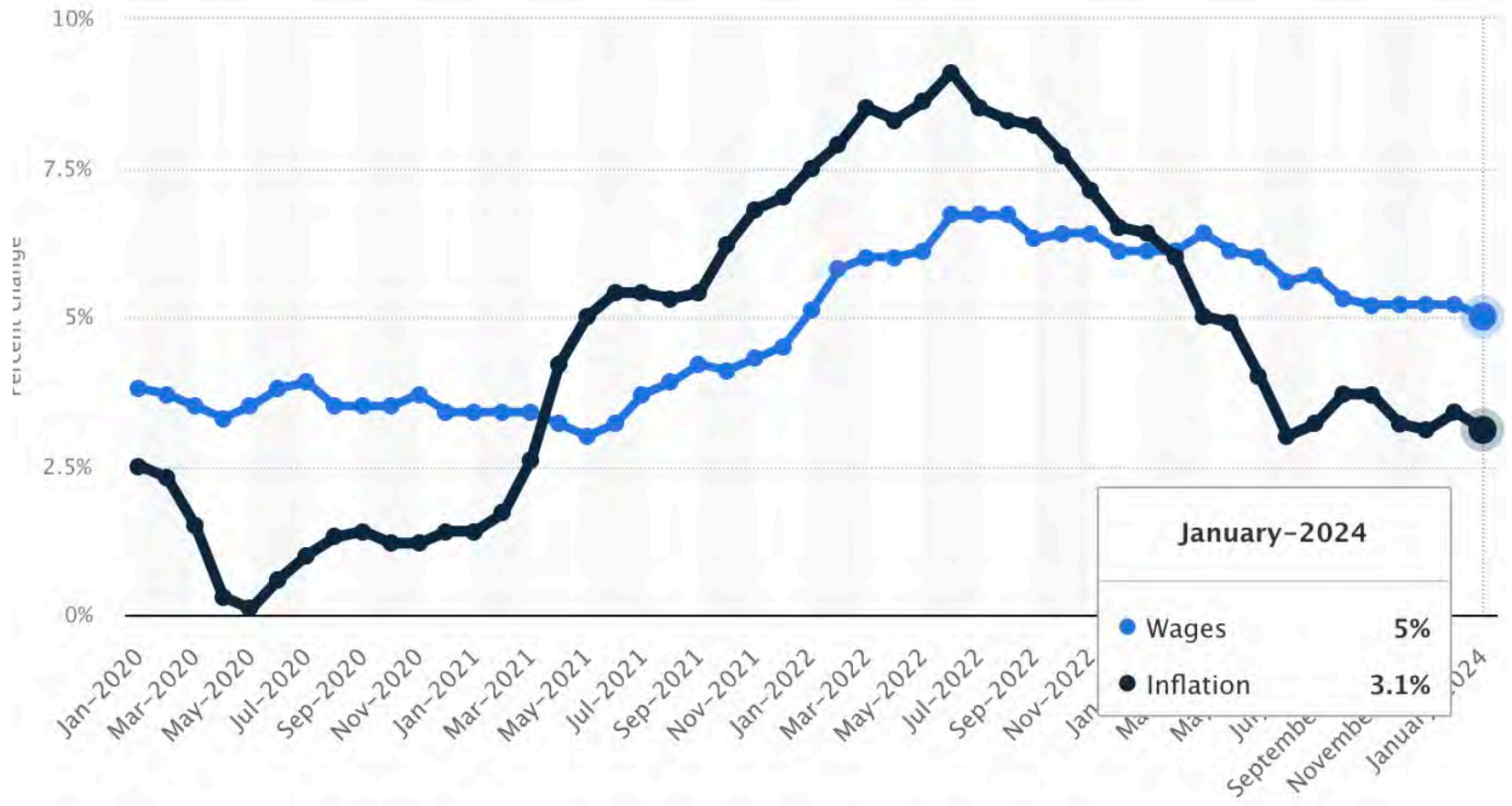
Driving Wage Growth to Outpace Inflation



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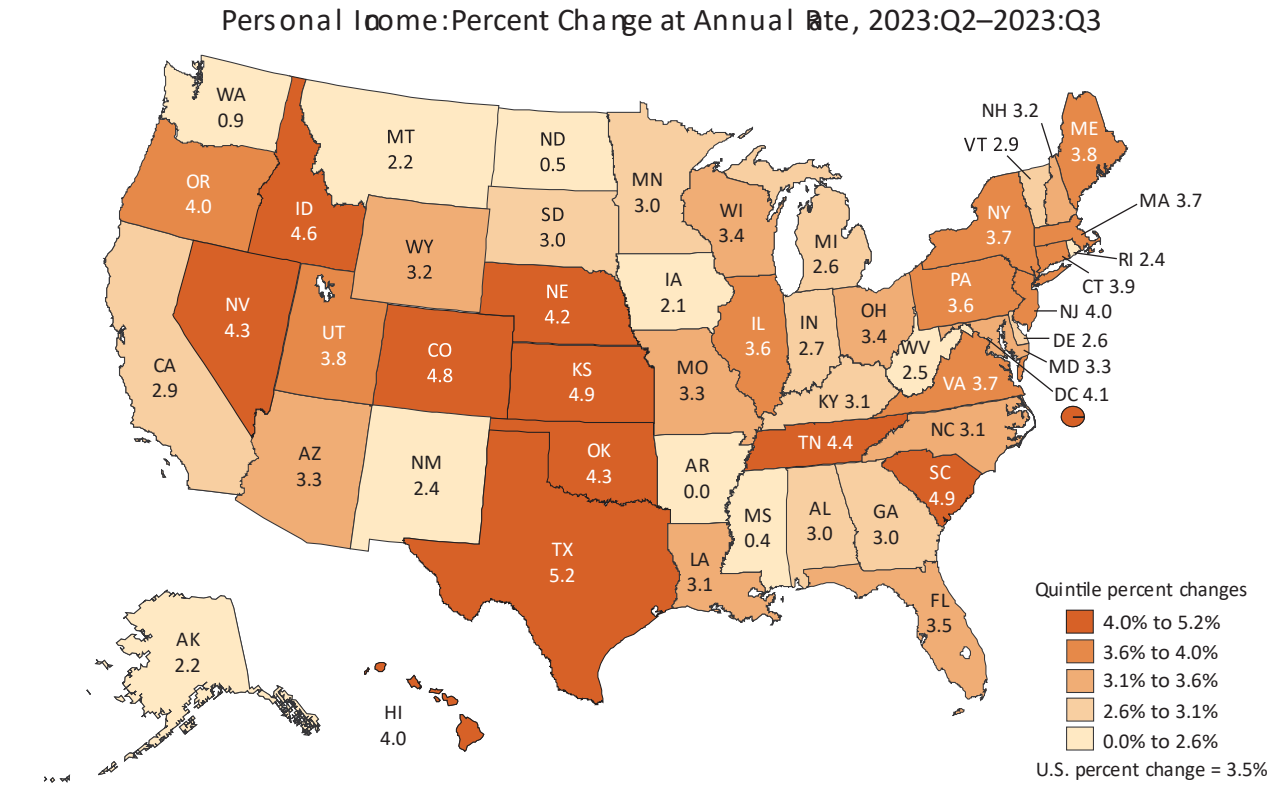
California Wage Growth Lags Behind National Numbers



U.S. Bureau of Economic Analysis

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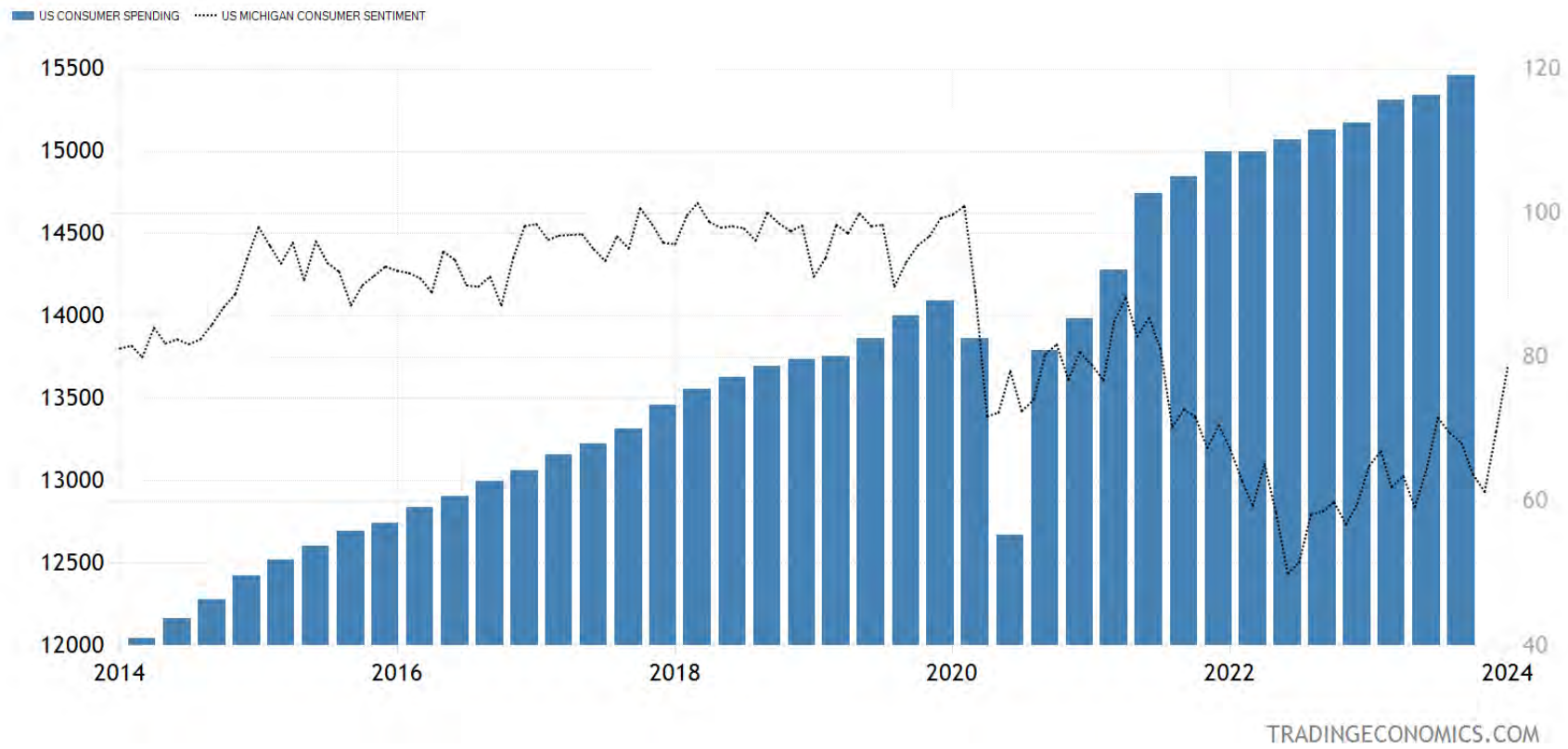
Consumer Spending Still Strong as Consumer Confidence Rises



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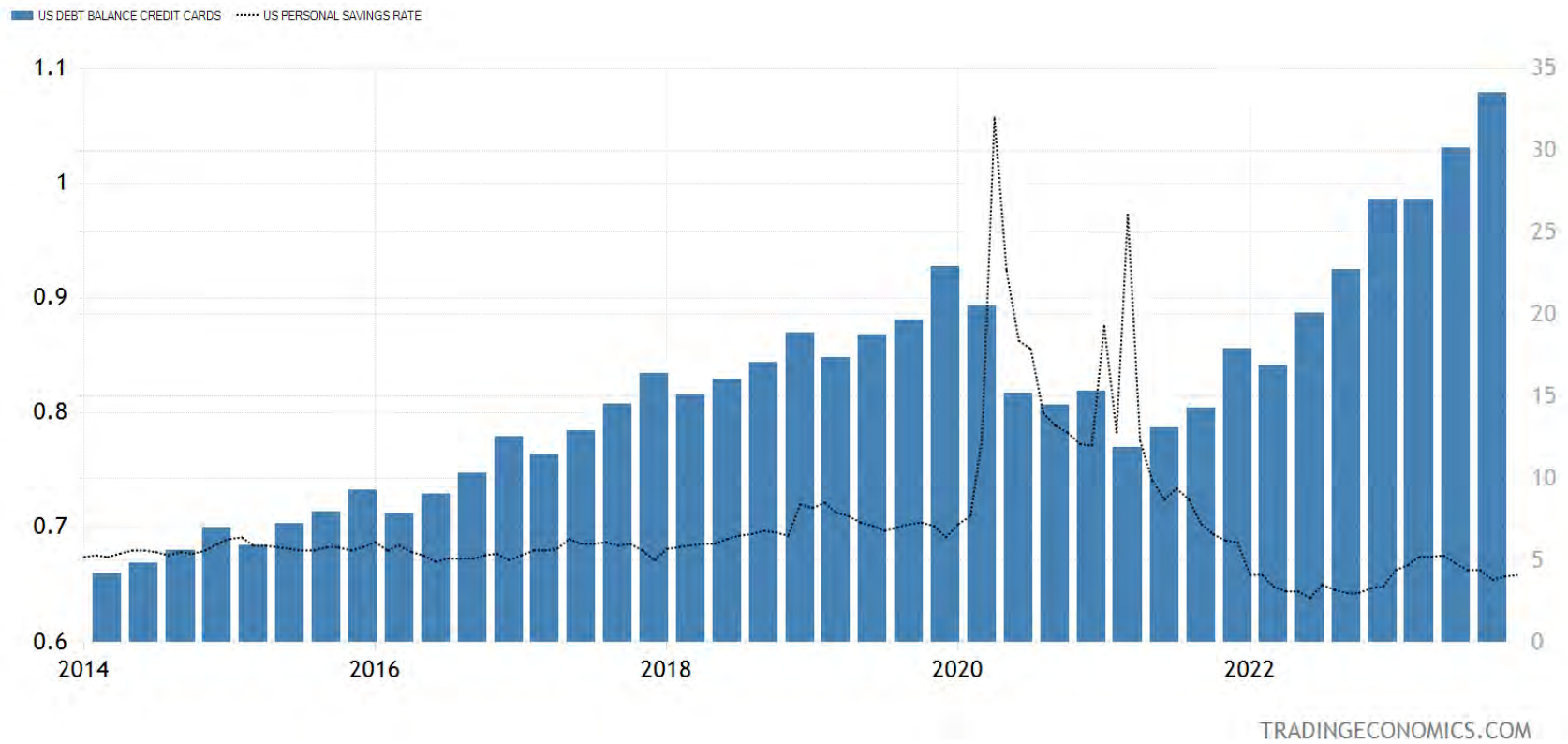
Credit Card Use Surpasses $1 Trillion While Savings Decline



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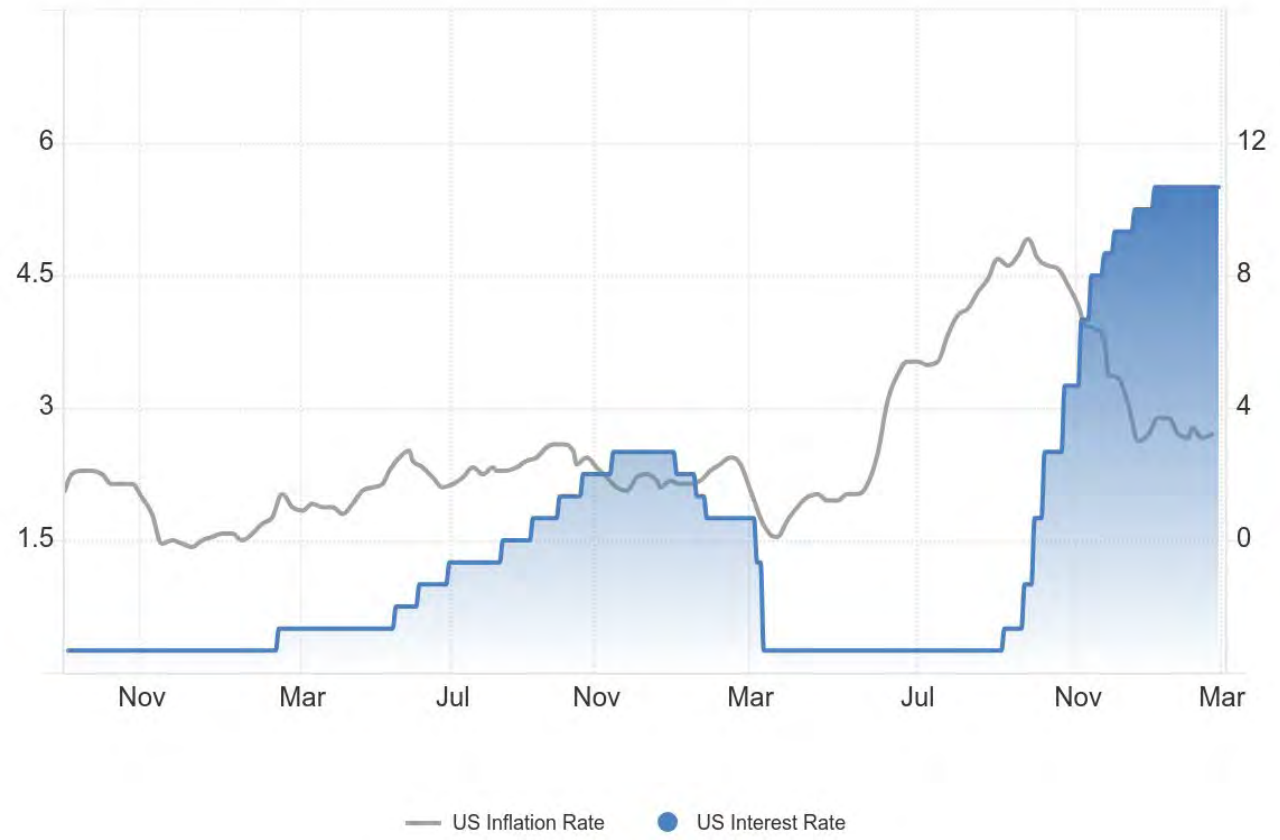
Inflation Has Peaked, but Fed Shows No Signs of Imminent Rate Cuts

Source: tradingeconomics.com



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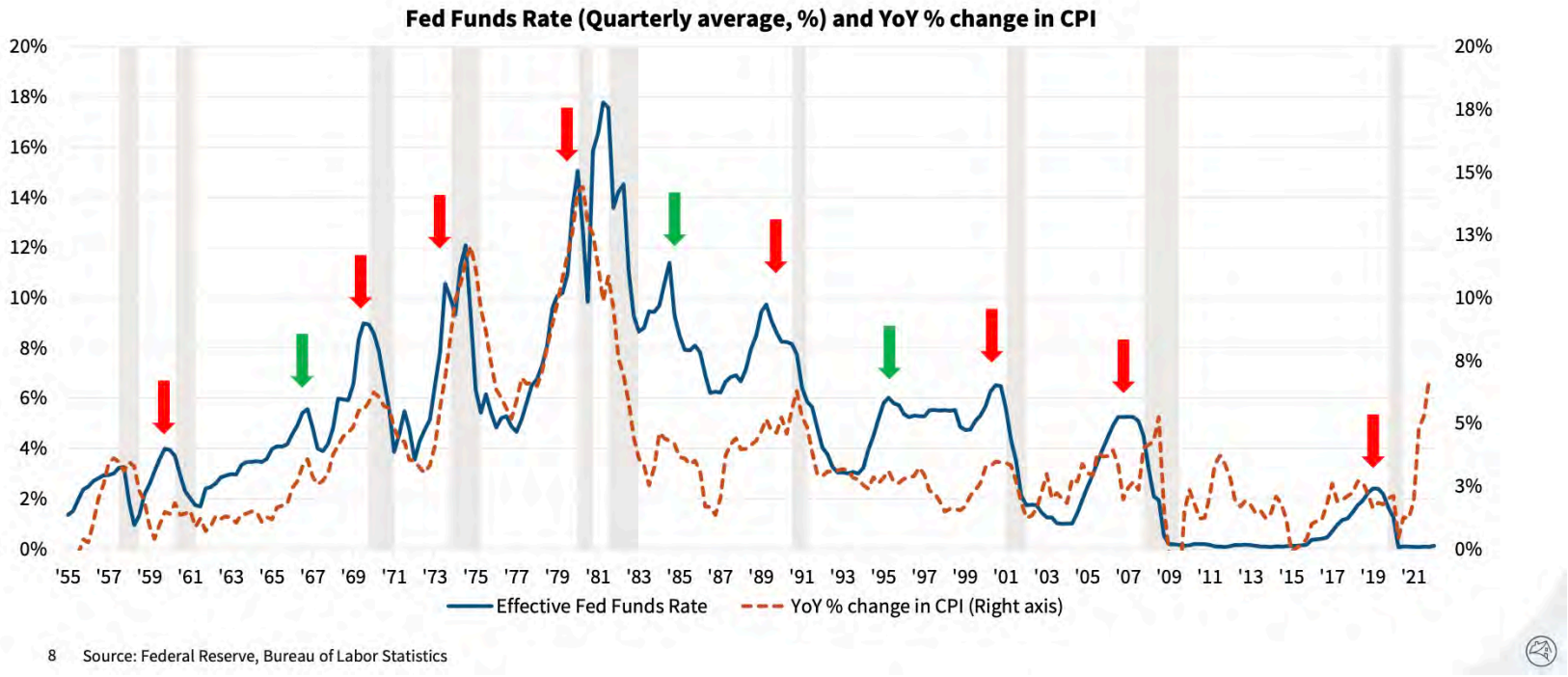
Is it Already Too Late to Avoid a Recession?

Fed funds rate increases often point toward next downturn

In times when the Fed has managed a "soft landing," they were generally moving preemptively



8 Source: Federal Reserve, Bureau of Labor Statistics

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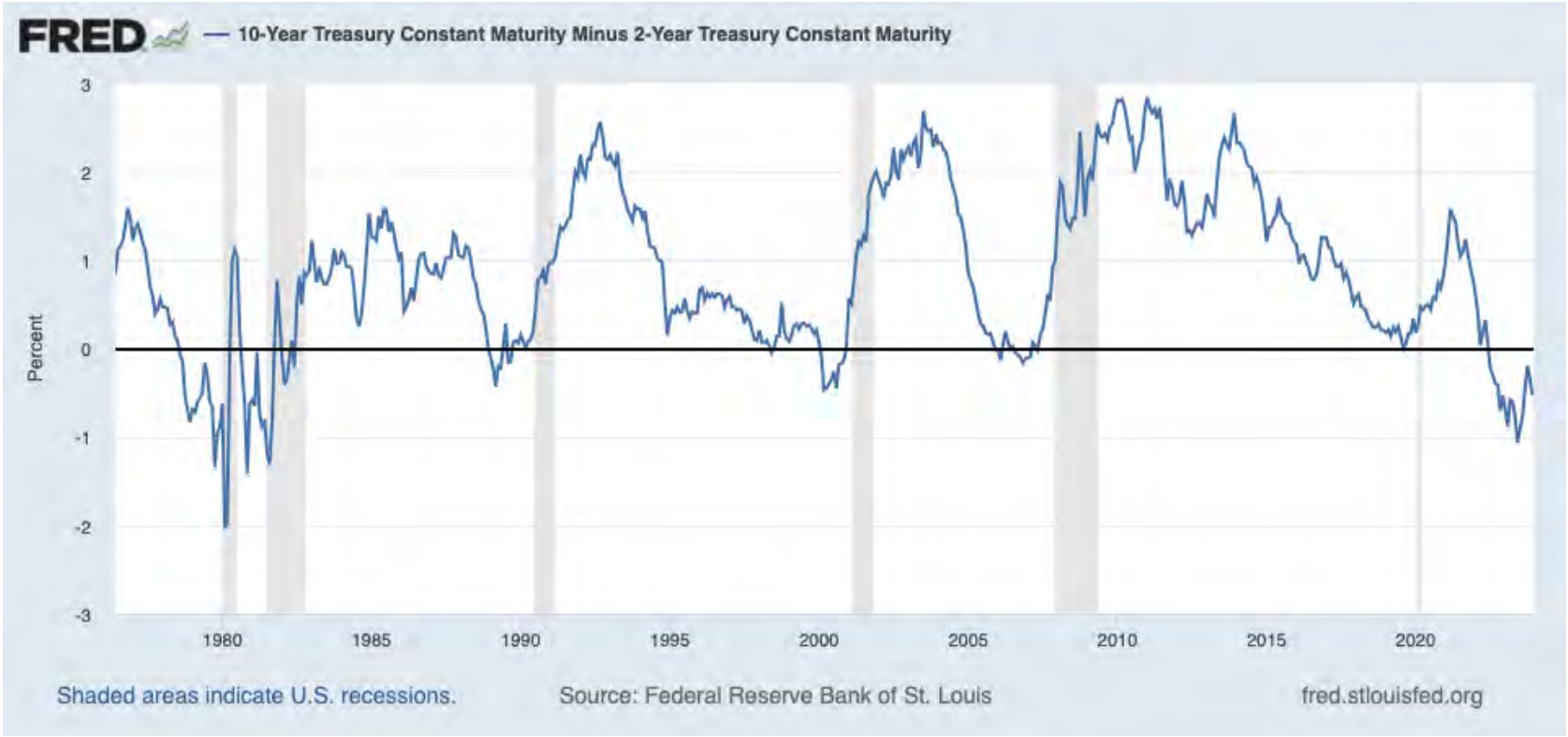
Inverted Yield Curve Also Points to a Recession



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Mortgage Rates Still Near 20-Year Highs

Source: Mortgage News Daily 03-12--24

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Causing Mortgage Applications to Remain Weak

Source: Mortgage News Daily 02-06--24

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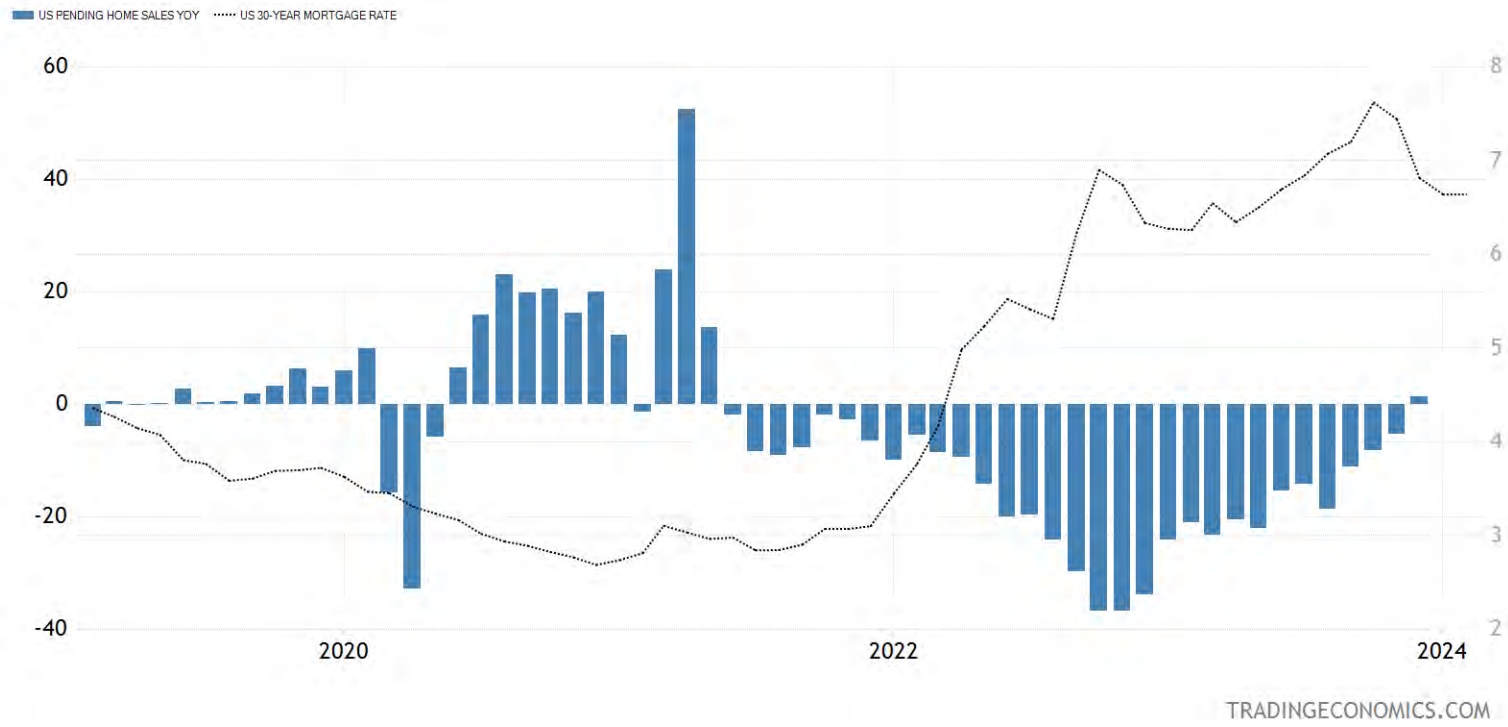
Pending Sales Plummeted as Mortgage Rates Rose



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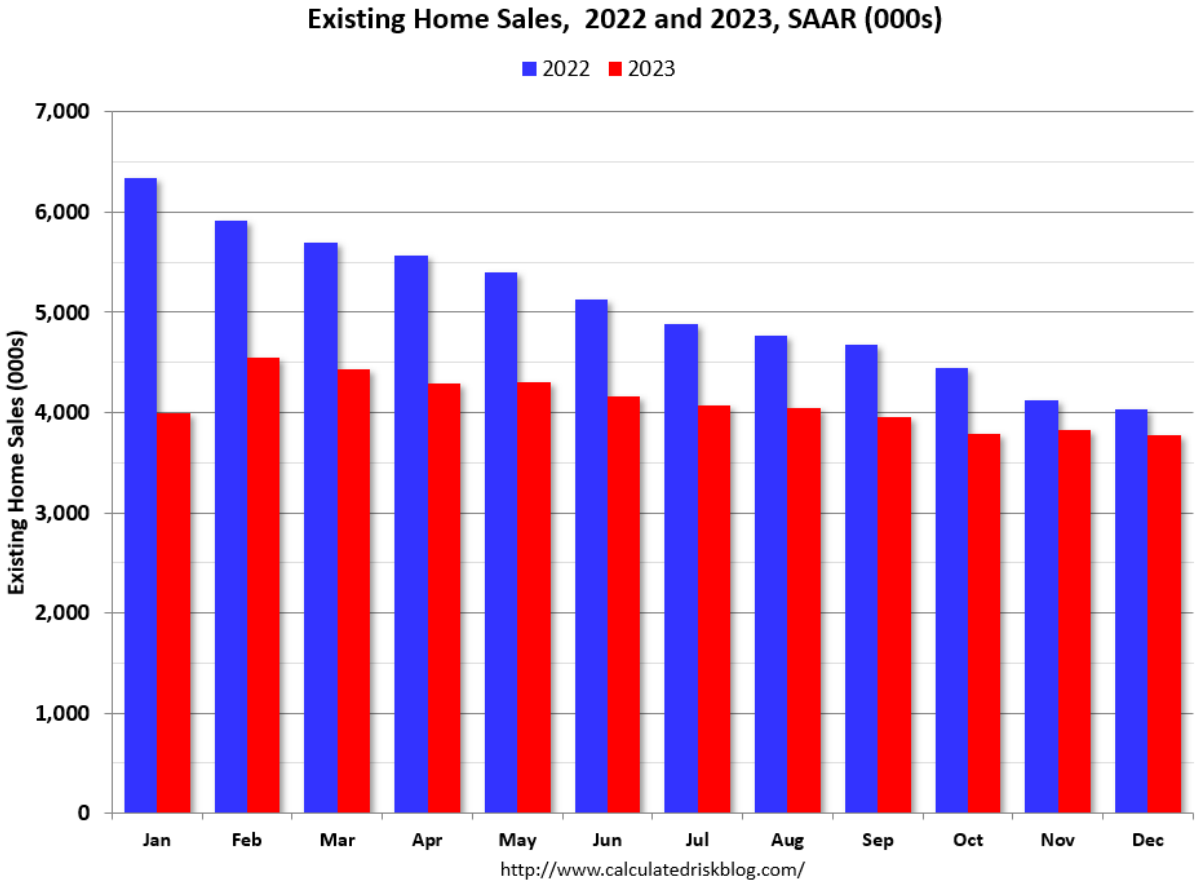
December: 28th Consecutive Month of Lower Y-O-Y Home Sales



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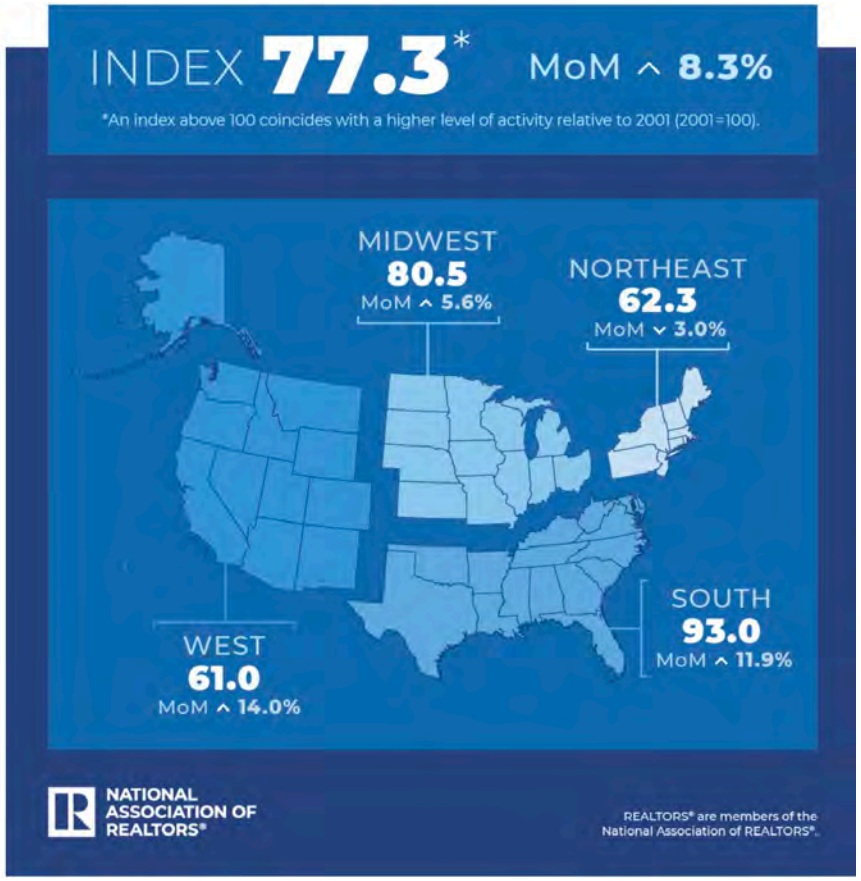
January Sales Up from December, but Down from 2023



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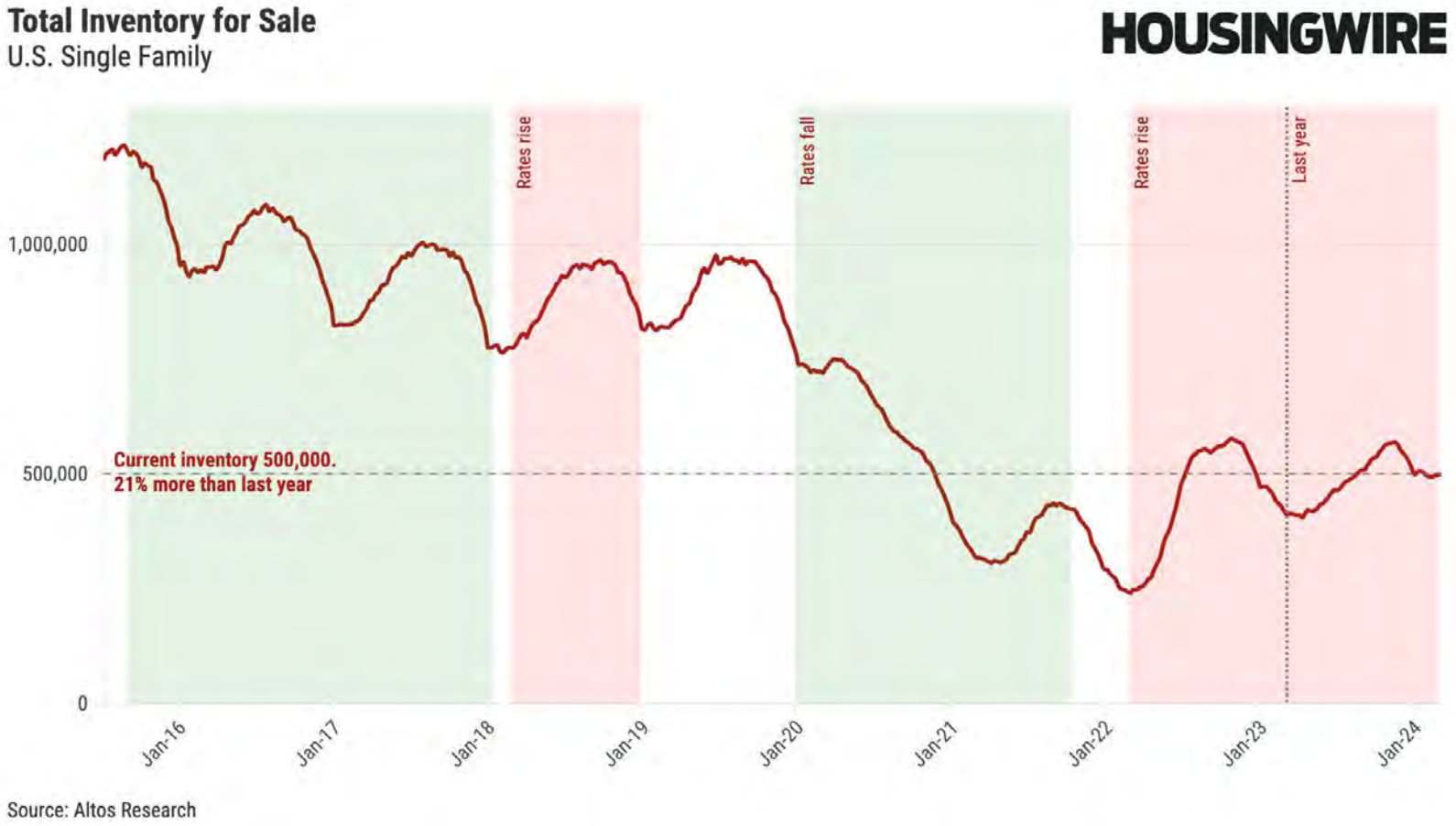
Inventory up 21% from Last Year; Still About Half of 2019 Levels



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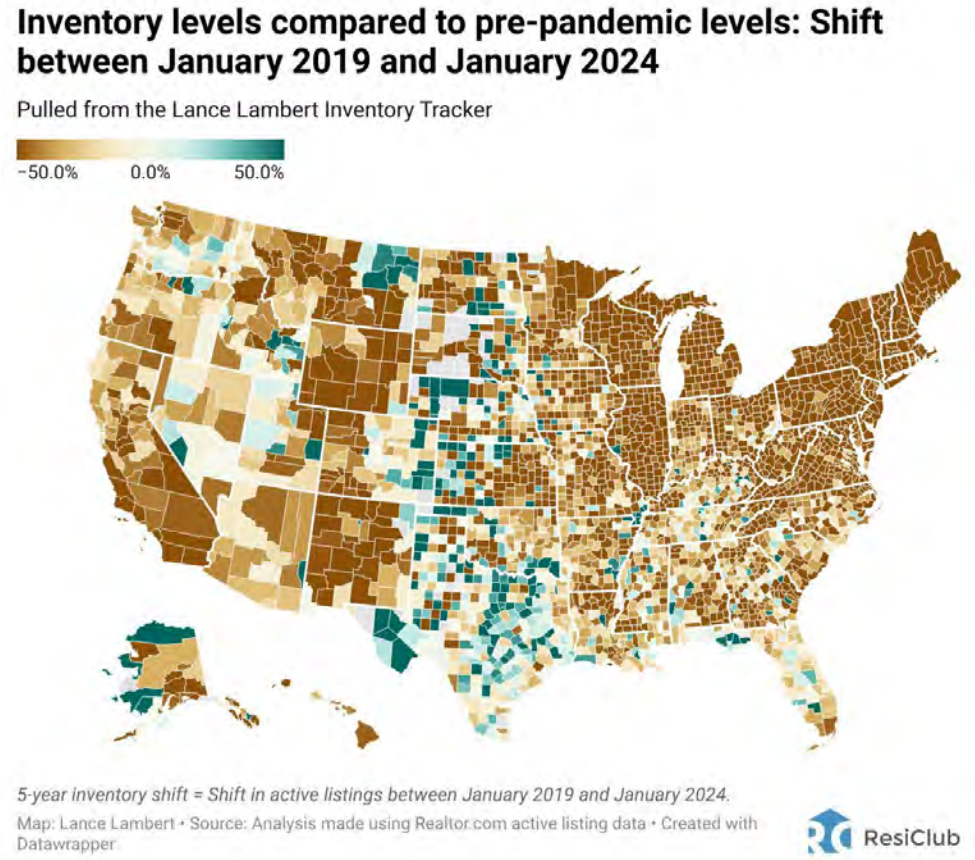
Much of the Increased Inventory in the Midwest and South



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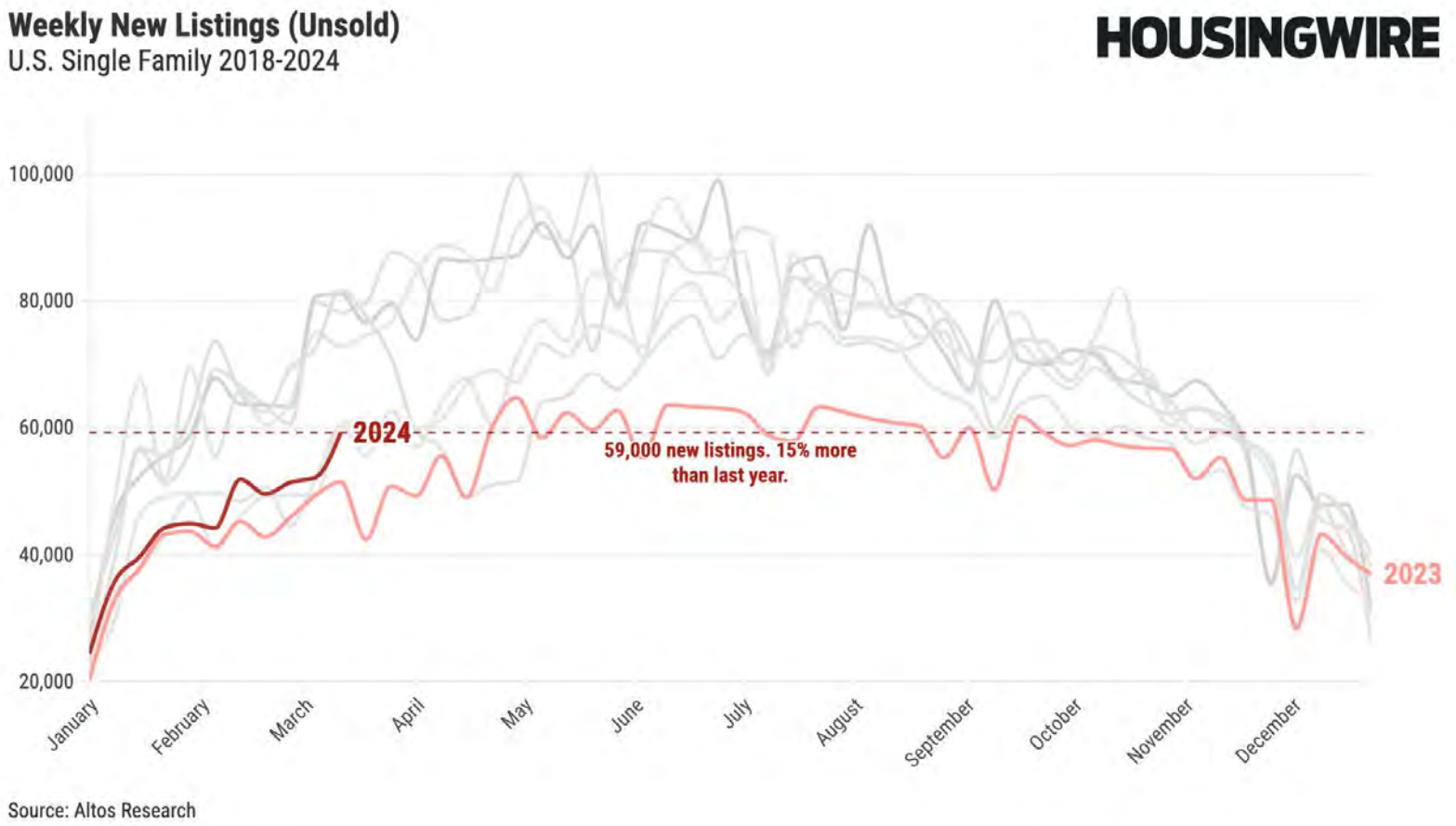
New Listings Up 15% from Historically Weak 2023 Numbers



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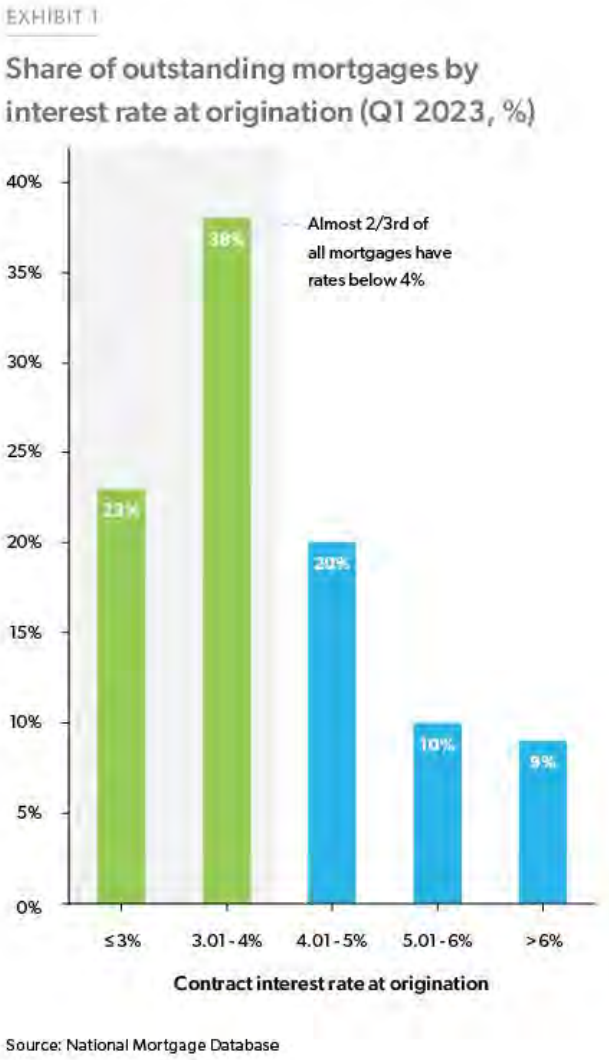
Rate Lock Effect Will Keep New Listings Unusually Low in 2024

- Over 2/3 of homeowners with an active mortgage have an interest rate of 4% or lower
- Almost 90% have an interest rate below 6%
- Homeowners aren't being picky: it's math



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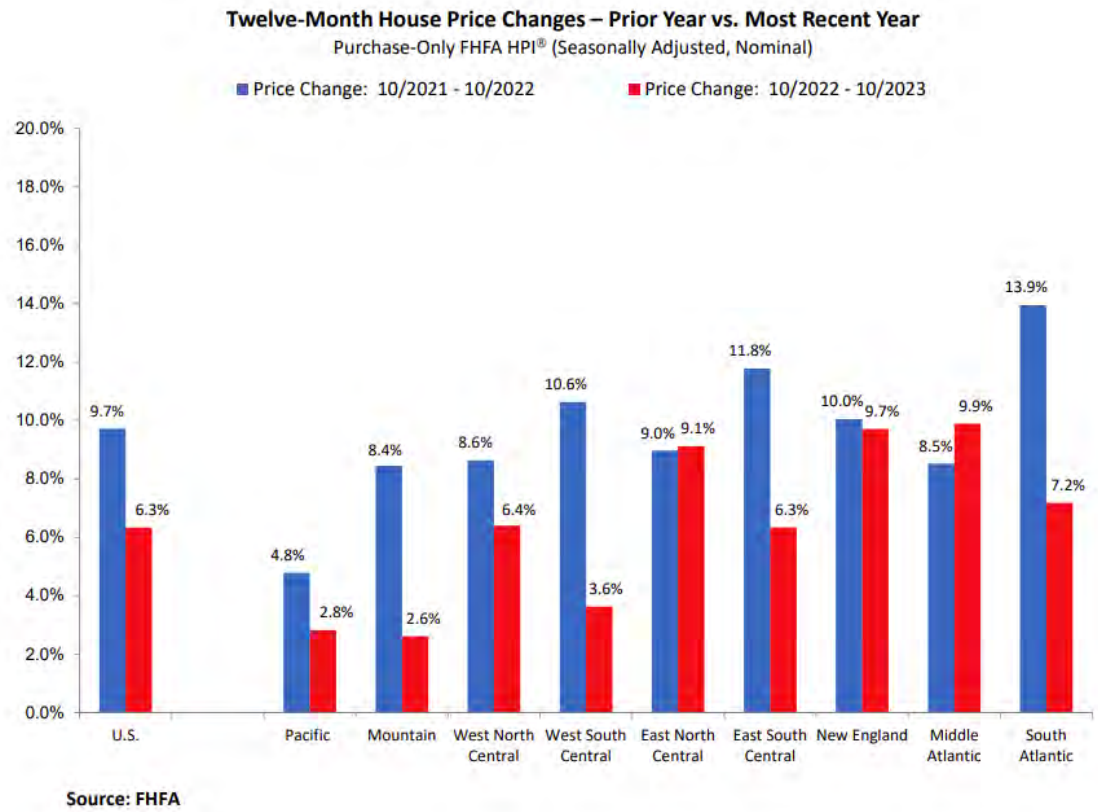
Home Prices are Up Year-Over-Year in Every Region of the Country



Source: FHFA

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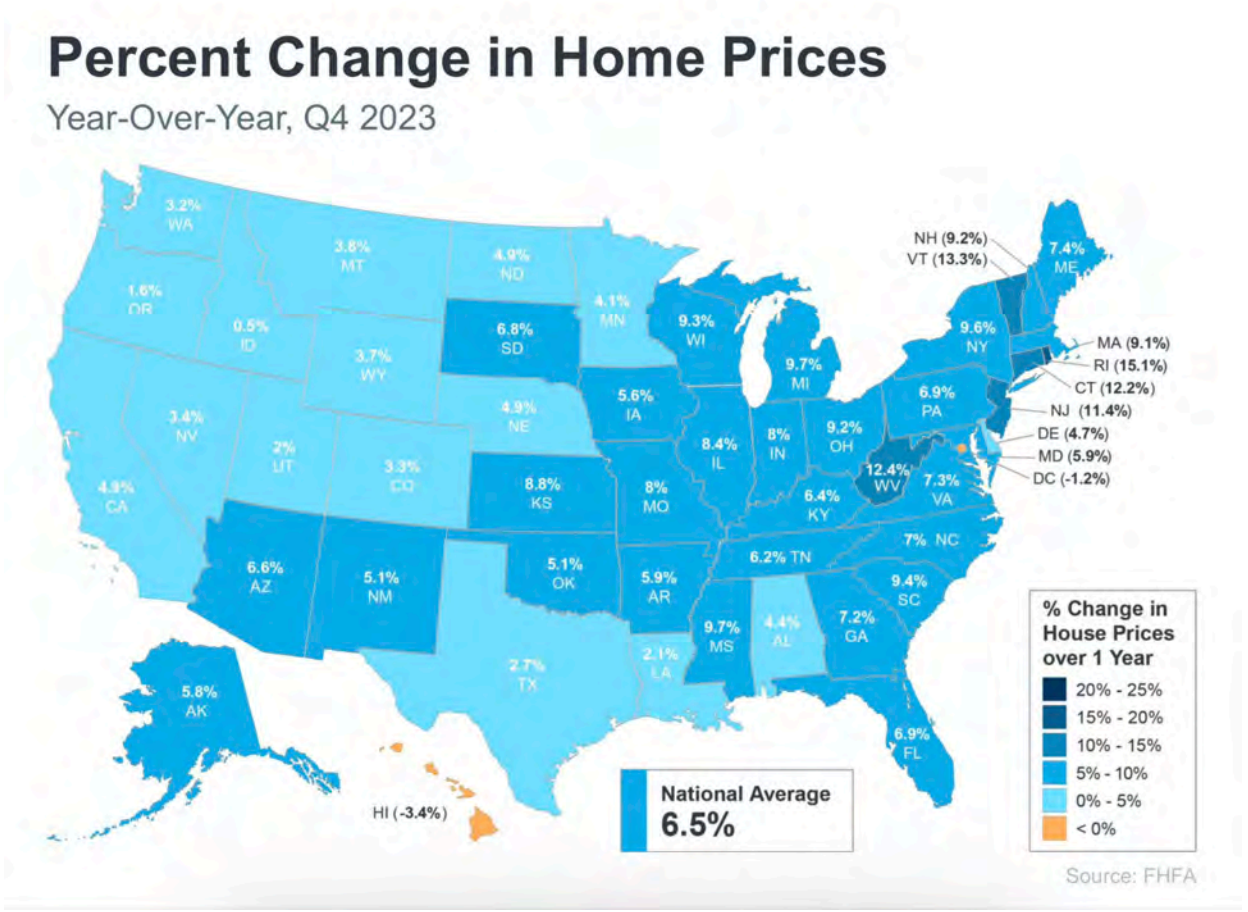
Home Prices Rose Almost Everywhere in 2023



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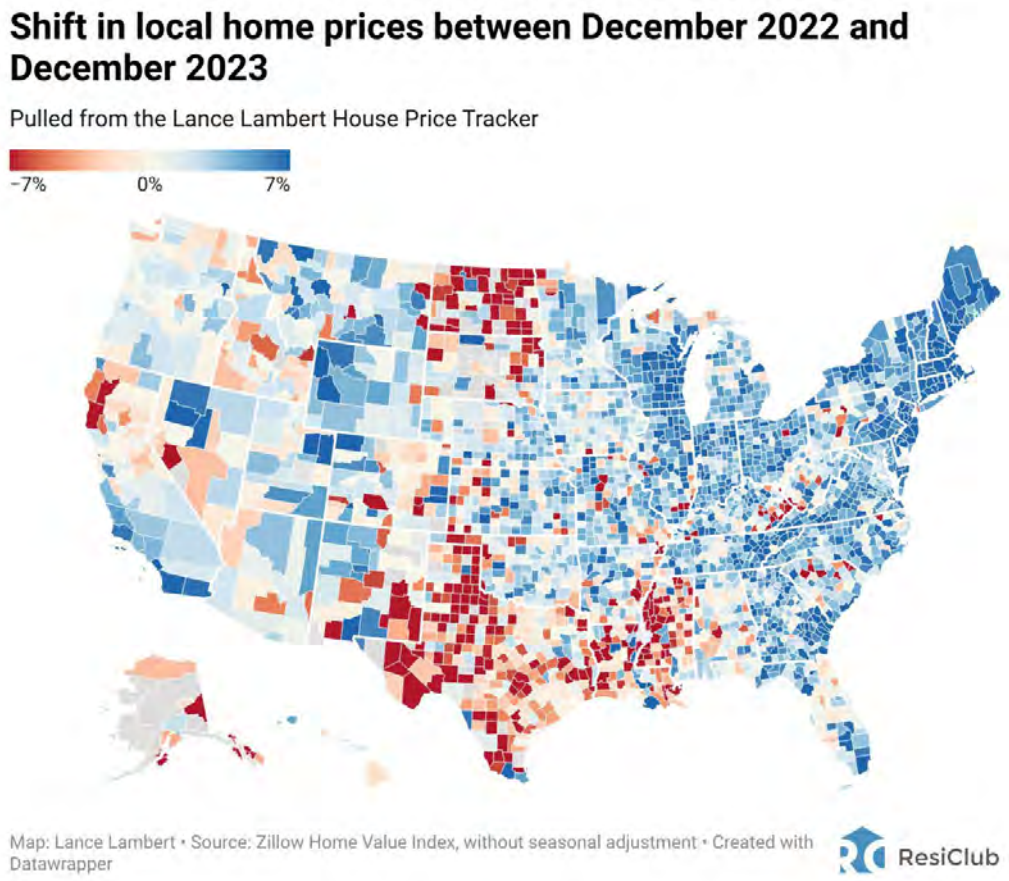
But Price Trends Varied Widely Within Those Regions



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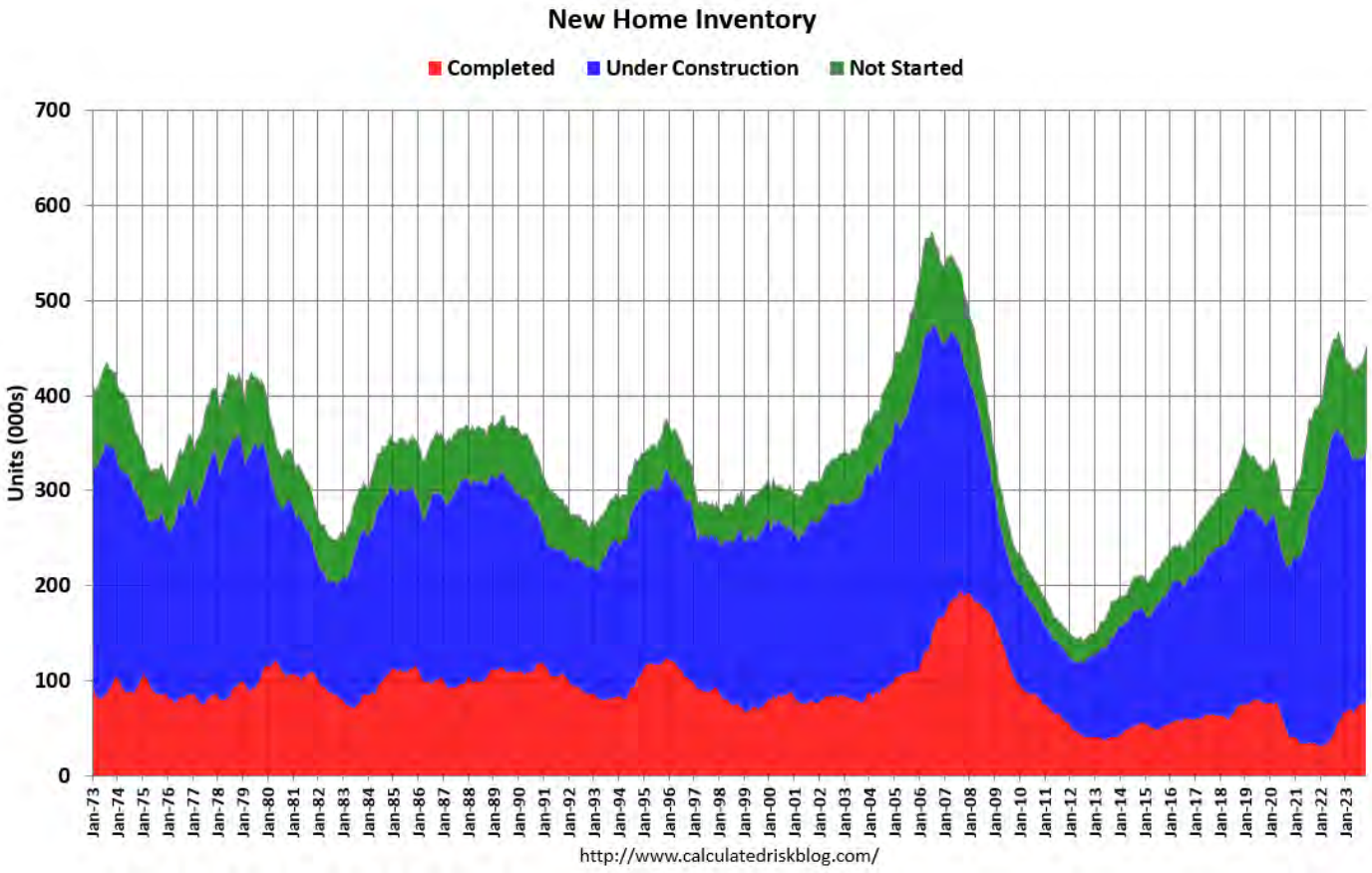
New Home Inventory is Almost Back to Pre-Pandemic Levels



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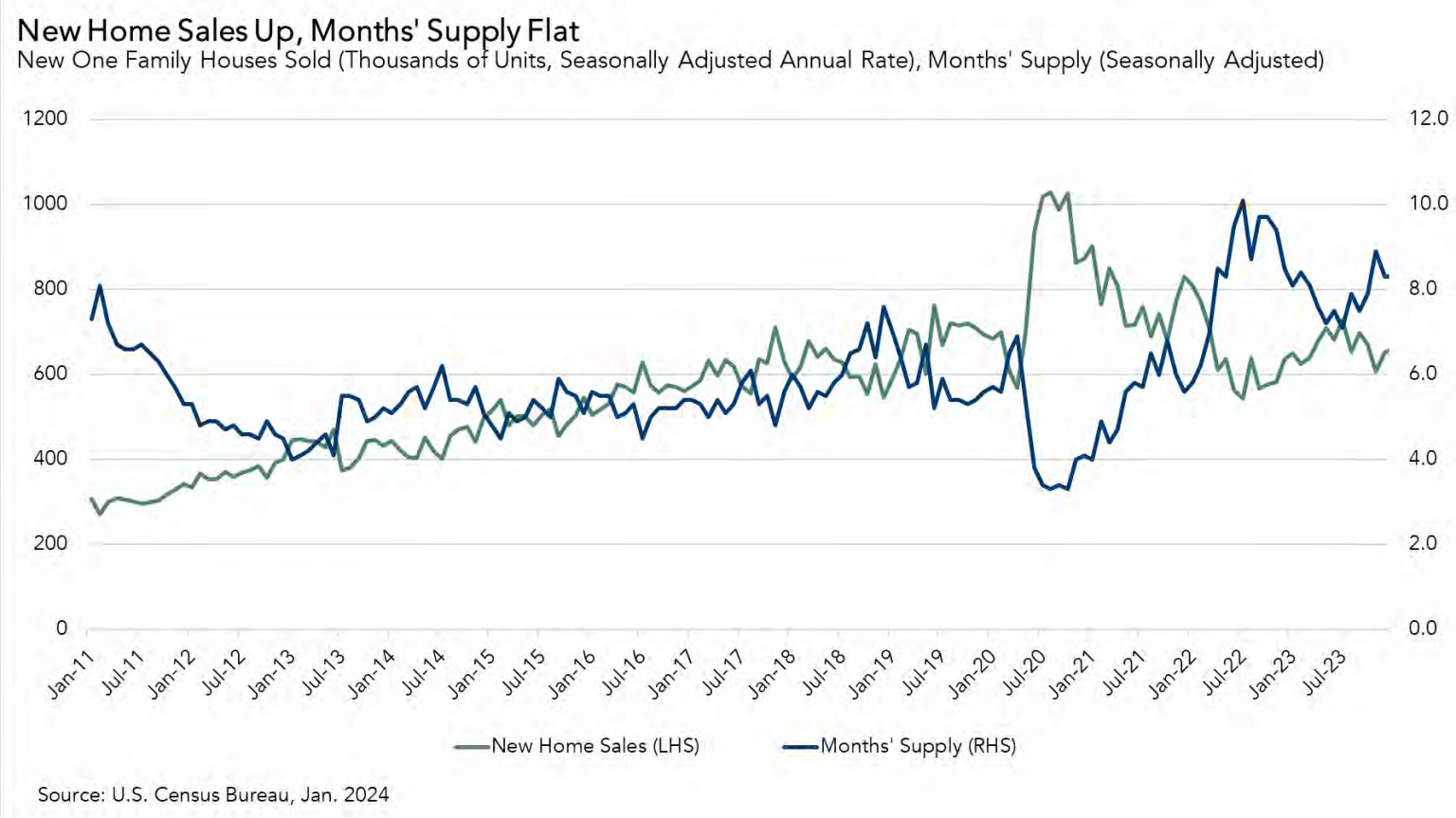
New Home Sales Bounce Back After Declining Late in 2023



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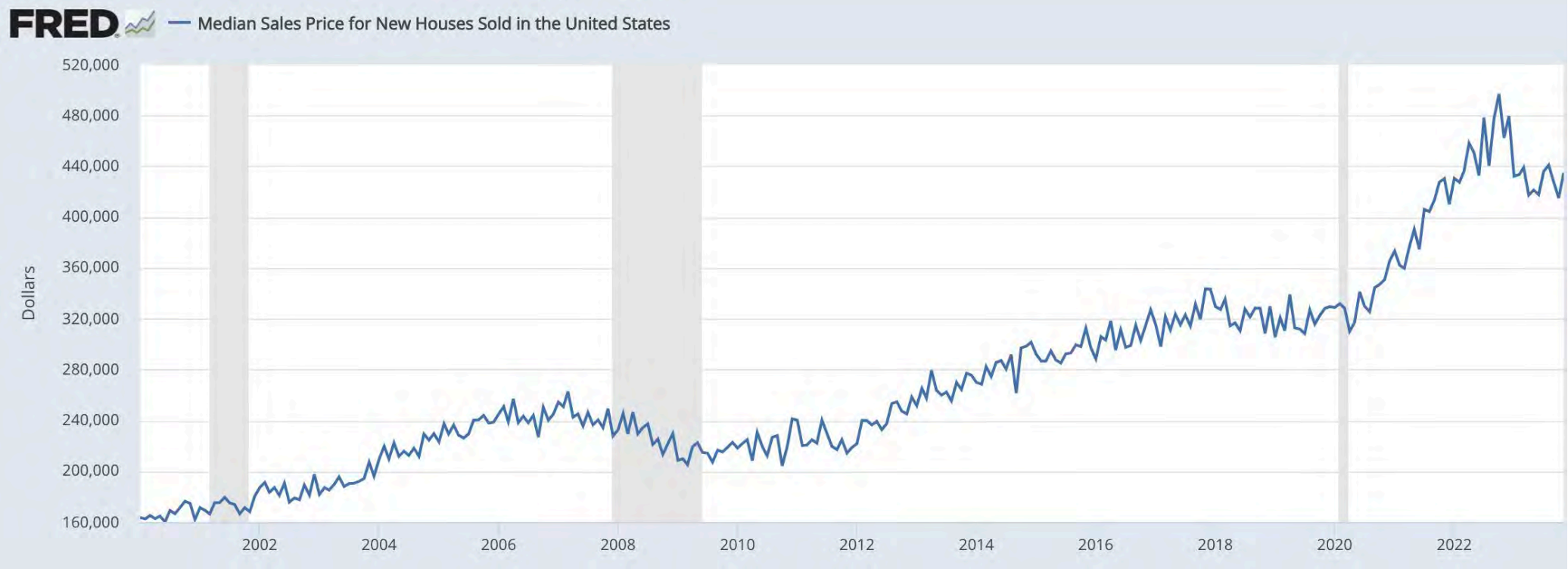
New Home Prices Down 15% from Peak



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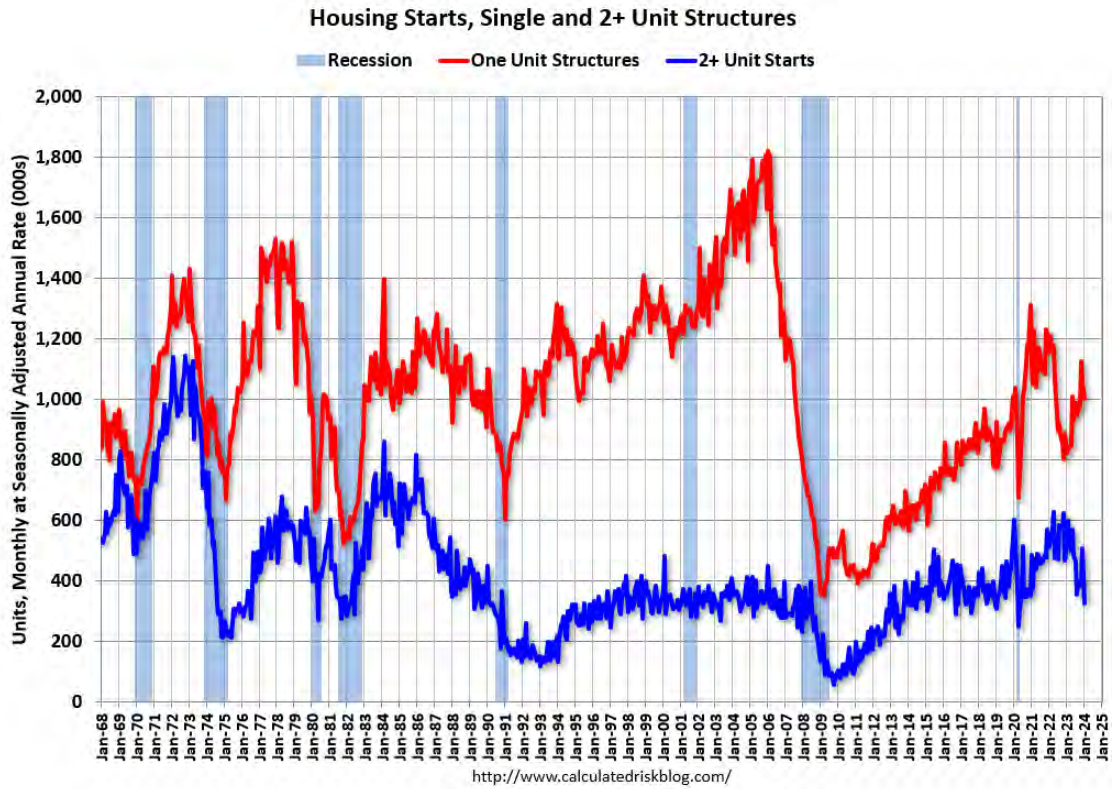
Housing Starts & Permits Show Promise for 2024



NEW RESIDENTIAL CONSTRUCTION JANUARY 2024

Building Permits:	**1,470,000**
Housing Starts:	**1,331,000**
Housing Completions:	**1,416,000**

Next Release: March 19, 2024

Seasonally Adjusted Annual Rate (SAAR)
Source: U.S. Census Bureau, HUD, February 16, 2024

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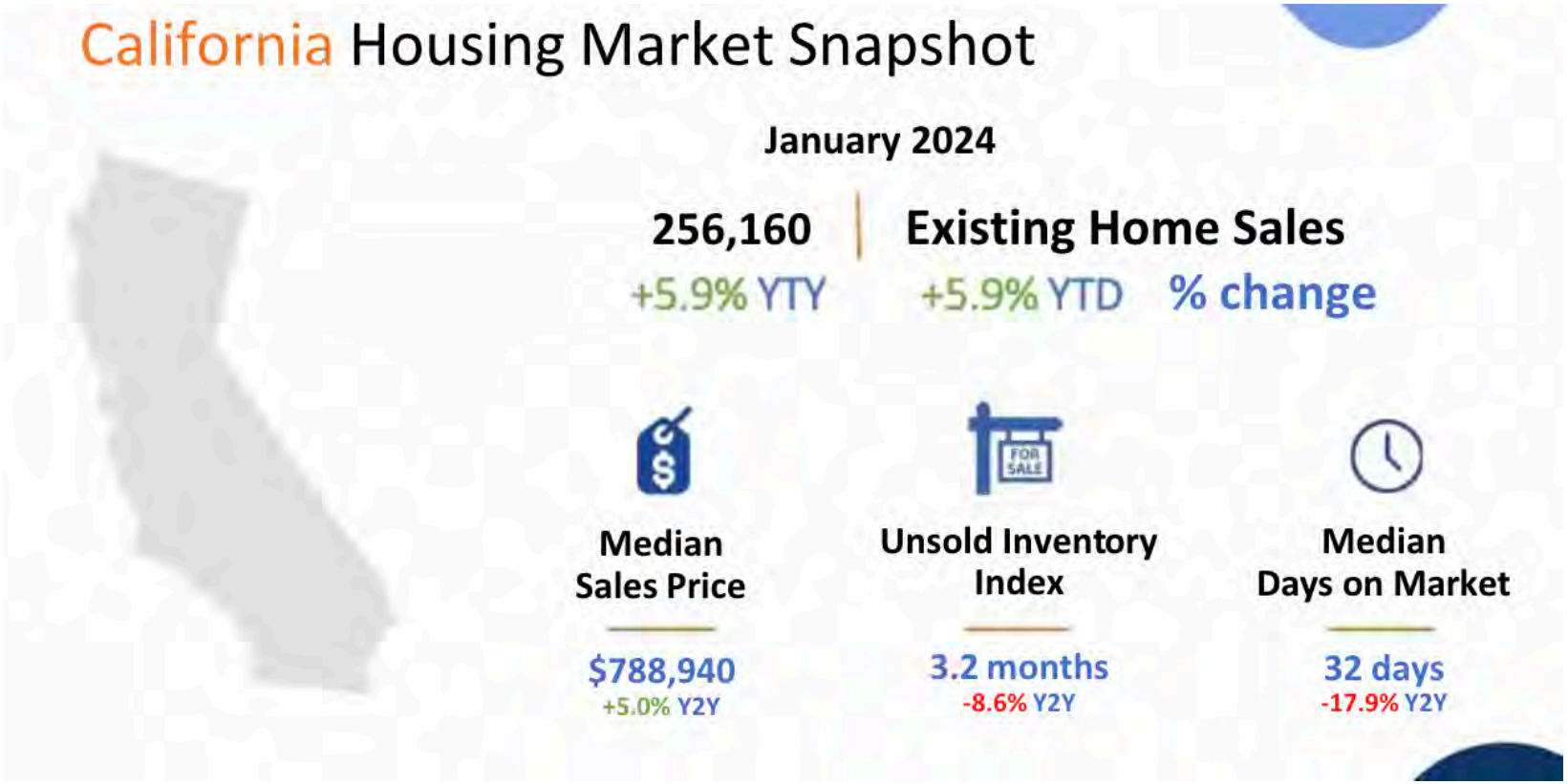
California Home Sales a Microcosm of the U.S.



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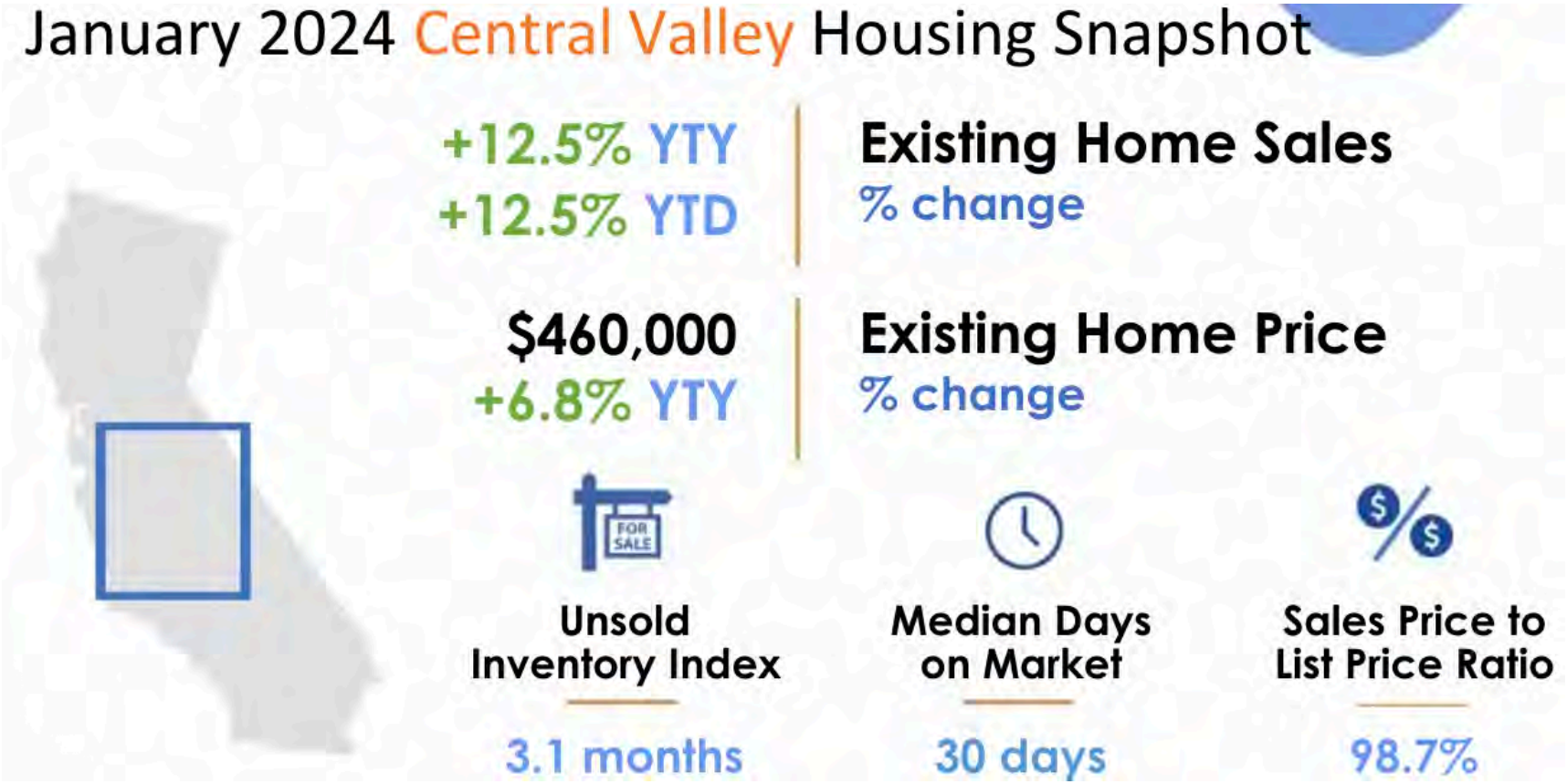
Central Valley Housing Market Outperforms Rest of the State



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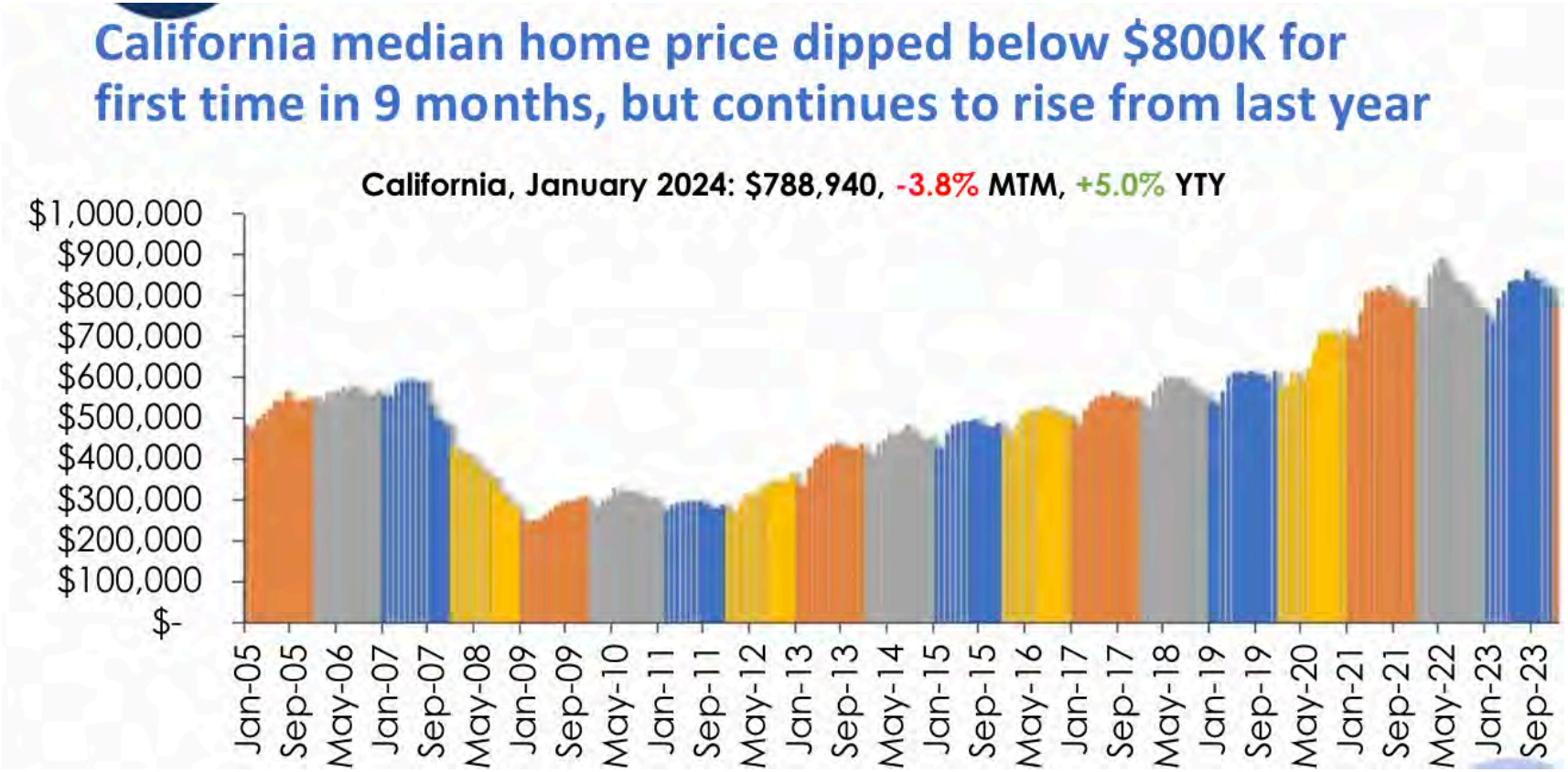
Home Prices Dip, but Still Up 5% from January 2023



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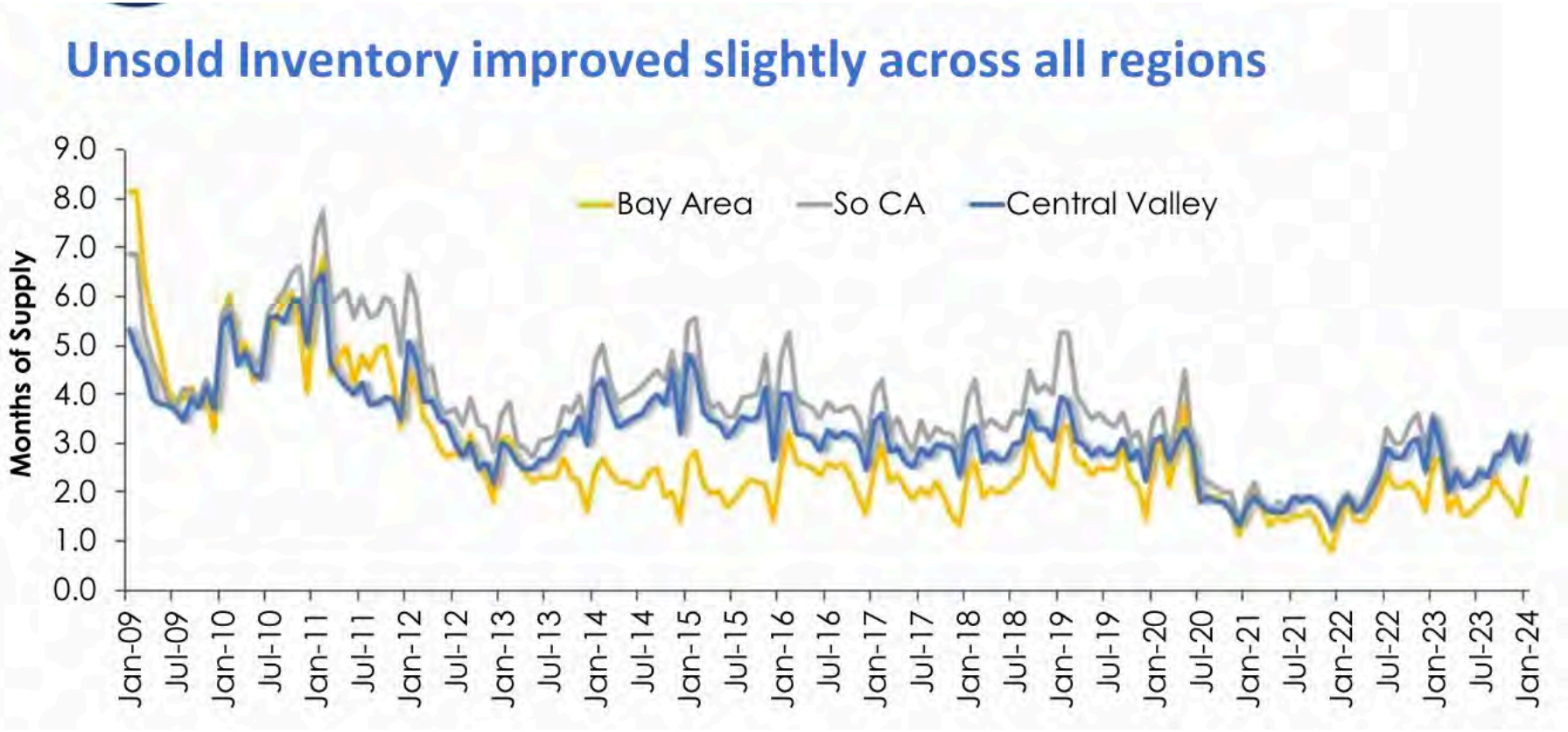
Inventory Improving as New Listings Increase Slightly



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CRE Sales Down 45% in 2023, Expected to Fall Slightly Further in 2024

Source: CBRE Research, MSCI Real Assets, Q3 2023.

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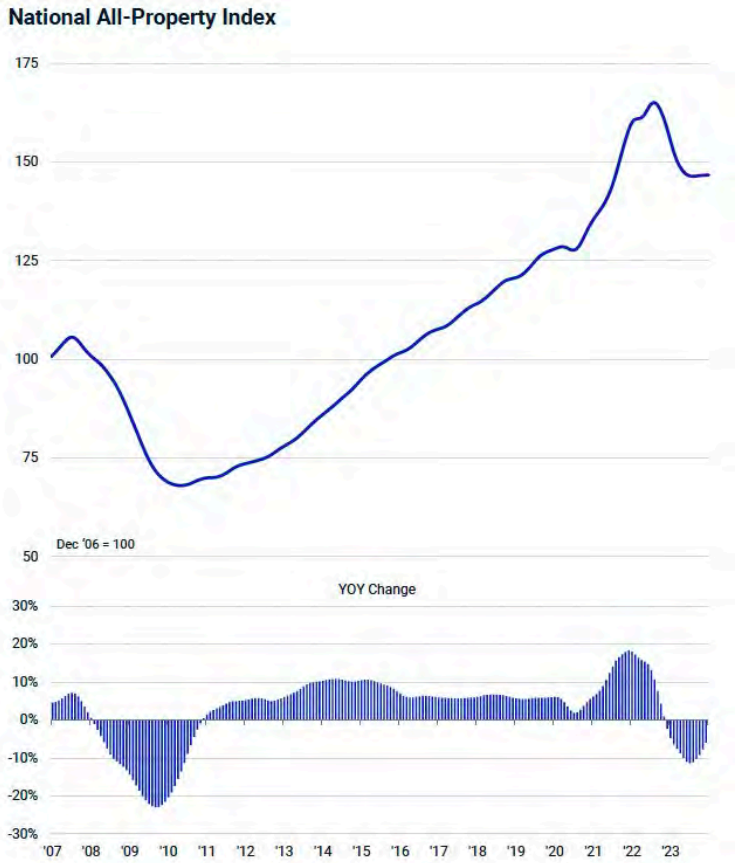
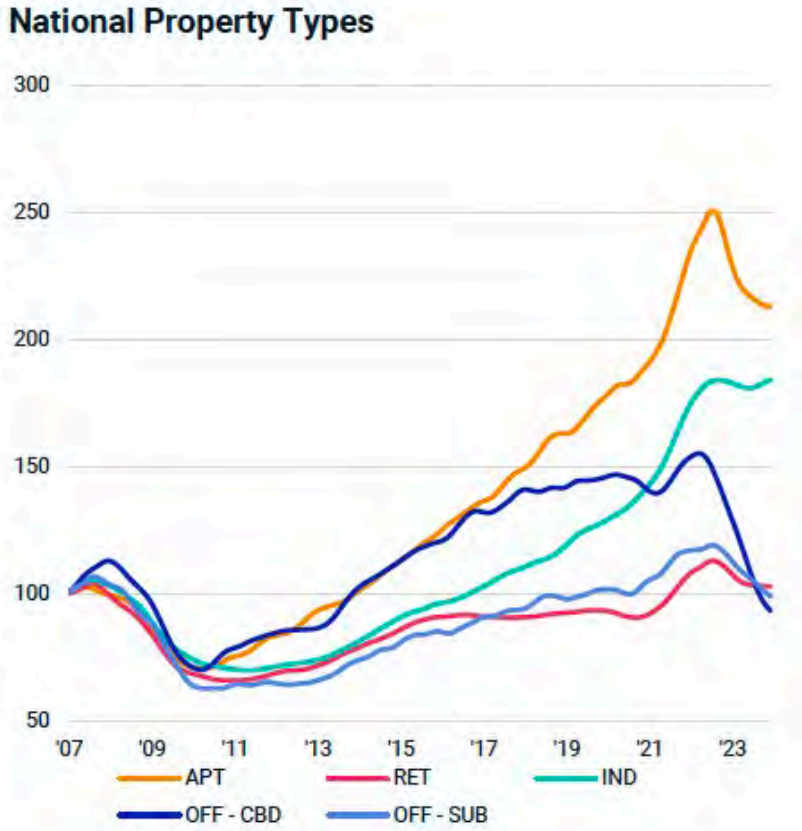
CRE Prices Down 5.9% from 2022





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Office Prices Declined the Most, Industrial Prices Showed Slight Gain

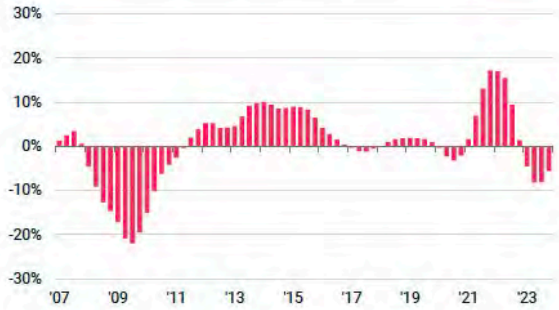
Year-Over-Year Change by Property Type

Apartment

Industrial

Office

Retail



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Change in RCA CPPI December 2023

	1-mth	3-mth	1-yr	3-yr	5-yr	10-yr
Office	-1.3%	-4.2%	-16.1%	-9.2%	-4.1%	27.9%
Office - CBD	-1.4%	-5.6%	-29.2%	-33.8%	-34.0%	-8.2%
Office - Sub	-1.0%	-3.3%	-13.2%	-5.4%	0.9%	34.3%
Industrial	0.3%	1.1%	0.5%	30.1%	55.7%	127.3%
Retail	-0.1%	-0.3%	-5.5%	12.4%	11.3%	31.0%
Commercial	-0.1%	-0.2%	-4.6%	8.8%	17.6%	52.8%
Apartment	0.0%	-0.5%	-8.4%	12.3%	30.6%	111.8%
All Types	0.0%	0.1%	-5.9%	8.8%	21.7%	71.8%
6 Major Metros All Types	-0.1%	-0.4%	-4.8%	2.2%	9.0%	56.3%
Non-Major Metros All Types	0.3%	0.9%	-6.1%	12.0%	27.5%	80.1%

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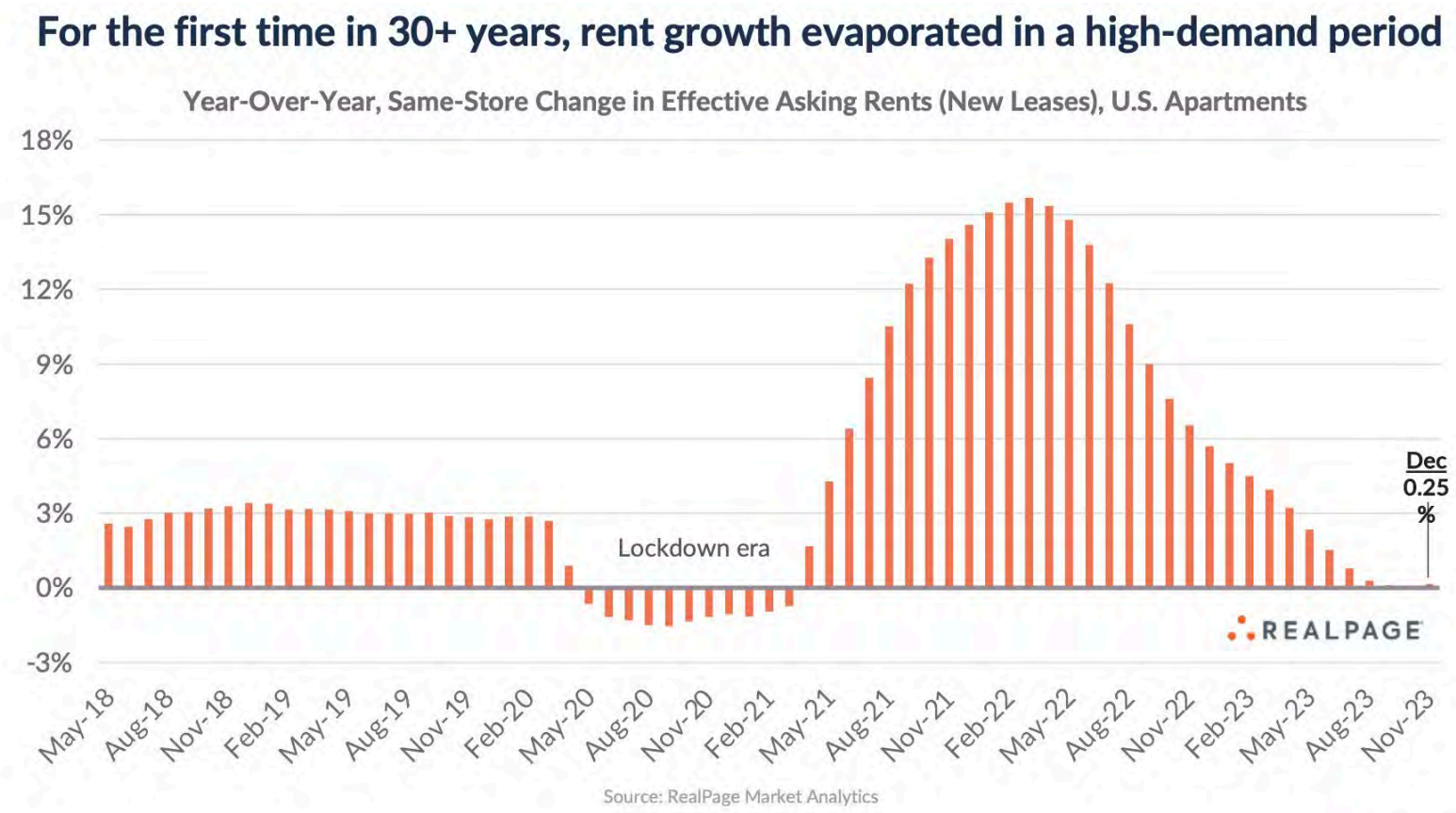
Apartment Rents Flat, as Supply Overwhelms Demand



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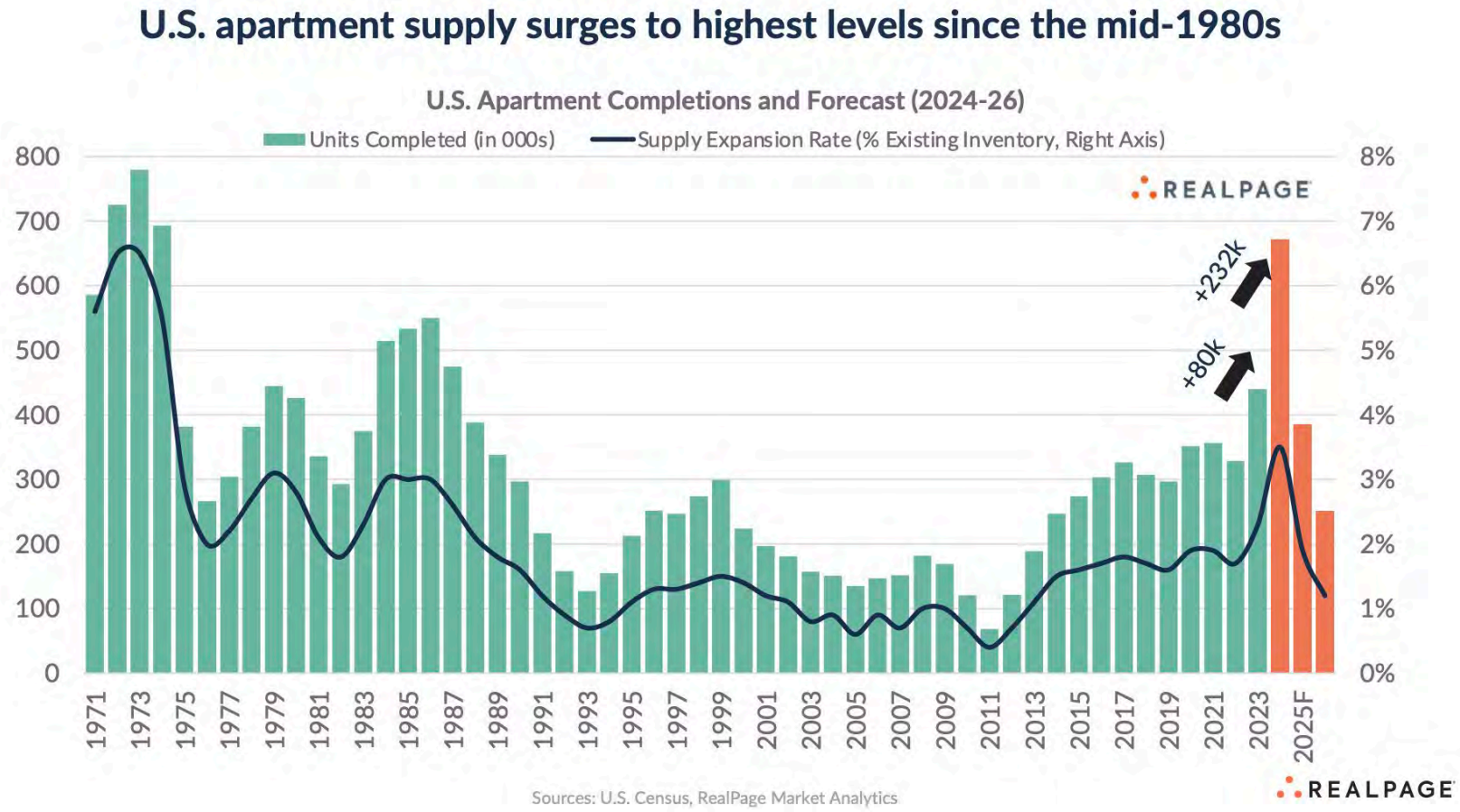
Near-Record Number of Apartment Units Flood the Market



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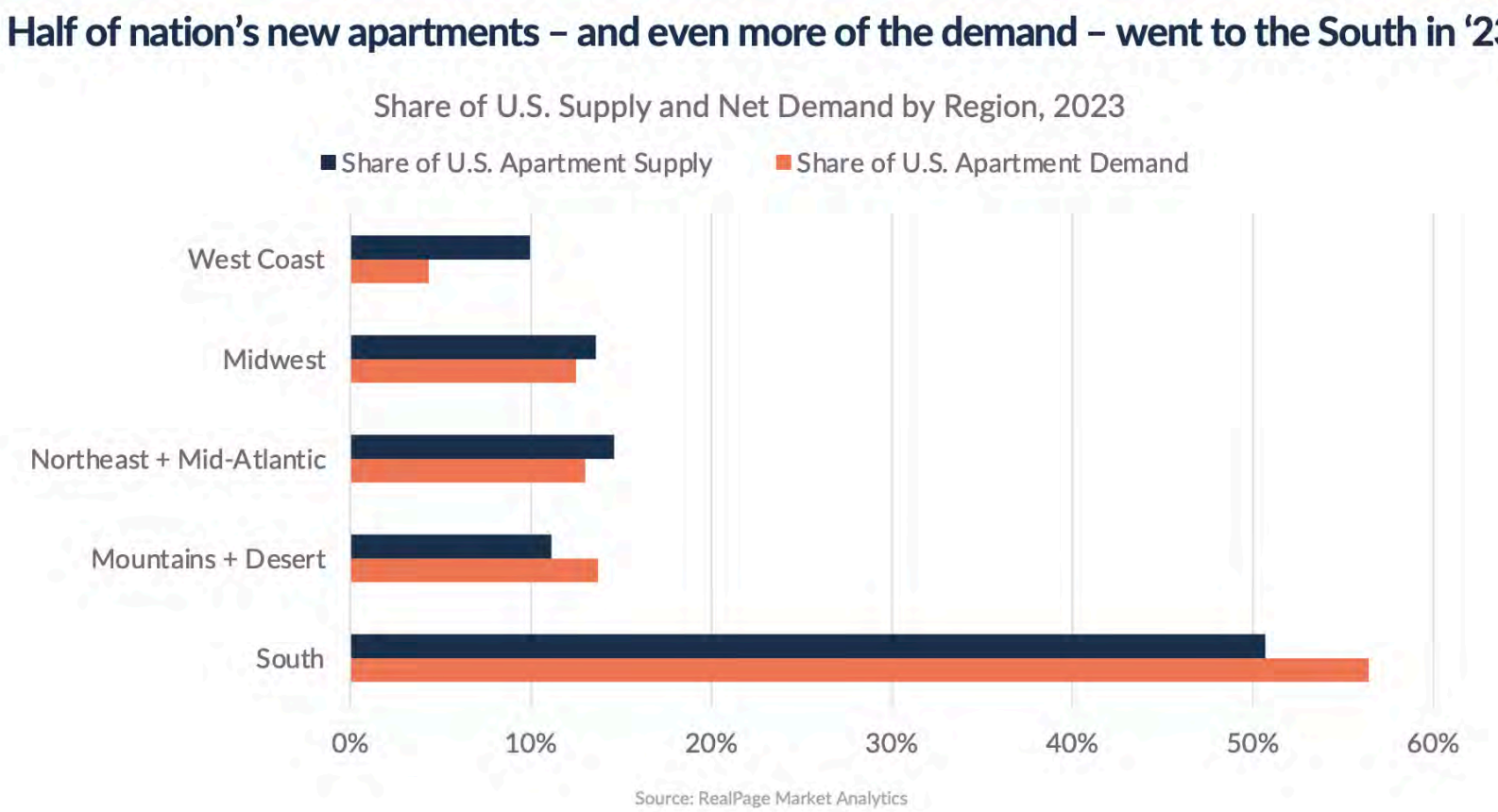
But Most of the New Inventory & Demand are in the Southern States



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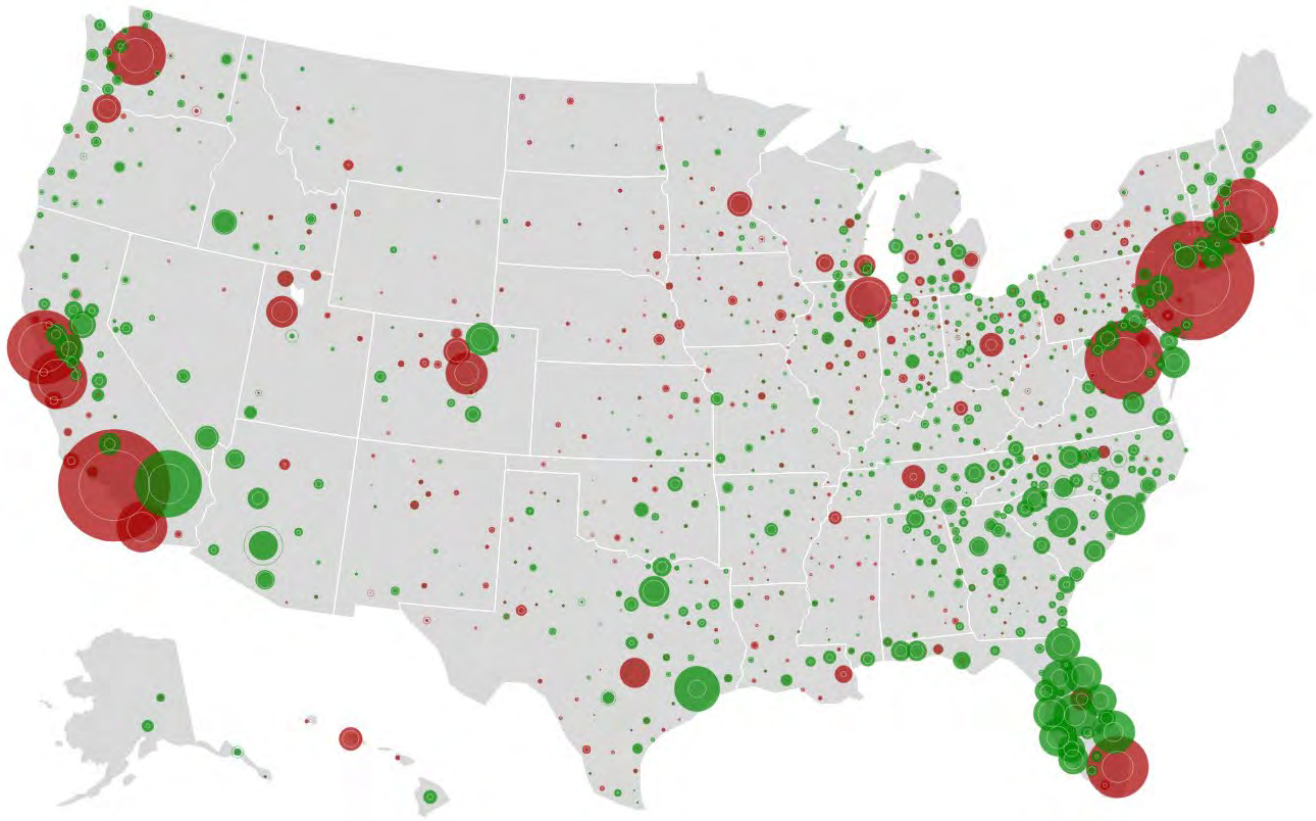
Apartment Trend Mirrors Population Migration to Less Expensive Markets



Negative Net Migration Jul-22 to Jun-23

Positive Net Migration Jul-22 to Jun-23

Source: Freddie Mac LPA

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California Markets Among Country's Highest Apartment Occupancy Levels

Most markets remain at a healthy occupancy level, but there are some spots where lagging occupancy + supply pressure may result in rent growth headwinds

Occupancy rate as of 4Q23

>96%	95% to 96%	94% to 95%	93% to 94%	92% to 93%
Anaheim	Boston	Baltimore	Charlotte	Atlanta
Milwaukee	Chicago	Cincinnati	Dallas	Austin
New York	Los Angeles	Cleveland	Denver	Fort Worth
Newark-Jersey City	Miami	Columbus	Indianapolis	Greensboro
	Philadelphia	Detroit	Nashville	Houston
	San Francisco	Fort Lauderdale	Orlando	Jacksonville
	San Jose	Inland Empire	Portland	Las Vegas
	Virginia Beach	Kansas City	Raleigh/Durham	Memphis
	San Diego	Minneapolis	Salt Lake City	Phoenix
		Oakland	St. Louis	San Antonio (<92%)
		Pittsburgh	Tampa	
		Richmond		
		Sacramento		
		Seattle		
		Washington, DC		
		West Palm Beach		

Yellow Highlights
Markets at lowest occupancy since at least 2010

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Source: RealPage Market Analytics

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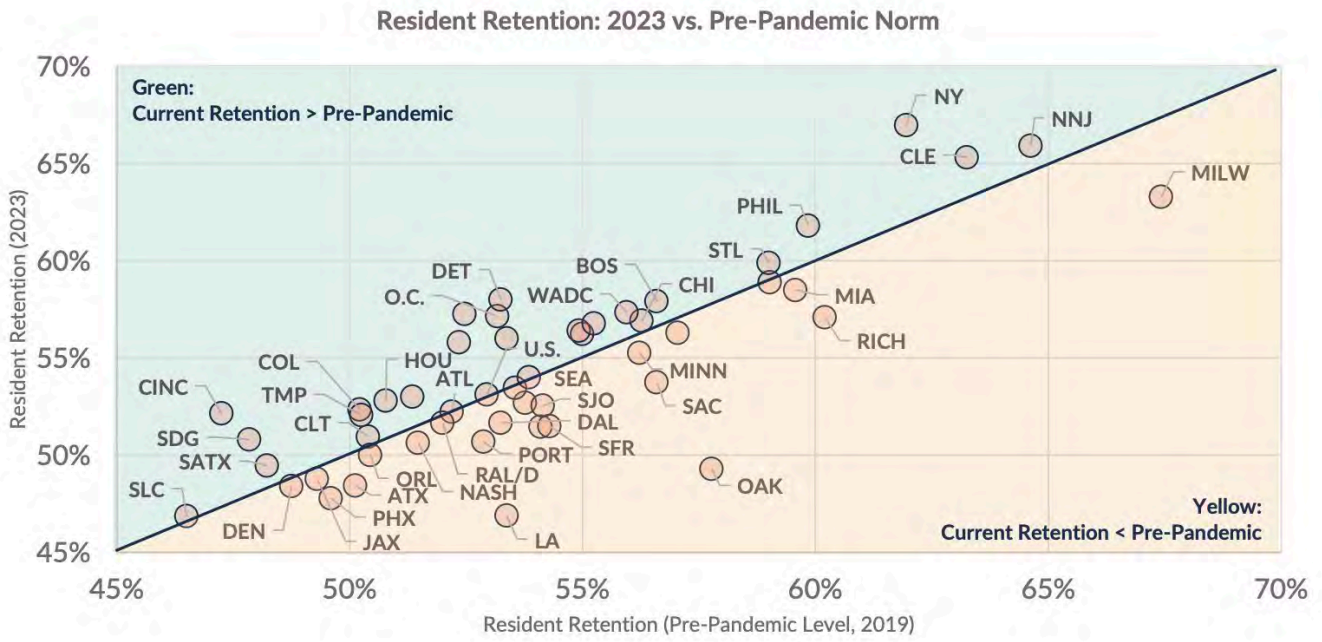
But West Coast Retention Trends Worse Than Pre-Pandemic Numbers

Retention varies by market, falling below-normal in high-supply markets + West Coast



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Source: RealPage Market Analytics

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DELINQUENCIES & FORECLOSURES

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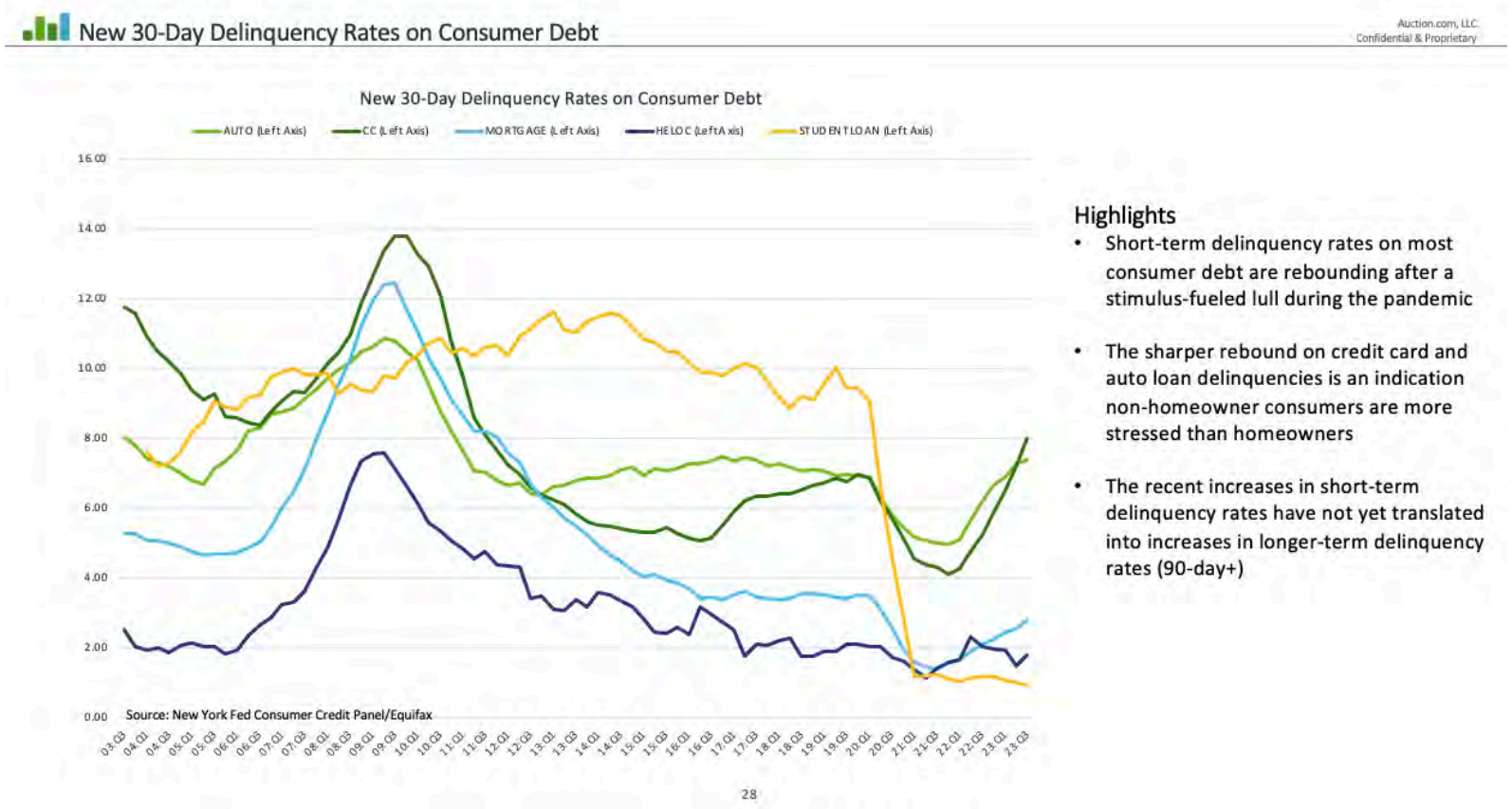
Consumer Delinquencies Increasing – Above Pre-Pandemic Levels



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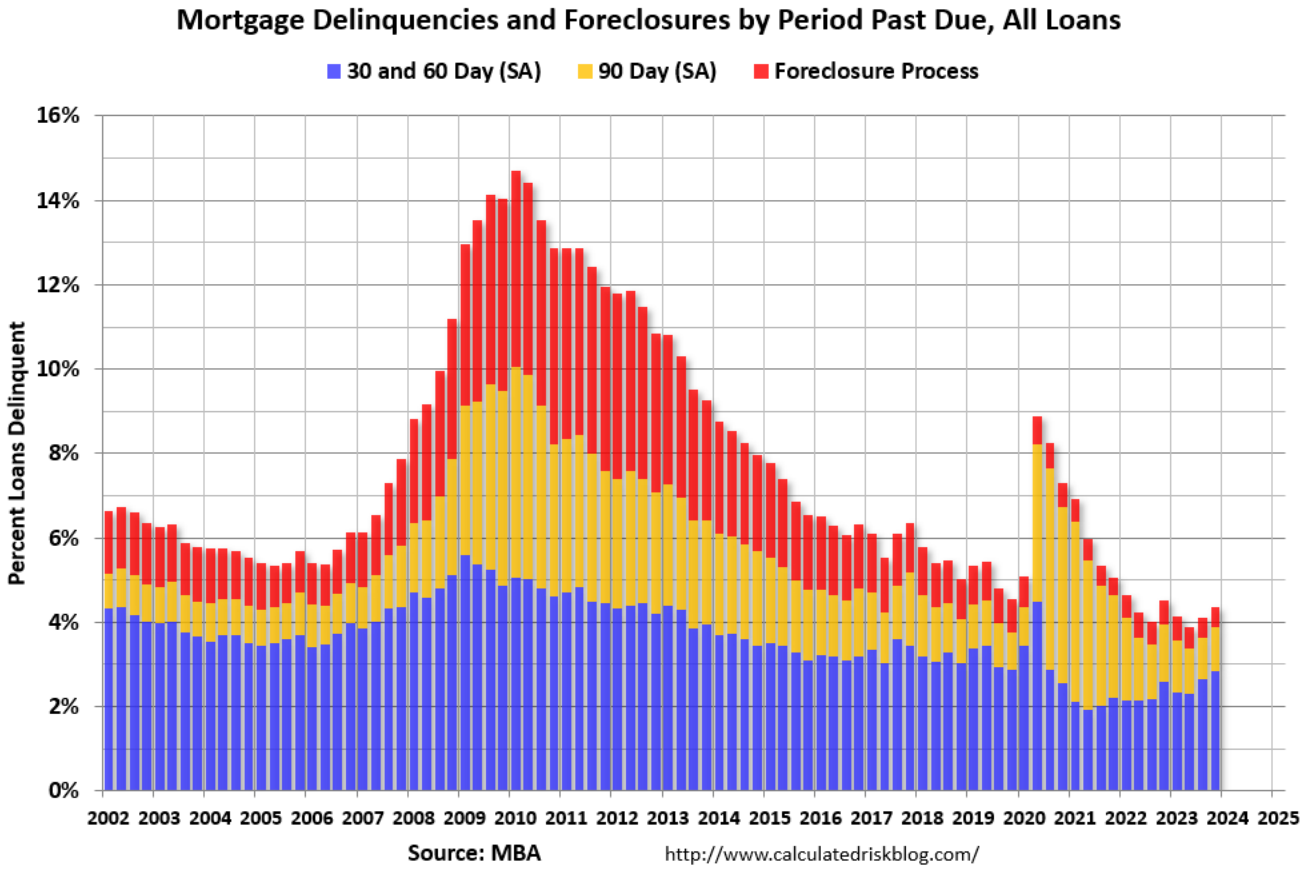
Mortgage Delinquency Rates Rose in Q4, Still Below Normal Levels



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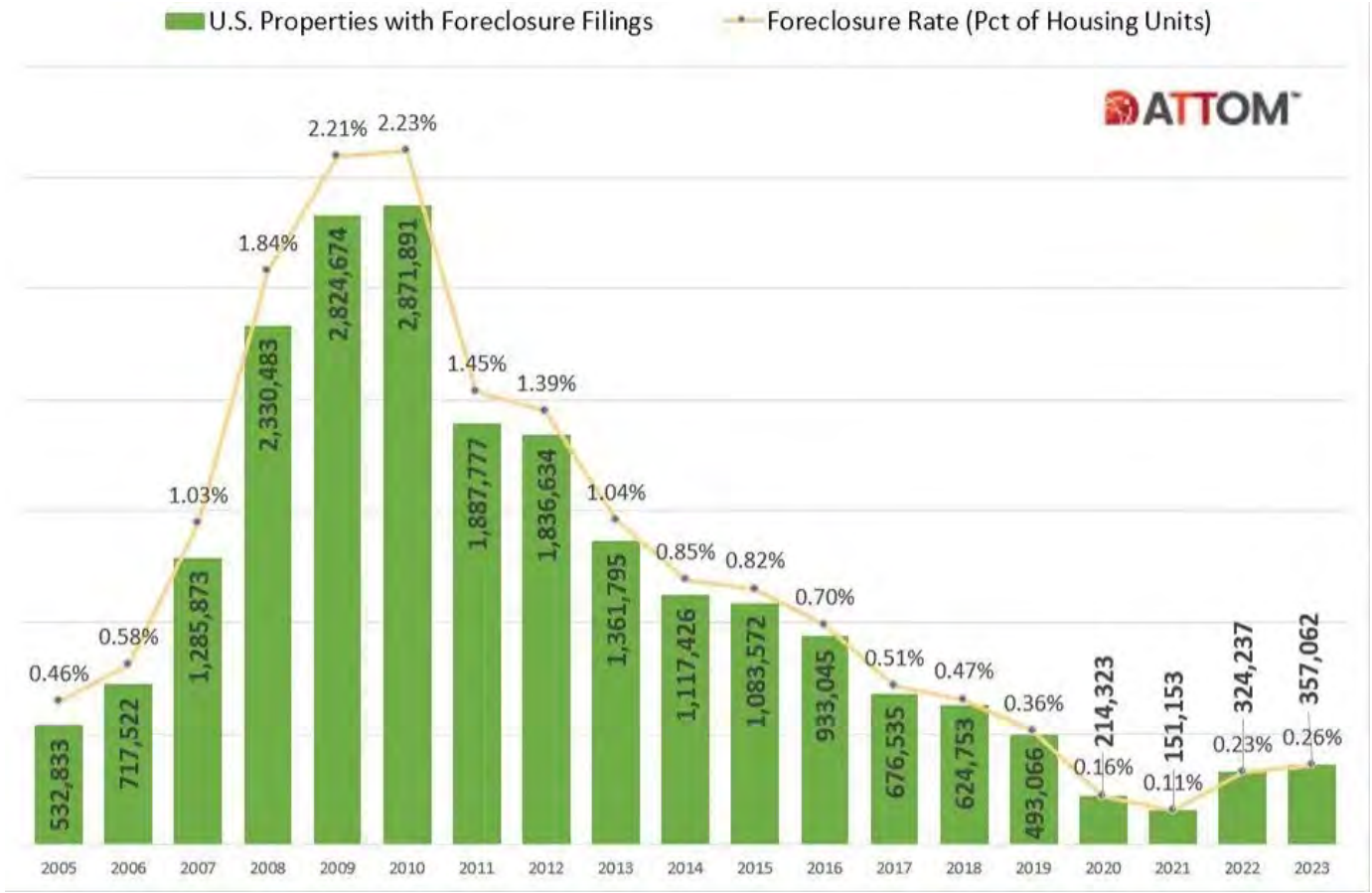
So Foreclosure Activity Ends the Year down 28% from 2019 Levels



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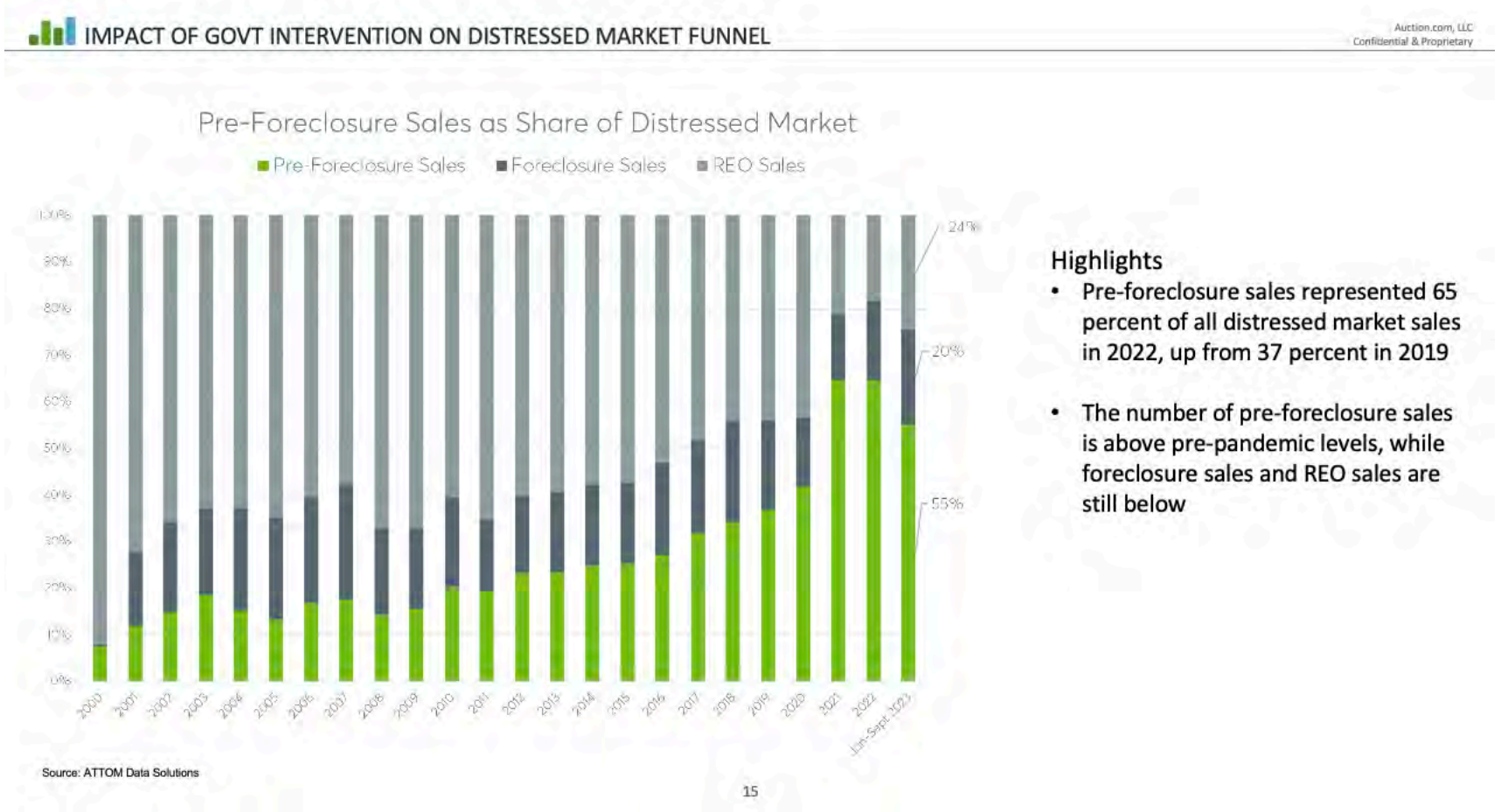
Homeowners Leverage Equity to Sell Homes Before Auctions



Highlights

- Pre-foreclosure sales represented 65 percent of all distressed market sales in 2022, up from 37 percent in 2019
- The number of pre-foreclosure sales is above pre-pandemic levels, while foreclosure sales and REO sales are still below

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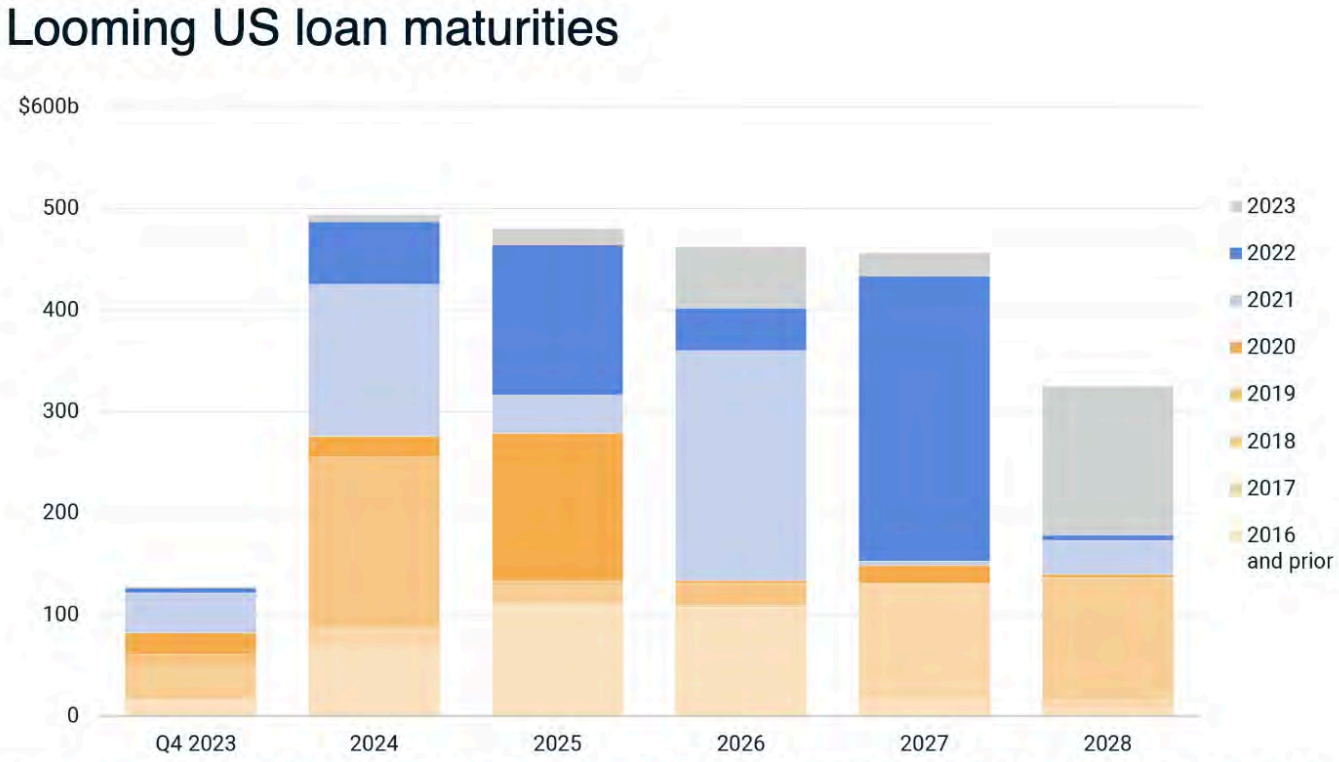
Almost $600 Billion in Commercial Loans Set to Mature in 2024



Loan maturities by origination vintage. Loans outstanding at Q4 2023. Data as of Dec. 5, 2023. Source: MSCI Mortgage Debt Intelligence

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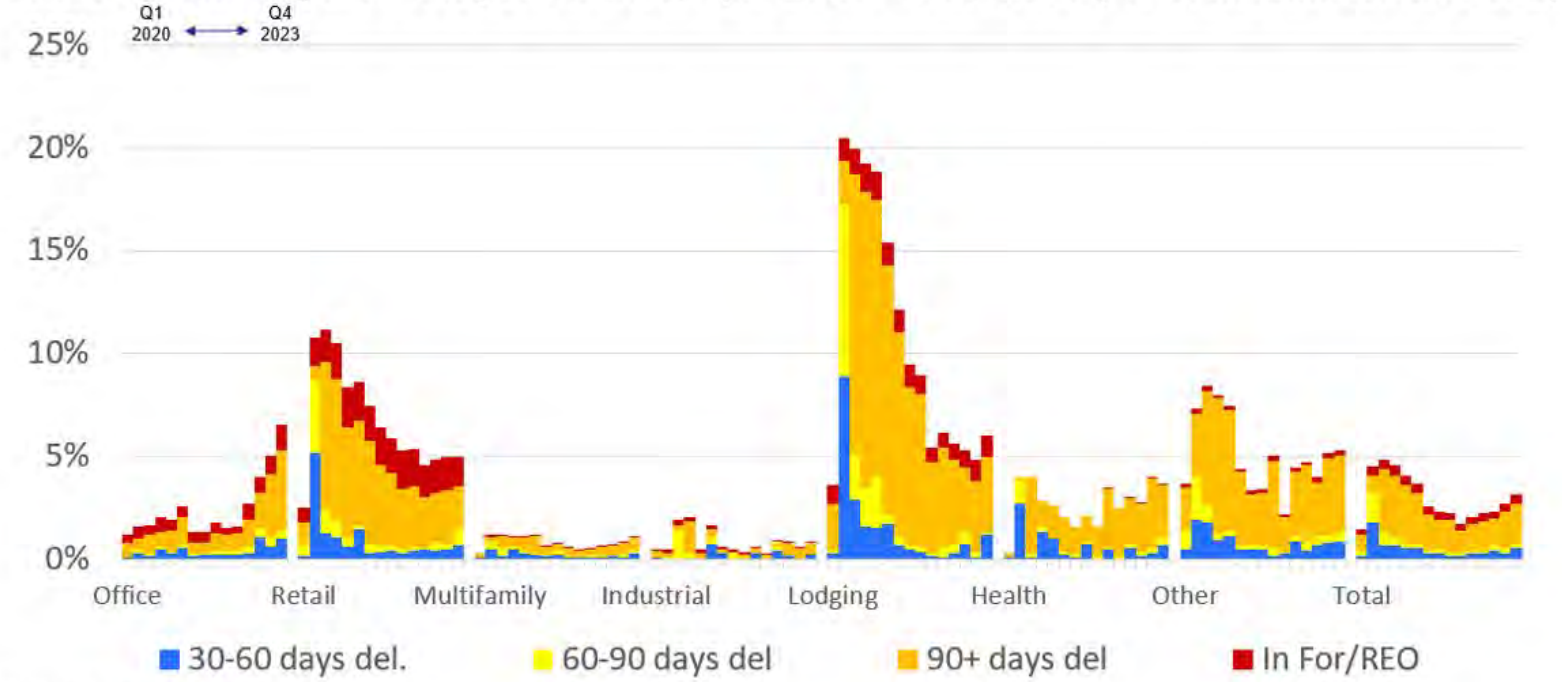
Office, Retail & Hotel Sectors Have Highest Delinquency Rates

Chart of the Week – January 19, 2024

End-of-quarter Delinquency Status, by Property Type

Share of Total Unpaid Principal Balance, April 2020 – Dec. 2023 (Note: no data for Q2 2022)



Source: Mortgage Bankers Association

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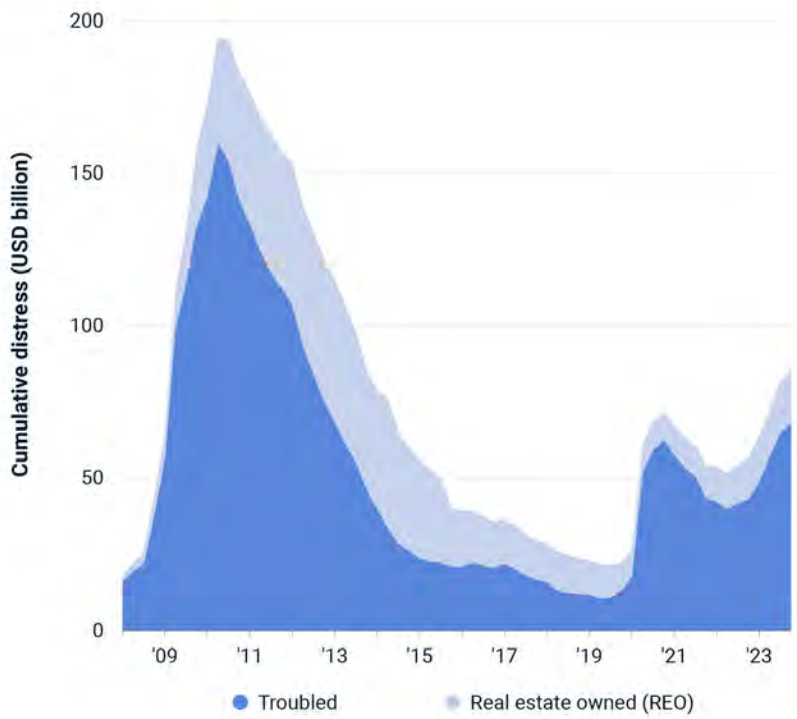
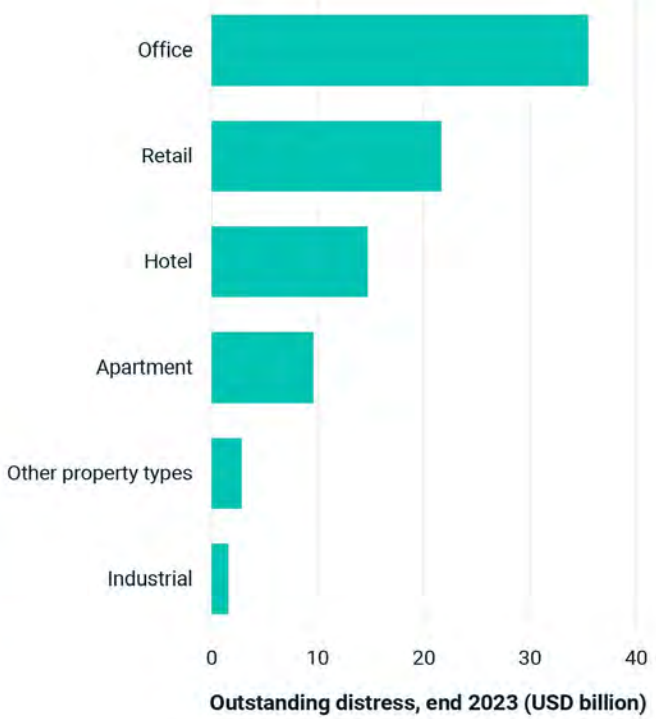
Amount of Distress Continues to Build – Especially in the Office Sector





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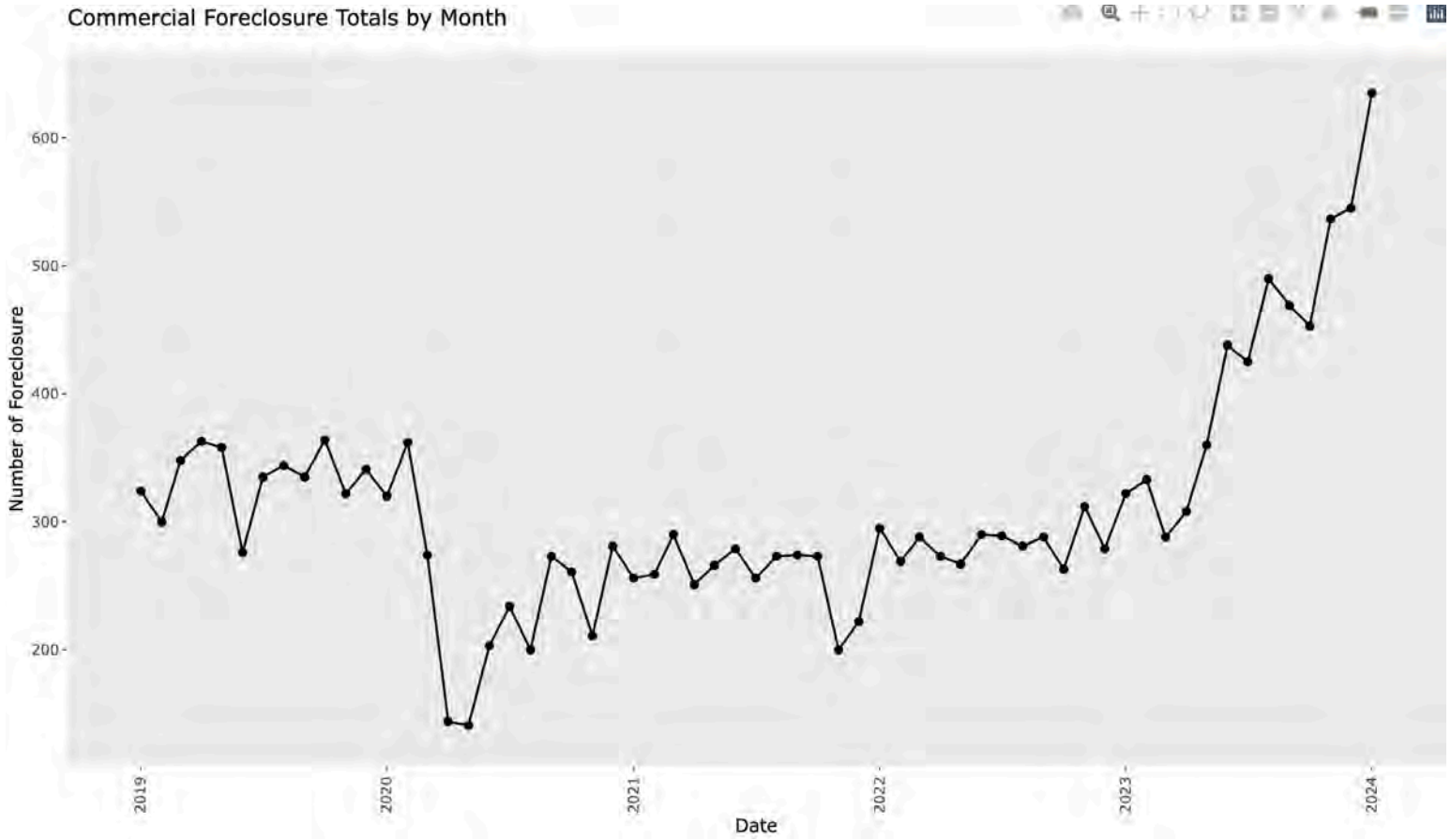
Commercial Foreclosures Much Higher Than Usual



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And Bankruptcies Increase After Declining for Multiple Years

BUSINESS AND NON-BUSINESS FILINGS,
YEARS ENDING
DECEMBER 31, 2019-2023

Year	Business	Non-Business	Total
2023	**18,926**	**434,064**	**452,990**
2022	13,481	374,240	387,721
2021	14,347	399,269	413,616
2020	21,655	522,808	544,463
2019	22,780	752,160	774,940

TOTAL BANKRUPTCY FILINGS BY CHAPTER,
YEARS ENDING
DECEMBER 31, 2019-2023

Year	Chapter			
	7	11	12	13
2023	**261,277**	**7,456**	**139**	**183,956**
2022	225,455	4,918	169	157,087
2021	288,327	4,836	276	120,002
2020	378,953	8,333	560	156,377
2019	480,206	7,020	599	286,979

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CLOSING THOUGHTS

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Observations

- A short, mild recession still seems like at least a possibility sometime this year
  - California economy not performing quite as well as the nation as a whole, and could see higher unemployment in a slowdown
- Home sales declined to about 4 million existing homes in 2023, and 660,000 new homes, and will improve only slightly in 2024
  - Slowly-declining mortgage rates will bring more homebuyers to the market than sellers, resulting in higher sales prices
  - Limited affordability for buyers will create more demand for rental units
- Commercial sales likely to decline through first half of 2024 before improving later
  - Office sector will probably see highest vacancy rates, weakest absorption, and most severe declines in prices and sales volume
- Foreclosure activity will remain below normal levels through 2024
  - REO inventory will remain even lower for even longer
  - Bankruptcy filings likely to continue to grow

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Thank You!

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@ricksharga

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STRETTO

U.S. Department of Justice Guidance for Attorneys Regarding Student Loan Bankruptcy Litigation

Prepared for the Sacramento Valley Bankruptcy Forum – Northern California Bankruptcy Conference 2024

March 2024

Agenda

1. Current Case and Statutory Standards
2. Department of Justice Guidance
3. How the Guidance Affects the Process
4. The Department of Justice Attestation Form
5. Income-Driven Repayment plans
6. Questions

TODAY'S PRESENTERS

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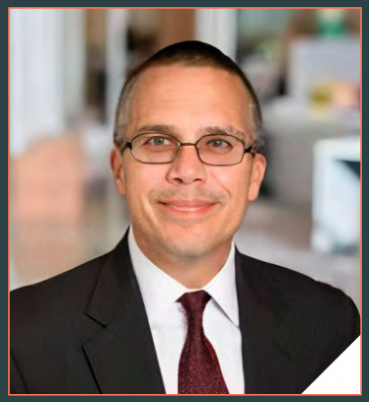

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Current Case and Statutory Standards

Statutory Standard for Student Loan Discharge

11 U.S.C. § 523

- A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

  Unless excepting such debt from discharge under this paragraph would impose an **undue hardship** on the debtor and the debtor's dependents, for—

  -
    - An educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
    - An obligation to repay funds received as an educational benefit, scholarship, or stipend; or

  - Any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

Majority Standard of Review for Student Loan Discharge

Brunner v New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987)

To discharge a student loan under the *Brunner* test, a bankruptcy court must find that the debtor has established that:

- The debtor cannot presently maintain a minimal standard of living if required to repay the student loan,
- Circumstances exist that indicate the debtor's financial situation is likely to persist into the future for a significant portion of the loan repayment period, and
- The debtor has made good faith efforts in the past to repay the student loan.

Minority Standard of Review for Student Loan Discharge

In re Long., 322 F.3d 549, 553 (8th Cir. 2003) "Totality of Circumstances" test

The Totality Test looks to:

- The debtor's past, present, and reasonably reliable future financial resources;
- A calculation of the debtor's and their dependents' reasonably necessary living expenses; and
- Any other relevant facts and circumstances surrounding each particular bankruptcy case.

Traditional Process for Seeking Discharge of Student Loans

- Debtor files bankruptcy case (any chapter)
- While pending, debtor files an adversary case against student loan lenders (Rule 7003 Fed.R.Bk.Pro.)
  - Debtor files a summons and complaint and serves on appropriate parties
  - Docketed and tracked as a separate legal action within case
  - Discovery, settlement conferences and trial using appropriate standard of review
- *Brunner* and *Totality* tests have been exceptionally difficult for debtor to prevail
- Litigation is often too costly for debtor, in bankruptcy, to afford
- *Duke Law Journal* 2020 study: 250,000 bankruptcy cases involving student loans filed annually, fewer than 300 debtors (less than .1%) received a discharge of student loans

Department of Justice Guidance

U.S. Department of Justice Guidance Standards

- Does NOT change initial process of seeking student loan discharge – adversary required
- Does provide an opportunity for the AUSA (Department of Justice (DOJ) Attorney), in cooperation with Department of Education (DOE), to:
  - Review debtor's situation thoroughly in early stages of litigation – pre-discovery
  - Stipulate to the facts demonstrating that the debts would impose an undue hardship
  - Recommend to the Court that the student loan debt should be discharged if three conditions are met:
    - The debtor presently lacks an ability to repay the loan
    - The debtor's inability to pay the loan is likely to persist in the future
    - The debtor has acted in good faith in the past in attempting to repay the loan

U.S. Department of Justice Guidance Standards continued

- Does not limit potential discharge to specific bankruptcy chapters.
- Partial discharge specifically called for where appropriate and permissible. Paragraph IV(E)
- Footnote #22:

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

U.S. Department of Justice Guidance Standards

- FFEL & Perkins Loans Now Subject to the Guidance ?
  - "Dear Colleagues" letter issued 10/19/2023 subjecting FFEL & Perkins Loans to the guidance
  - Permissive language

    "a holder *may* fulfill its regulatory requirements as to the first step of the analysis by following the process outlined in November 2022 Guidance."
  - Safer course is to consolidate into Direct Loan prior to filing bankruptcy

DOJ Press Release November 16, 2023

- 632 cases were filed in the first 10 months of the new process (November 2022 through September 2023), a significant increase from recent years. The departments anticipate that this trend will continue.
- 97% of all borrowers in the cases filed are voluntarily using the new streamlined process.
- The vast majority of borrowers seeking discharge have received full or partial discharges. In 99% of cases where courts have entered orders or judgments to date, the government recommended, and the court agreed to, a full discharge or partial discharge.
- Two bankruptcy courts — the Northern and Central Districts of California — have adopted procedures recognizing the utility of the new process, aimed at further streamlining the procedures debtors must follow to obtain discharges.

Department of Justice and Department of Education Announcement November 16, 2023

- 632 cases filed through September 20, 2023
  - 97% of 632 filings (613) utilize DOJ guidance
  - 99% of cases where order entered, full or partial discharge granted
- 120 final resolutions achieved*
  - 84 full or partial discharges *
    - 13.7% of all cases
    - 70% of all final resolutions
  - 36 dismissals*
    - 5.9% of all cases
    - 30% of all final resolutions
  - 493 pending resolution*
    - 80.4% of all cases

* Per 2023 NCLC Conference

How the Guidance Affects the Process

Ethical Obligation for Student Loan Discharge Analysis

- Applicable Model Rules of Professional Conduct
  - Rule 1.1: Competence
  - Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer
  - Rule 1.3: Diligence
  - Rule 1.4: Communications
  - Rule 2.1: Advisor
- 11 U.S.C. § 707(b)(4)(c): Signature of Attorney constitutes certification that a reasonable investigation has been performed
- Recommended Reading
  - *Dignity Health v. Seare (In re Seare)*, 493 B.R. 158
  - *In re Egwin*, 291 B.R. 559
  - *Love v. United States Department of Education*, 21-02045-C

New Process for Seeking Discharge of Student Loans

- Debtor files bankruptcy case (any chapter)*
- While pending, debtor files an adversary case against student loan lenders (Rule 7003 Fed.R.Bk.Pro.)
- Debtor prepares and submits attestation to AUSA (DOJ)
- DOE provides AUSA with “litigation report” containing record of account history
- AUSA “consults proactively” with DOE to evaluate specific circumstances of case
- AUSA makes recommendation on dischargeability
  - Complete discharge
  - Partial discharge
  - No discharge

The Department of Justice Attestation Form

Section I

- Personal information
  - Residence
  - Household size and structure
- Loan information
  - Balance of loans
  - Current repayment information
  - Educational history
  - Employment situation

Section II - Current Income and Expenses

- Household gross income
  - Includes all income from all sources in the household
  - No exceptions (compare to form 122 “Means Test”)
  - Income is the only element that must be supported
    - Most recent tax return filed w/affirmation of no substantial change
    - Pay advices from most recent two months of income*
    - Other proof of gross household income from employment
    - Other verification of sources of income other than employment

Section II - Current Income and Expenses continued

- Monthly expenses
  - IRS national standards are utilized for comparison for food, housekeeping supplies, apparel and services, personal care products and services and miscellaneous. Standards:
    - If debtor's expenses are below IRS standard, no further inquiry needed, and debtor is allowed the full National Standard amount.
    - If debtor's expenses are above the IRS standard, debtor can explain why and AUSA will consider explanation to determine allowance.
  - Payroll deductions
  - IRS local standards are utilized for comparison for housing, utilities and transportation. AUSA will limit these to actual expenses. Standards:
    - If debtor's expenses are below IRS standard, AUSA will use actual expenses.
    - If debtor's expenses are above the IRS standard, AUSA will use the standard.
      - Explanations still allowed by debtor and will be considered.

Section II - Current Income and Expenses continued

- Monthly expenses continued
  - Allowance of other necessary expenses (alimony, child support, babysitting, day care, nursery and preschool costs where reasonable and necessary)
    - Allowable if reasonable and necessary
  - Allowance for reasonable expenses not incurred
    - Recognizes that debtor often forgoes what would be reasonable and necessary expenses due to budget constraints
    - Explicitly gives debtor ability to identify and explain these expenses
    - AUSA will consider them in analysis
- Allowable expenses are then compared to income to determine current ability to pay
- If bankruptcy is filed within 18 months of adversary, Schedules I and J may be used
- Student loan repayment estimates are to be based on the Standard Repayment Plan

Section III - Future Inability to Repay Student Loans

- Checklist of five factors that raise a rebuttable presumption:
  - Debtor is over 65
  - Student loans have been in repayment status for at least 10 years
  - Debtor did not complete the education for which debt was incurred
  - Debtor has permanent disability or chronic injury, limiting ability to work
  - Debtor has been unemployed for 5 of the last 10 years

- Checklist of five factors that are to be considered but do not raise a presumption:
  - Incurred loans in pursuit of degree but was unable to complete
  - Not currently employed
  - Employed but unable to obtain employment in field
  - Employed but income is insufficient
  - Any other circumstances that make it unlikely to pay in the future

Section IV - Prior Efforts to Repay Loans

- Utilizes objective criteria with factors to be considered:
  - Making a payment on the loans
  - Applying for deferment or forbearance
  - Applying for enrollment in IDR
  - Applying for consolidation
  - Responding to collection efforts of servicer/collection agent
  - Engaging with DOE “meaningfully” regarding repayment options
  - Engaged with a 3rd party “meaningfully” for assistance to resolve student loan repayment
- Additionally reviews debtor’s efforts to:
  - Obtain employment
  - Maximize income
  - Minimize expenses
  - Generally, handle their finances
- Debtor inaction during the COVID moratoriums is explicitly not bad faith

Section V - Current Assets

- Lists five specific asset types
  - Real estate
  - Motor vehicles
  - Retirement accounts
  - Interests in businesses
  - Anticipated tax refunds
- AUSA is not to give dispositive weight to non-liquid assets
- AUSA is not to give dispositive weight to assets critical to debtor maintaining a minimal standard of living
- AUSA is not to give dispositive weight to exempt status of assets*

Section VI - Additional Circumstances

- A simple “catch-all” for the debtor to make any additional arguments they choose to

Practice Pointers for a Successful Outcome

- Selectively prosecute your cases (only those to whom the standards should reasonably apply should be prosecuted)
- Properly serve your complaint:
  - U.S. Secretary of Education Miguel Cardona, 400 Maryland Ave. SW, Washington, DC 20530
  - U.S. Attorney General Merrick Garland, 950 Pennsylvania Ave. NW, Washington, DC 20530
  - U.S. Attorney for your jurisdiction
- Ensure your client executes the attestation prior to submission
- Support your points of advocacy when submitting the attestation
- Work cooperatively to get an efficient and effective review
- Be prepared and prepare your client to wait for the process to complete

Income-Driven Repayment Plans

INCOME-DRIVEN REPAYMENT PLANS

- Currently nine repayment plans under HEA, 4 balance-based, 5 income-driven
  - All plans are “by right” - eligible debtors cannot be denied
  - Balance-based allow for full repayment of loans with interest over time
  - Income-driven allow for payments based on borrowers' disposable income
    - Include provisions for forgiveness at end of plan
    - Include Public Service Loan Forgiveness
    - Generally last 10 – 25 years
  - Borrowers must enroll in plans and recertify income annually

Revised Pay As You Earn (REPAYE) plan becoming Saving on a Valuable Education (SAVE) plan

- Phase 1: Immediate upon payment restart
  - Spouses may file separate tax returns to exclude income
  - Include Public Service Loan Forgiveness
  - Poverty calculation up to 225% from 150%
  - Subsidy covers 100% of excess interest

- Phase 2: Effective July 1, 2024
  - Those enrolled in REPAYE will be automatically converted
  - Decreases discretionary income contribution from 10% to 5% for undergraduate loans (remains at 10% for graduate loans)
  - Those in other IDRs will be able to re-enroll into SAVE
  - 10-year forgiveness for ≤ $12k, 20-year forgiveness for ≥ $12k

Stretto Tools Assisting Debtor Attorneys

Bankruptcy Discharge Analyzer

- Populate borrower-specific data via wizard-based program
- Imports and analyzes NSLDS file
- Provides report on likelihood of success
- If success is likely:
  - Populates DOJ attestation
  - Substantially prepares complaint
  - Advises of supporting document requirements

Repayment Plan Analyzer

- Reviews potential administrative discharges
- Reviews PSLF eligibility
- Provides report on all repayment plan options for borrower
- Populates IDR enrollment forms and, if necessary, consolidation forms
- Advises of supporting document requirements

Questions? Thank You.

APPENDIX B:
Debtor Example Scenario

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

Part I: Personal Information

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

Part II: Present Ability to Pay

Ms. Smith provided information about her income and expenses in Part II of the Attestation. Ms. Smith has reported on her Attestation that she earns $3900 per month and has current monthly expenses of $3857, including $600 that is deducted from her paycheck for taxes, Medicare, Social Security, and health insurance. Ms. Smith has indicated that she resides in inadequate housing and needs to incur additional housing expenses to achieve a minimal standard of living which will increase her total expenses by $800 (for a total expense amount of $4657). Below are the steps the Department attorney, in consultation with Education, takes in analyzing Ms. Smith's income and expenses:

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

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

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

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

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

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

Line 14(a) of the Attestation asks the debtor to confirm whether certain expenses are within amounts allowed under the IRS National Standards. Here, Ms. Smith has confirmed that her household monthly expenses do not exceed the allowed amounts for the following categories, nor the aggregate amount for these categories. The Department attorney should allow the full amount for these categories (for a household of two):

Food: $779
Housekeeping supplies: $82
Apparel & Services: $161
Personal care products and services: $82
Miscellaneous: $306
Total: $1410

Ms. Smith has indicated that her uninsured medical costs are $225, an amount which exceeds the IRS allowed amount of $75 per household member under age 65. However, she has explained that her daughter requires medication and an inhaler, and the total cost not covered by

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

insurance is $150. Because Ms. Smith has reasonably explained why she needs this excess expense in order to meet her daughter's health care needs, she should be allowed her actual expense amount of $225, including $75 for her uninsured medical costs and $150 for her daughter's.

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

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

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

(c) Other Necessary Expenses. Line 15(c) allows a debtor to list expenses consistent with the IRS Other Necessary Expenses categories. Ms. Smith has listed only one expense, $150 per month for babysitting, day care or nursery and preschool costs. The Other Necessary Expenses categories require explanation of the necessity for these expenditures, and Ms. Smith explains that she needs to pay for her daughter to attend before and after care because her daughter's school schedule conflicts with her work schedule. Because Ms. Smith must pay this expense in order to

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

maintain her job, and it is reasonable that she use the services provided by her daughter's school, this expense is "reasonable and necessary."

(d) Expenses for Unmet Needs. The expenses calculated above total $3857, an amount less than Ms. Smith's income. However, the Department attorney should also consider anticipated expenses that the debtor has identified on Line 17 of the Attestation. Ms. Smith has explained in Line 17 that she currently lives in her mother's basement apartment, but that this living situation is not sustainable. She has located an apartment for $1300 per month where she intends to move within a few months, increasing her total housing and utilities expense by $800. Because Ms. Smith will need to incur this additional expense in order to meet basic housing needs for her and her daughter, the Department attorney should consider Ms. Smith's anticipated rent increase when calculating her total expenses.

(e) Ms. Smith's allowable expenses (including the additional housing expense) total $4657:

- $600 – Payroll deductions
- $1635 – National Standards
- $1472 - Local Standards (without additional future housing expense)
- $150 – Other Necessary Expenses
- $800 – future expenses (additional housing expense)

(3) Comparison to income. Ms. Smith's allowed expenses of $4657 exceed her monthly income of $3829, which has been verified by her tax returns. Because her allowed expenses exceed her income, the Department attorney should find she currently does not have sufficient means to pay her student loans while maintaining a minimal standard of living.

Part III: Future Circumstances

Part III of the Attestation allows a debtor to attest to matters showing that the inability to pay will persist into the future. In Line 18, the debtor can attest to two circumstances that justify a *presumption* of a future inability to pay. Ms. Smith has indicated that her student loan went into repayment more than 10 years ago.[4] She has also indicated she did not complete the degree for which she incurred the student loans. Accordingly, she is entitled to a presumption that she will remain unable to repay the loan in the future.

Although the presumption of future inability to pay is rebuttable, those circumstances should be infrequent. Illustratively, Ms. Smith has not provided any information in her Attestation that indicates a likely future ability to pay or that her financial circumstances are likely to change. The Attestation, as a whole, supports her claim that she will remain unable to

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

pay. She has indicated on Lines 18 and 19 that she (1) was forced to drop out of nursing school to care for her infant daughter, (2) she cannot obtain employment as a nurse because she did not obtain her degree, (3) her current job does not offer significant raises or promotions, and (4) she has been unable to obtain a second job and likely could not do so because her daughter suffers from asthma. None of that information provides a basis to rebut the presumption of future inability to pay. Indeed, this information would appear to support a conclusion that she lacks a future ability to pay even in the absence of any presumption. In this situation, there does not appear to be a need for the attorney to investigate further. Although there are circumstances where the Department attorney may reasonably make inquiry to supplement or elucidate statements in the Attestation, that need may be infrequent. In this example, the Department attorney should conclude that Ms. Smith's inability to pay will continue for a significant portion of the repayment period.

Part IV: Prior Efforts to Repay Loans

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

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

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

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

vehicle with a car payment, she explains the need for reliable transportation. In addition, the vehicle payment is within the Local Standards above. Obtaining the vehicle is not evidence of a refusal to minimize expenses.

Part V: The Debtor's Assets

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

Conclusion

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

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

[Updated January 2023]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re:	)	
	)	
JANE SMITH,	)	Case No. 22-00000
	)	Chapter 7
Debtors.	)	
	)	
_____	)	
	)	
JANE SMITH,	)	
	)	
Plaintiff,	)	Adversary Pro.22-0000
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF EDUCATION,	)	
	)	
Defendant.	)	
_____	)	

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

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

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

I. PERSONAL INFORMATION

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

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

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

Jane Smith	*30 years*	*[self]*
Sarah Smith	*10 years*	*daughter*

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

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

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

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

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

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

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

II. CURRENT INCOME AND EXPENSES

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

A. Household Gross Income

11. My current monthly household ***gross*** income from all sources is $3900.[1] This amount includes the following monthly amounts:

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

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

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

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

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

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

_____

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

B. Monthly Expenses

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

(a) Living Expenses[2]

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

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

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

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

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

vi. My total expenses in these categories — do exceed □ do not exceed ■
$785 (one person)
$1,410 (two persons)
$1,610 (three persons)
$1900 (four persons in household)
Add $344 per each additional member if more than four in household.

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

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

_____
_____
_____
_____

(b) Uninsured medical costs:

My uninsured, out of pocket medical costs do exceed ■ do not exceed □

$75 (per household member under 65)
$153 (per household member over 65)

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

My total uninsured medical costs are $225. I buy inhalers and medications for my daughter, who has asthma, and the total cost not covered by insurance for her expenses is approximately $150 per month. I have $75 in uninsured medical costs for myself.

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

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

(a) Payroll Deductions

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

ii. Contributions to retirement accounts $*0*

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

[You may refer to line 17 of the Means Test or Schedule I, line 5]

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

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

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

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

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

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

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

vii. Other payroll deductions
_____ $ *n/a*
_____ $_____
_____ $_____

(a) Housing Costs[4]

i. Mortgage or rent payments $ *500*
ii. Property taxes (if paid separately) $ *n/a*
iii. Homeowners or renters insurance (if paid separately) $*15*
iv. Home maintenance and repair (average last 12 months' amounts) $ *n/a*
v. Utilities (include monthly gas, electric $*250*

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

water, heating oil, garbage collection,
residential telephone service,
cell phone service, cable television,
and internet service).

(b) Transportation Costs

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

(c) Other Necessary Expenses

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

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

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

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

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

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

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

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

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

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

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

_____
_____
_____
_____

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

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

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

viii. Other expenses I believe necessary for a minimal standard of living. $ *n/a*

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

_____
_____
_____
_____

16. After deducting the foregoing monthly expenses from my household gross income, I have *$0* remaining income.

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

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

III. FUTURE INABILITY TO REPAY STUDENT LOANS

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

___ I am age 65 or older.

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

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

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

I was in nursing school but had to drop out to care for my daughter. Without a degree, I cannot obtain employment as a nurse and cannot increase my income.

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

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

_____
_____
_____
_____
_____

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

_____

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

Please explain your efforts to obtain employment.

_____
_____
_____
_____
_____
_____

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

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

Describe how the school closure has inhibited your future earning capacity:

_____
_____
_____
_____
_____
_____
_____

___ I am not currently employed.

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

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

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

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

Please explain why you believe this is so:

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

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

Explain these circumstances:

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

IV. PRIOR EFFORTS TO REPAY LOANS

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

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

___ regular monthly payments of $_____ each.

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

22. I have applied for *0* forbearances or deferments. I spent a period totaling *0* months in forbearance or deferment.

23. I have attempted to contact the company that services or collects on my student loans or the Department of Education regarding payment options, forbearance and deferment options, or loan consolidation at least *10* times.

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

Description of efforts:

_____
_____
_____
_____
_____
_____
_____

_____
_____

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

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

26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the student loan(s) you are seeking to discharge. These may include efforts to obtain employment, maximize your income, or minimize your expenses. They also may include any efforts you made to apply for a federal loan consolidation, respond to outreach from a loan servicer or collector, or engage meaningfully with a third party you believed would assist you in managing your student loan debt.

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

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

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

V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: *None*

Owners:[7] _____

_____

Fair market value: _____

Total balance of mortgages and other liens. _____

28. I own the following motor vehicles:

Make and model: *2018 Toyota Camry*

Fair market value: $*25,000*

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

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

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

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

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

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

_____ _____ _____

_____ _____ _____

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

VI. ADDITIONAL CIRCUMSTANCES

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

_____
_____
_____
_____
_____
_____
_____
_____
_____

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

/s/ Jane Smith .
Signature:

Jane Smith .
Name:

Date: *February 25, 2022*

At a Glance: Department of Justice's New Process for Student Loan Bankruptcy Discharge Cases

Each year, individuals in the bankruptcy process seek to discharge student loan debt in order to get the "fresh start" envisioned by the bankruptcy code. Congress has set a higher bar for discharging student loan debt compared to other debt—debtors who seek to discharge student loans must prove in a separate "adversary proceeding" that paying their student loans would impose an "undue hardship." But that higher bar need not be an insurmountable barrier for debtors who cannot afford to pay their student loans.

The Department of Justice, in close coordination with the Department of Education, is implementing a new process at the outset of adversary proceedings in which debtors seek to discharge federal student loans in bankruptcy. While the bankruptcy judge makes the final decision whether to grant a discharge, the Justice Department can play an important role in that decision by supporting discharge in appropriate cases. The new process will help ensure transparent and consistent expectations for the discharge of student loan debt in bankruptcy; reduce the burden on debtors of pursuing such proceedings; and make it easier for Justice Department attorneys to identify cases where discharge is appropriate.

Under the Justice Department's new process, debtors will complete an attestation form to assist the government in assessing the discharge request. The Justice Department, in consultation with the Department of Education, will review the information provided, apply the factors that courts consider relevant to the undue-hardship inquiry, and determine whether to recommend discharge. Even where the applicable factors may not support a complete discharge, where appropriate, the Justice Department will consider supporting a partial discharge.

Justice Department attorneys will assess the undue-hardship factors in the following manner:

Present Ability to Pay – Using existing standards developed by the IRS and the information provided by the debtor, the Justice Department attorney will calculate a debtor's expenses and compare those expenses to the debtor's income. If a debtor's expenses equal or exceed the debtor's income, the Department will determine that the debtor lacks a present ability to pay.

Future Ability to Pay – The Department will then assess whether the debtor's present inability to pay is likely to persist in the future. The Department attorney will presume a debtor's financial circumstances are not likely to change if certain factors—such as retirement age, disability or chronic injury, protracted unemployment history, lack of degree, or extended repayment status—are present. Where such factors are not present, the Department attorney will assess the facts showing whether the debtor's present inability to pay is likely to persist.

Good Faith Efforts – In assessing what courts call the "good faith" standard, the Department will focus on objective criteria reflecting the debtor's reasonable efforts to earn income, manage expenses, and repay their loan. The Department attorney will consider, for example, whether the debtor contacted the Department of Education or their loan servicer regarding payment options for their loan. A debtor will not be disqualified based on past non-payment if other evidence of good faith exists. A debtor also will not be disqualified based on their not enrolling in an income driven repayment plan where the debtor was deterred from participating in such a plan or otherwise provides a reasonable explanation for non-enrollment.

[Updated August 2023]

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE _____ DISTRICT OF _____

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

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

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

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

I. PERSONAL INFORMATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. CURRENT INCOME AND EXPENSES

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

A. Household Gross Income

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

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

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

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

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

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

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

_____

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

B. Monthly Expenses

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

(a) Living Expenses[2]

i. My expenses for food — do exceed ☐ do not exceed ☐
$466 (one person)
$777 (two persons)
$936(three persons)
$1123 (four persons)

ii. My expenses for housekeeping supplies — do exceed ☐ do not exceed ☐
$47 (one person)
$80 (two persons)
$85 (three persons)
$90 (four persons)

iii. My expenses for apparel & services — do exceed ☐ do not exceed ☐
$96 (one person)
$145(two persons)
$207 (three persons)
$252 (four persons)

iv. My expenses for (non-medical) personal care products and services — do exceed ☐ do not exceed ☐
$43 (one person)
$78 (two persons)
$91 (three persons)
$97 (four persons)

v. My miscellaneous expenses (not included elsewhere on this Attestation) — do exceed ☐ do not exceed ☐
$189 (one person)
$309 (two persons)
$381 (three persons)
$431 (four persons)

vi. My total expenses in these categories — do exceed ☐ do not exceed ☐
$841 (one person)

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

$1389 (two persons)
$1700 (three persons)
$1993 (four persons in household)
Add $356 per each additional member if more than four in household.

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

(b) Uninsured medical costs:

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

$79 (per household member under 65)
$154 (per household member 65 or older)

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

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

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

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

(a) Payroll Deductions

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

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

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

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

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

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

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

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

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

vii. Other payroll deductions

_____ $_____
_____ $_____
_____ $_____

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

(b) Housing Costs[4]

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

(c) Transportation Costs

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

(d) Other Necessary Expenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. FUTURE INABILITY TO REPAY STUDENT LOANS

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

☐ I am age 65 or older.

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

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

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

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

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

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

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

Please explain your efforts to obtain employment.

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

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

Describe how the school closure inhibited your future earnings capacity:

☐ I am not currently employed.

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

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

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

Please explain why you believe this is so:

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

Explain these circumstances:

IV. PRIOR EFFORTS TO REPAY LOANS

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

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

___ regular monthly payments of $_____ each.

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

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

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

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

Description of efforts:

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

26. Describe any other facts indicating you have acted in good faith in the past in attempting to repay the student loan(s) you are seeking to discharge. These may include efforts to obtain employment, maximize your income, or minimize your expenses. They also may include any efforts you made to apply for a federal loan consolidation, respond to outreach from a loan servicer or collector, or engage meaningfully with a third party you believed would assist you in managing your student loan debt.

V. CURRENT ASSETS

27. I own the following parcels of real estate:

Address: _____

_____

_____

Owners:[7] _____

_____

Fair market value: _____

Total balance of mortgages and other liens. _____

28. I own the following motor vehicles:

Make and model: _____

Fair market value: _____

Total balance of Vehicle loans And other liens _____

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

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

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

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

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

VI. ADDITIONAL CIRCUMSTANCES

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

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

_____
Signature:

_____
Name:

_____
Date:

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

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

PRESS RELEASE

Justice Department and Department of Education Announce Successful First Year of New Student-Loan Bankruptcy Discharge Process

Thursday, November 16, 2023

Share

For Immediate Release

Office of Public Affairs

Agencies Will Continue to Assess Whether Process is Providing Relief to Eligible Borrowers

WASHINGTON – The Justice Department, in close coordination with the Department of Education, announced today a successful first year of the new process for handling cases in which individuals seek to discharge their federal student loans in bankruptcy. One year after Associate Attorney General Vanita Gupta announced the process in November 2022, data and information show that the process is achieving its goals of ensuring consistency and equity in the evaluation of student loan discharge requests, and that the process has translated into increasing numbers of eligible federal student loan borrowers seeking and obtaining debt relief under the Bankruptcy Code.

The departments finalized new guidance in November 2022 that outlined a fairer, more accessible process to ensure consistent treatment of the discharge of federal student loans, reduce the burden on borrowers of pursuing such proceedings, and facilitate identifying cases where discharge is appropriate. At the time, both the departments committed to assessing the guidance after the first year of implementation. To do so, the Justice Department surveyed all 94 U.S. Attorneys' Offices and consulted closely with the Department of Education to gather data and comments on the process. A dedicated group of experts within the Civil Division also collected input on the new process from consumer law groups, including the National

Association of Consumer Bankruptcy Attorneys. Finally, the Civil Division has conducted large-scale trainings for Department attorneys, as well as public training events supported by regional bar associations and the courts, including most recently a training session hosted by the American Bankruptcy Institute that was attended by over 300 consumer bankruptcy attorneys. The Department of Education also participated in training events hosted by regional bar associations, as well as at the annual meeting of the National Association of Chapter 13 Trustees (NACTT), which included private attorneys as well as Chapter 13 trustees.

The information that the departments have collected indicates that the new process is making it easier for eligible debtors to achieve bankruptcy discharge of their federal student loan debts. Since the process was announced one year ago:

- 632 cases were filed in the first 10 months of the new process (November 2022 through September 2023), a significant increase from recent years. The departments anticipate that this trend will continue.
- 97% of all borrowers in the cases filed are voluntarily using the new streamlined process.
- The vast majority of borrowers seeking discharge have received full or partial discharges. In 99% of cases where courts have entered orders or judgments to date, the government recommended, and the court agreed to, a full discharge or partial discharge.
- Two bankruptcy courts — the Northern and Central Districts of California — have adopted procedures recognizing the utility of the new process, aimed at further streamlining the procedures debtors must follow to obtain discharges.

“One year ago, we set out to simplify and improve the process for student loan borrowers in bankruptcy,” said Associate Attorney General Gupta. “I am thrilled that our one-year review indicates that our efforts have made a real difference in borrowers’ lives by ensuring student-loan discharges are more accessible to eligible borrowers. We will continue working with our partners at the Department of Education to ensure the process continues to be a success.”

“It is clear that this improved process is helping struggling borrowers,” said Chief Operating Officer Rich Cordray of the Department of Education's Office of Federal Student Aid. “This guidance is an important piece of our overall efforts to create a student loan system that is more humane, with affordable payments and programs that work as intended. In partnership with the Justice Department, we will continue working to streamline this process and to provide student loan borrowers a pathway to obtaining much-needed relief in bankruptcy.”

Because the new process is working well, the Justice Department is not making any changes to the guidance at this time. The departments will continue to meet regularly to ensure that the guidance is appropriately implemented and to consider adjustments as warranted. Subject-matter experts in the Civil Division plan to continue to promote awareness of and provide training on the guidance both within and outside the government. The departments will also continue to conduct outreach to the broader community potentially affected by the process.

Updated November 16, 2023

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Press Release Number: 23-1295

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December 13, 2023

SPEECH

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Thank you, Amy. It is great to be here with you and the Attorney General, whose support for communities and law enforcement is the backbone of everything we do at…

December 11, 2023

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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re: ANGELO MARTEL LOVE, CHRISTINE MARIE LOVE, Debtors. CHRISTINE MARIE LOVE, Plaintiff, v. UNITED STATES DEPARTMENT OF EDUCATION, FEDLOAN SERVICING, NELNET Defendants.	Case No. 19-20532-C-7 Chapter 7 Adversary No. 21-02045-C **OPINION**

Before: Christopher M. Klein
United States Bankruptcy Judge

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

This was an "undue hardship" student loan discharge trial. This trier of fact finds by preponderance of evidence that the self-represented debtor plaintiff demonstrated "undue hardship on the debtor and the debtor's dependants" within the meaning of 11 U.S.C. § 523(a)(8).

Despite widespread belief that student loans are virtually impossible to discharge in bankruptcy, the § 523(a)(8) tool that Congress placed in the judicial toolbox in 1978 to assess "undue hardship" is adequate to the task if only the bar and the bench correctly do their jobs. Litigants must present factual evidence of "undue hardship" that enables trial courts to make findings of fact and conclusions of law by preponderance of evidence to be reviewed on appeal for "clear error."

It is time to demythologize unwarranted and fallacious dogmas and propaganda that have encrusted, ossified, neutralized, and transmogrified § 523(a)(8) analysis into a misconception that student loan debt is virtually impossible to discharge, even though the "undue hardship" standard of proof is preponderance of evidence and the standard of appellate review is "clear error."

It is a paradox. Only the most compelling cases seem to be able to qualify for discharge as "undue hardship" on a standard of proof that is preponderance of evidence.

The solution follows from the Supreme Court's explication of the proper roles of trial and appellate courts facing "mixed questions" of law and fact and proper standard of review. U.S. Bank Nat'l Ass'n v, Village at Lakeridge, 138 S.Ct. 960 (2018).

Student loan "undue hardship" questions depend intensely on the facts of each case. As such, they are mixed questions of law and fact in which factual questions predominate over legal analysis that must, if there has been a trial, be reviewed on appeal under the deferential "clear error" standard. If there has been a trial with findings of fact and conclusions of law, then appellate review must be under the "clear error" standard that does not permit appellate courts to substitute judgment for that of the trial court. Lakeridge, 138 S.Ct. at 966-67.

Mindful that factual questions predominate in a § 523(a)(8) mixed question of law and fact, this court hereby makes findings of fact and conclusions of law determining that excepting the subject debt from discharge would constitute an "undue hardship" on the debtor and her dependents.

Facts

These findings are rendered after a trial during which the self-represented plaintiff testified and was cross-examined by defendants' counsel. Supplemental Findings are being filed under seal because some of the relevant facts are intensely private and personal. Permitting them to be published by those who routinely post findings on the internet would chill the willingness of litigants to provide candid testimony about sensitive matters that are relevant and material to issues before the court.[1]

Christine Love owes the United States Department of Education about $27,270 for student loans incurred between 2016 and April 2018 while studying Healthcare Administration at Ashford University, a proprietary school that closed under a storm of litigation by the California Attorney General.[2] She may also be exposed to liability for about $57,697 in student loans incurred by her now-former spouse.

The studies at Ashford have produced no discernable improvement in her employment opportunities.

She was forced to abandon her studies due to debilitating injuries suffered at the hands of her now-former husband. The

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[1]This court on its own motion is exercising its protective authority under 11 U.S.C. § 107(b)(2) relating to potentially scandalous or defamatory matter and under 11 U.S.C. § 107(c) because this court finds disclosure would create undue risk of unlawful injury to the individual debtor.

[2]The California Attorney General obtained a judgment against Ashford "for misleading students about career outcomes, cost and financial aid, pace of degree programs, and transfer credits in order to entice them to enroll at Ashford." Statement of Dec., at p. 47, People of the State of California v. Ashford University, LLC, et al., Case No. 37-2018-00046134-CU-MC-CTL, March 3, 2022.

ensuing divorce action terminated marital status in August 2019, leaving for future resolution property division of the family home. Her husband was sentenced to 6.7 years in state prison.

With spouse in prison and with two minor children, Love could not afford to pay current debts. The voluntary chapter 7 case was filed January 30, 2019.

Love's "current monthly income" was $3,390.09 from employment as a Pharmacy Technician. After taxes and insurance, her monthly income was $2,834.87. Her monthly expenses were $3,949.00. She received gifts from her grandmother to help pay bills. Her annual gross income of $40,681.08 was 43 percent of the state's median family income for her size family.[3]

A Notice to File Claims was issued after the chapter 7 trustee made a finding of assets.

The United States Department of Education filed two timely proofs of claim totaling $88,019.86.[4] Of that total, $28,249.86 was owed by Love as the borrower. The trustee paid a total of $3,052.85 ($2,073.05 + $979.80) on those claims.[5]

In this action, Love seeks discharge of all her liability for student loans. That includes both her direct remaining debt of $27,270.06 and any potential liability she may have for her now-former spouse's remaining debt of $57,697.14.

The United States concedes that Love has never been in

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[3]All numbers from Official Forms 106I, 106J & 122A-1.

[4]Claim #11-1, US Dept of Ed c/o NELNET, $59,770.19, borrower Angelo Love; Claim #13-1 US Dept of Ed c/o FEDLOANSERVICING, $28,249.86, borrower Christine Love.

[5]Trustee's Final Report, Dkt #30, filed, 9/11/2019.

default on student loans. In addition to the $3,052.85 paid in the chapter 7 case, Love made voluntary additional payments of $50.59. She was approved for a "REPAYE" flexible repayment plan with $10.00 monthly payments beginning in February 2019 and made payments under that plan. In January 2021, she was notified the monthly REPAYE payment would increase to $284.20 per month. This adversary proceeding was filed in June 2021.

Love received assistance from the California Keep Your Home program in order to help with her mortgage, at a cost of an $18,000 lien that eventually will have to be repaid.

Love has a history of diligent work for over 20 years in low-paying jobs and of striving to improve her lot in life. From 2000 until 2013 she worked in assisted living facilities in various humble capacities. She has since worked as a medical records technician and as pharmacy technician. She presently is employed in a clerical position reviewing health-care claims for audits. She believes that she has reached her maximum income potential. This court agrees and so finds.

Her grandmother explained that she helps Love with "food, gas, and occasional household necessities and bills due to her financial struggles." The court believed that testimony, to which there was no objection.

This court likewise believed Love's testimony about her minimal standard of living. There are no luxuries in her budget. The evidence reveals a need for continuing medical care due to her lingering physical injuries.

Based on observing Love's credible testimony, this court finds that she is sincere, hard-working, and has made an honest

effort in good faith to address her student loan debt.

Moreover, this court finds that Love does not have significant prospects for future increases in income beyond the rate of inflation and finds that this state of affairs is likely to persist indefinitely. She is doing the best she can in coping with the challenges of life.

Jurisdiction

Subject-matter jurisdiction is founded on 28 U.S.C. § 1334(b). Determinations of dischargeability of student loans are core proceedings a bankruptcy judge may hear and determine. 28 U.S.C. § 157(b)(2)(I).

Analysis

Student loan "undue hardship" issues under § 523(a)(8) are assessed in the Ninth Circuit under the three-part "Brunner Test," borrowed from the Second Circuit. United Student Aid Funds, Inc. v. Pena, 155 F.3d 1108 (9th Cir. 1998); Brunner v. New York State Higher Educ. Serv. (In re Brunner), 831 F.2d 395 (2d Cir. 1987). Ms. Love's situation is examined here through the Brunner prism, focusing on what Brunner and Pena actually held.

I

Brunner Test

The first step of the three-part Brunner test is: the debtor "cannot maintain, based on current income and expenses, a 'minimal' standard of living for [self] and dependents if forced to repay the loans." Pena, 155 F.3d at 1111; Brunner, 831 at 396.

Second, the debtor must show that "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." Pena, 155 F.3d at 1111; Brunner, 831 at 396.

Third, the debtor "has made good faith efforts to repay the loans." Pena, 155 F.3d at 1111; Brunner, 831 at 396.

A

Pena and Brunner make a fascinating pair because their facts led to opposite conclusions regarding "undue hardship." Each involved versions of § 523(a)(8) that permitted automatic discharge regardless of hardship after the lapse of a specified period. The issue in each was early discharge based on "undue hardship" in lieu of waiting for the statutory period for automatic discharge to elapse.

They presented two sides of the same coin. Using the same test, the Second and Ninth Circuits each affirmed decisions that had reached opposite conclusions regarding the existence of "undue hardship." The facts made all the difference.

B

Applying the Brunner Test in the Ninth Circuit

Accepting that Brunner is the law of the Ninth Circuit, how Brunner is actually applied in the circuit is important. One gains useful insights by comparing and contrasting the respective successful and unsuccessful assertions of "undue hardship" in Pena and Brunner. The standard of appellate review looms large in discerning the appropriate "undue hardship" analysis.

1

Minimal Standard of Living on Current Income

The first element of the Brunner test is "cannot maintain, based on current income and expenses, a 'minimal' standard of living for [self] and dependents if forced to repay the loans."

Monthly income and monthly expenses were addressed separately by the Ninth Circuit in Pena.

There was evidence that the Penas' monthly income fluctuated. The Ninth Circuit ruled it was not "clear error" for the bankruptcy court to determine monthly income as $1,748 based on the sum of take-home pay at the time of filing of $1,370 plus a fixed disability payment of $378. Although there was evidence that wages had increased between discovery and time of trial, there also was evidence that income fluctuated. Hence, the Ninth Circuit ruled, "we accept as not clearly erroneous the bankruptcy court's finding that the Penas' monthly net income was $1,748." Pena, 155 F.3d at 1112.

As to monthly expenses, the Ninth Circuit affirmed as not clearly erroneous the bankruptcy court's averaging of monthly expenses at three stages of the proceeding – when schedules were filed, when interrogatories were answered, and time of trial. It specifically rejected the argument that "current" income under the Brunner test means the time of trial: "where evidence suggests that the debtor's income or expenses tend to fluctuate, it is not inappropriate to average figures over a reasonable period of time." Pena, 155 F.3d at 1112.

Comparing average monthly expenses ($1,789) and net monthly income ($1,748) there was a deficit of $41. In view of that $41

monthly deficit, the Ninth Circuit ruled: "Clearly, in these circumstances the Penas could not maintain a minimal standard of living and pay off the student loans." Pena, 155 F.3d at 1113.

That conclusion satisfied the first Brunner element in Pena.

2

Additional Circumstances

Next, the debtor must show that "additional circumstances" exist indicating that the inability to maintain a minimal standard of living will "persist for a significant period of the repayment period of the student loans."

In Pena, two factual findings by the bankruptcy court satisfied the second Brunner element: First, there was the finding of Mrs. Pena's ongoing mental disability about which she testified as impairing her ability to obtain "meaningful permanent employment." The Ninth Circuit rejected the proposition that expert corroboration of the medical condition was required, reasoning that the trial court was entitled to believe her testimony and that the existence of a back disability award, as well as receipt of ongoing disability payments sufficed such that it was not clear error for the trial court to conclude that the condition would persist.

The Ninth Circuit distinguished Pena from Brunner as different because in Brunner there was no evidence that Ms. Brunner's mental state impaired her capacity to work. Pena, 155 F.3d at 1113-14.

Second, as other evidence, the Ninth Circuit ruled that low value of the education provided is "relevant to [the student's]

future ability to pay off the student loans." Specifically, the loans incurred to pay ITT Technical Institute yielded a credential as "Associate in Specialized Technology" that was useless to Mr. Pena because it did not help him in his employment and was not accepted by other colleges for course work credit.

Hence, the "bankruptcy court did not err in considering that [Mr. Pena's] income was not likely to increase as a result of his ITT education." Pena, 155 F.3d at 1114.

These findings satisfied the second Brunner prong.

3

"Good Faith" Effort to Repay Loans

As to "good faith," the Ninth Circuit ruled the "bankruptcy court did not clearly err in finding that the Penas exhibited good faith in attempting to pay back the student loans."

The record showed that there had been "several" payments and "after being laid off ..., the debtors were given a 90-day deferment, but then were unable to meet their obligations and filed chapter 7." This sufficed to support the bankruptcy court's finding of "good faith" efforts to repay the loans.

The Ninth Circuit rejected the argument that good faith was undermined by their use of Mrs. Pena's $8,000 back disability benefit award to buy a used car and pay other bills.[6]

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[6]The Ninth Circuit explained:

> USA Funds does not suggest why good faith would have required the Penas to pay the student loan debt prior to paying down portions of their other debts ($43,360 minus $8,685) when the other debts were approximately four times the amount of the student loans.

Contrasting the Pena's situation with the facts in Brunner, the Ninth Circuit noted that Ms. Brunner failed to establish good faith because she filed for discharge within a month after the first payment of her loans came due, made virtually no attempt to repay, and never requested the available deferment of payment that was available to those who are unable to pay because of prolonged unemployment. Pena, 155 F.3d at 1114.

Hence, in Pena "several" payments and brief deferment during a job loss, followed by a chapter 7 filing, sufficed to satisfy the "good faith" prong of Brunner against attack as clear error.

C

Ninth Circuit Decisions After Pena

The Ninth Circuit's first noteworthy student loan decision in the shadow of Pena was Saxman in 2003, ruling that bankruptcy courts have equitable power to partially discharge student debt to the extent payment would constitute an "undue hardship." Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168 (9th Cir. 2003); cf. Graves v. Myrvang (In re Myrvang), 232 F.3d 1116 (9th Cir. 2000) (§ 523(a)(15)).

In other words, bankruptcy courts have equitable power to scale down student loan debt. E.g., Nitcher v. Educ. Credit Mgmt. Corp. (In re Nitcher), 606 B.R. 67, 80 (Bankr. D. Or. 2019).

Another key Ninth Circuit decision in the wake of Pena was Hedlund, a partial discharge case in which the Ninth Circuit clarified and enforced the standard of review for "undue

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Pena, 155 F.3d at 1114.

hardship" determinations made by bankruptcy judges.

In Hedlund, the Ninth Circuit disapproved a district court's use of de novo review in which the district court had substituted its judgment for that of the bankruptcy trial court and reversed a determination of Brunner "good faith." The Ninth Circuit, in turn, reversed the district court because it erred by applying the wrong standard of review: "a good faith finding under Brunner should be reviewed for clear error." Hedlund v. Educ. Res. Inst. Inc., 718 F.3d 848, 854 (9th Cir. 2013). In short, Hedlund holds it is error for an appellate court to substitute its judgment for that of the trial court on the question of Brunner "good faith."

The Ninth Circuit explained that "good faith" is "an essentially factual inquiry" driven by "data of practical human experience." Hedlund, 718 F.3d at 854, citing Figter Ltd. v. Teachers Ins. & Annuity Assoc. of Am. (In re Figter Ltd.), 118 F.3d 635, 638 (9th Cir. 1997); accord, United States v. McConney, 728 F.2d 1195, 1203-04 (9th Cir. 1984) (en banc).

Nor is the Ninth Circuit position regarding review of "good faith" unique. The Seventh Circuit (which applies Brunner under the name Roberson) has reached the identical conclusion on the same reasoning: the Brunner good faith standard "combines a state of mind (a fact) with a legal characterization (a mixed question of law and fact) that Supreme Court precedent teaches be "treated as factual in nature." Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882, 884 (7th Cir. 2013) ("It is important not to allow judicial glosses, such as the language in Roberson and Brunner,

to supersede the statute itself.") (Easterbrook, J.).[7]

II

The "Mixed Question" Conundrum

Despite the apparent clarity of a "clear error" review, confusion persisted. Student loan creditors that lost "undue hardship" cases in bankruptcy court would appeal and urge the appellate court to substitute its judgment for that of the trial court. Implicit in the arguments was a sense that "undue hardship" is some form of a "mixed question" for which it is fair game to substitute judgment on appeal.

An example is the district court's reversal of the Hedlund bankruptcy court, which the Ninth Circuit later reversed for

[7]The Seventh Circuit's Krieger decision is indicative of a growing realization that something is rotten in Brunner. The critiques come from two directions. First, per Krieger, too much judicial gloss has transmogrified Brunner. Second, the question in Brunner (what showing is required to prove "undue hardship" when discharge is automatic after five years?) is very different than the question after the automatic discharge was repealed (what showing is required to prove "undue hardship" when it is the only route to discharge lifetime?). Judge Pappas was an early voice crying in the wilderness: Roth v. Educ. Credit Mgmt Corp. (In re Roth), 490 B.R. 908, 920-23 (9th Cir. BAP 2013). The chorus is gaining volume. E.g., McDowell v. Educ. Credit Mgmt Corp. (In re McDowell), 549 B.R. 744, 765-66 n.32 (Bankr. D. Idaho 2016); Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (In re Rosenberg), 610 B.R. 454, 458-59, 373 Ed. Law Rptr. 836 (Bankr. S.D.N.Y. 2020); Clavell v. U.S. Dep't of Educ. (In re Clavell), 611 B.R. 504, 513-14 (Bankr. S.D.N.Y. 2020); Wolfson v. DeVos (In re Wolfson), 2022 WL 5055468 (Bankr. D. Del. 2022). See generally Bruce Grohsgal, The Long Strange Trip to a Certainty of Hopelessness: The Legislative and Political History of the Nondischarge of Student Loans in Bankruptcy, 95 Am. Bankr. L.J. 443 (2021).

using an improper standard of review. Hedlund, 718 F.3d at 854.[8]

A more subtle version is paying lip-service to "clear error" but then using the "mixed question" label as license to nit-pick the trial court all the way to reversal in a manner that is the antithesis of "clear error" review. E.g. Educ. Credit Mgmt. Corp. v. Mason (In re Mason), 464 F.3d 878, 884-85 (9th Cir. 2006).

III

Supreme Court Resolves "Mixed Question" Conundrum

The "mixed question" conundrum was not unique to student loans and befuddled appellate courts in a variety of arenas.

In 2018, parsing the Title 11 definition of "insider," the Supreme Court cleared up the confusion about "mixed questions."

Giving a master class on the roles of trial and appellate courts, the unanimous Supreme Court prescribed a controlling analysis for assessing "mixed" questions of law and fact and the proper implementation of "clear error" review. U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC, 138 S.Ct. 960, 965-69 (2018) (9-0 decision) ("Lakeridge").

A

Roles of the Respective Courts

The Supreme Court focused in Lakeridge on the roles of the respective trial and appellate courts.

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[8]Before the Ninth Circuit squarely decided the "clear error" standard of review question in Hedlund, it had declined to find error in a district court's substitution of judgment in an appeal in which it did not purport to determine the correct standard of review. Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087 n.2 (9th Cir. 2001) (de novo review.)

A bankruptcy court "must tackle three kinds of issues – the first purely legal, the next purely factual, the last a combination of the other two." Lakeridge, 138 S.Ct. at 965.

An appellate court "must consider all its component parts, each under the appropriate standard of review." Lakeridge, 138 S.Ct. at 965.

The first step is choice by the bankruptcy judge of a legal test to determine the issue before the court at trial. An appellate panel "reviews such a legal conclusion without the slightest deference." Lakeridge, 138 S.Ct. at 965.

Next, the bankruptcy judge must "make findings of what we have called 'basic' or 'historical' fact – addressing questions of who did what, when or where, how or why. Lakeridge, 138 S.Ct. at 966.

An appellate court reviews such factual findings "only for clear error – in other words, with a serious thumb on the scale for the bankruptcy court." Lakeridge, 138 S.Ct. at 966.

Finally, the bankruptcy judge must "determine whether the historical facts found satisfy the legal test." This is the so-called "mixed question" that asks "whether the historical facts ... satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Lakeridge, 138 S.Ct. at 966, quoting Pullman-Standard v. Swint, 456 U.S. 273, 289, n.19 (1982).

The problem becomes whether the ruling on the mixed question is to be reviewed on appeal de novo or for clear error.

B

Nature of the Mixed Question Controls Standard of Review

As posited by the Supreme Court, the inquiry is: "What is the nature of the mixed question here and which kind of court (bankruptcy or appellate) is better suited to resolve it?" Lakeridge, 138 S.Ct. at 966.

Mixed questions "are not all alike." Lakeridge, 138 S.Ct. at 967.

When a particular mixed question requires courts "to expound on the law, particularly by amplifying or elaborating on a broad legal standard" and "developing auxiliary legal principles of use in other cases," then de novo review is appropriate. Lakeridge, 138 S.Ct. at 967, citing Salve Regina College v. Russell, 499 U.S. 225, 231-33 (1991).

When a mixed question "immerses courts in case-specific factual issues – compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called 'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" then appellate courts should review the decision with deference. Lakeridge, 138 S.Ct. at 967, citing Pierce v. Underwood, 487 U.S. 552, 561-62 (1988); Anderson v. Bessemer City, 470 U.S. 564, 574-76 (1985).

After Lakeridge, the rule is: "the standard of review for a mixed question all depends — on whether answering it entails primarily legal or factual work." Lakeridge, 138 S.Ct. at 967.

C

"Mixed Questions" in "Undue Hardship" Cases

The mixed question that a bankruptcy court addresses in a § 523(a)(8) "undue hardship" student loan discharge case immerses the court in case-specific factual issues. The controlling law – the Brunner test – is well known and needs little explication.

The bankruptcy court, to use the words of the Supreme Court, "takes a raft of case-specific historical facts, considers them as a whole, balances them one against another – all to make a determination:" whether the debtor's current income and expenses permit a "minimal" standard of living for herself and her dependents; whether additional circumstances make the state of affairs likely to persist for a significant portion of the repayment period of the student loan; and whether the debtor has made a "good faith" effort to repay the loans.

As the Supreme Court explained in Lakeridge: "Just to describe that inquiry is to indicate where it (primarily) belongs: in the court that has presided over the presentation of the evidence, that has heard all the witnesses, and that has both the closest and the deepest understanding of the record – i.e., the bankruptcy court." Lakeridge, 138 S.Ct. at 968.

The Supreme Court also reasoned that an alternative approach which gets to the same answer is to ask how much legal work is entailed in applying the controlling test? Its answer was "precious little." Norms and criteria already exist. The multi-part test is already in place.

Since answering the § 523(a)(8) "undue hardship" question is primarily factual in nature, it follows that deferential "clear

error" review applies when, as here, the bankruptcy court holds a trial and makes findings of fact and conclusions of law.[9]

The import of Lakeridge to this adversary proceeding is that it undermines the vitality of Ninth Circuit decisions that are not consistent with the Lakeridge "mixed question" rule. Rifino permitted a district court to substitute judgment for that of the bankruptcy court in a manner disapproved by Lakeridge. Rifino, 245 F.3d at 1087 n.2. Likewise, the nit-picking analysis of "good faith" in Mason is contradicted by Lakeridge. Mason, 464 F.3d at 884-85. Both Rifino and Mason were garden-variety decisions in which a bankruptcy court found "undue hardship."[10]

IV

§ 523(a)(8) "Undue Hardship" in this Case

We now return to applying the three-part Brunner-Pena test to the facts of this case.

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[9]When bankruptcy courts decide student loan cases without trial, appellate courts correctly apply de novo review and may substitute judgment for that of the bankruptcy court. That was the situation in the original Brunner case. Subsequent examples show that appellate courts that view records only in the abstract and do not have to look debtors in the eyes do not hesitate to reverse "undue hardship" determinations on review de novo.

[10]The Supreme Court was insistent about the line it was drawing regarding "mixed questions" in which facts predominate:

> if an appellate court someday finds that further refinement of the arm's length standard is necessary to maintain uniformity among bankruptcy courts, it may step in to perform that legal function. By contrast, what it may not do is review independently a garden-variety decision, as here, that the various facts found amount to an arm's length (or non-arm's-length) transaction and so do not (or do) confer insider status.

Lakeridge, 138 S.Ct. at 968 n.7 (emphasis in original).

A

The first step is whether the debtor "cannot maintain, based on current income and expenses, a 'minimal' standard of living for [self] and dependents if forced to repay the loans." Pena, 155 F.3d at 1111; Brunner, 831 at 396.

The debtor's gross income in 2019 was $40,681. In 2021, it was $40,992. She works full time. Opportunities for overtime work are too infrequent to be deemed material.

Her monthly obligations at the time of trial totaled $3,763 and after taxes take-home pay was $2,807. Her grandmother has been helping her cover the imbalance.

Examination of the items on her monthly budget reveals no excessive items.

This trier of fact is persuaded by preponderance of evidence that the debtor is not able to maintain a "minimal" standard of living for herself and dependents if forced to repay the loans.

B

Second, the debtor must show that "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." Pena, 155 F.3d at 1111; Brunner, 831 at 396.

The circumstances of the debtor are such that this trier of fact is persuaded by preponderance of evidence that this state of affairs is likely to persist for at least the remaining portion of the repayment period, and well beyond.

The debtor has demonstrated that she is doing the best she can. There is no upward career path presently available to the

debtor. There is no reason to believe her compensation will increase by more than the rate of inflation.

In addition, as with Pena, the low value of the Ashford education may be considered as evidence probative of the likelihood that the state of affairs will persist. Pena, 155 F.3d at 1114. It is particularly pertinent that the California Attorney General obtained a judgment against Ashford "for misleading students about career outcomes, cost and financial aid, pace of degree programs, and transfer credits."[11]

Moreover, as Ashford is no longer an operating entity there is no realistic opportunity to resume her academic program. It is doubtful that transfer credits would be accepted. Even if it were possible to resume the education, additional debt would have to be incurred and opportunities for promotion upon completion are too speculative to be credited.

In sum, the preponderance of evidence demonstrates that the present state of affairs is likely to persist for a long time.

C

Third, the debtor must have "made good faith efforts to repay the loans." Pena, 155 F.3d at 1111; Brunner, 831 at 396.

It is conceded that the debtor never has been in default on payments.

A total of $3,052 was paid on the two timely proofs of claim filed by the United States in the chapter 7 case.

This court specifically rejects the argument by the United

[11]Note 2 supra.

States that the chapter 7 dividend should not be treated as having been voluntary and made in "good faith." Rather, as a matter of law and of fact, payments on claims in a voluntary case under the Bankruptcy Code that was filed by the debtor in good faith are "voluntary" payments that are made in good faith for purposes of the "good faith" component of the Brunner-Pena test.

In addition, after filing her voluntary chapter 7 case in January 2019, the debtor made voluntary additional payments totaling $50.59. The notice to the debtor in January 2021, that required payment under her "REPAYE" flexible repayment plan would increase to $284.00 per month is what precipitated the filing of this adversary proceeding.

Nor is the debtor's "good faith" undermined by not now seeking potential new administrative remedies that have arisen since this adversary proceeding was filed – she has heretofore participated in good faith in seeking administrative relief and been rewarded with a $284.00 monthly payment that is plainly beyond her means to pay. Enough is enough.

In sum, the debtor has demonstrated by preponderance of evidence "good faith efforts to repay the loans" within the meaning of the Brunner-Pena test.

V

Administrative Alternatives

The United States has provided a post-trial statement asking that Love apply for "Borrower Defense" administrative relief in lieu of a § 523(a)(8) "undue hardship" judgment.

It is suggested that the debtor is a member of the class

action known as Sweet v. Cardona, No. C 19-03674 WHA (N.D. Cal.), the settlement of which could qualify the debtor for a refund of $1,033.04. And it is urged that she pursue the "New Process" for student loan bankruptcy discharges as an administrative matter. This court declines the invitation.[12]

A

The debtor's evidence adduced at trial establishes by the requisite preponderance of evidence all three elements of the Brunner-Pena test. She is entitled to a judgment determining that excepting the total student loan debt from discharge would impose an "undue hardship" on the debtor and the debtor's dependents within the meaning of § 523(a)(8). She is entitled to the relief now without awaiting mere possibilities of administrative relief.

There is no requirement of law that administrative remedies have been exhausted before a § 523(a)(8) "undue hardship" action is ripe for decision. Such a requirement, in view of the delays characteristic of the bureaucracy inherent in student loan administration, would be a contradiction in terms.

B

Much of the proposed administrative relief under the "New Process" announced November 17, 2022, remains uncertain and is embroiled in partisan litigation challenging the validity of that and other administrative initiatives.

[12]United States' Response to Post-Trial Order, at 2, Dkt 81.

C

The United States says: "Education is willing to refund Love the $1,033.04 distribution made to Education by the Chapter 7 trustee in this case, and it believes the trustee has agreed to Education making this refund to Love."[13] This is puzzling.

1

First, there is no Chapter 7 trustee serving in the case who could have agreed to anything. Upon entry of the Final Decree on March 26, 2020, the Chapter 7 trustee was discharged and the trustee's bond was released from further liability.[14]

When the case was reopened in 2021 pursuant to § 350(b) and Rule 5010 incident to filing Love's adversary proceeding, it was ordered that no trustee be appointed. 11 U.S.C. § 350(b); Fed. R. Bankr. P. 5010.[15] None has since been appointed.

Even if a trustee had been appointed, it is unlikely a Chapter 7 trustee could agree to a refund to the debtor of a claim distribution without complying with § 502(j) and at least giving notice to the other creditors who, like the Department of Education, received paltry 3.47% dividends and may wish to assert rights in the proceeds. 11 U.S.C. § 502(j).

2

Moreover, there is uncertainty about the relief that would

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[13]Id. at 3 (emphasis supplied).

[14]Final Decree, 3/26/2020, Dkt. 42.

[15]Order Reopening Case, 6/21/2021, Dkt. 46.

be provided for Love by this proposed administrative action.

Her direct liability for the $27,270 that she owes on her own account is one thing.

But there is also potential for liability for the $57,697 owed on student loans to her former spouse that were contracted during the marriage and could construed as a community debt for which remaining community property – including Love's home – might be liable

The loan summary to the proof of claim #13 filed by the Department of Education on her former spouse's debt includes the intriguing notation "spousal consol." If that connotes spousal liability, then she has more student loan debt to discharge.

The uncertainty stems from California community property law with respect to liability and property settlements in divorces. At best, California law is sufficiently confused that it cannot be said with confidence that Love has no liability when there has been no completed marital settlement agreement. Compare Cal. Family Code § 916, with Cal. Family Code § 2641(b)(2).

Nor can the United States say the issue is fanciful. The U.S. Department of Education has litigated the effect of a California marital settlement agreement regarding allocation of student loan debt between divorcing spouses. U.S. Dep't of Educ. v. Carrion (In re Carrion), 601 B.R. 523 (9th Cir. BAP 2019).

3

Also dubious is a statement that could be construed as suggesting that discharging the debt under § 523(a)(8) could

disqualify the debtor for some student loan benefits.[16] Perhaps it is inept gobbledegook, but it could be construed as offending § 525(c). 11 U.S.C. § 525(c).

In short, blandishments of possible administrative relief are of uncertain value when compared with the alternative of immediate discharge of all of Love's student loan liability pursuant to § 523(a)(8) in an enforceable judicial judgment.

Conclusion

The debtor having proved by preponderance of evidence all elements of the controlling Brunner-Pena test for discharge of all of her student loan liability as "undue hardship" under § 523(a)(8), judgment to that effect will be entered in a separate order.

Dated: April 05, 2023

United States Bankruptcy Judge

[16]The ambiguous statement is:

> Additionally, new Education provisions will no longer count Pell Grants received for the same period of attendance at school, as loans receiving Borrower Defense discharge for purposes of Pell Grant limits, restoring eligibility if Love chooses to return to school. However, if her loans are discharged through bankruptcy, she has no debt eligible for relief under the Sweet v. Cardona class action settlement and will not receive those benefits.

United States' Response to Post-Trial Order, at 3, Dkt 81.

Federal Student Aid
An OFFICE of the U.S. DEPARTMENT of EDUCATION

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PUBLICATION DATE: October 19, 2023
DCL ID: GEN-23-13
SUBJECT: Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings

SUMMARY: This letter provides guidance to guarantors and educational institutions participating in the Federal Family Education Loan Program (FFELP) and Federal Perkins Loan Program (Perkins) (hereinafter "holder" or "holders") as they continue to implement U.S. Department of Education (hereinafter "the Department" or "Education") regulations (at 34 C.F.R. § 682.402(i)(1)(ii) & (iii) (FFELP) and 34 C.F.R. § 674.49(c) (Perkins)) that govern their actions in defending bankruptcy adversary proceedings in which borrowers seek discharge of student loans authorized by Title IV of the Higher Education Act of 1965, as amended (hereinafter "Title IV"), including Parent PLUS loans, on the basis that excepting the loans from discharge would impose undue hardship upon the borrowers. This letter clarifies that, in determining whether repayment of the student loan would impose an undue hardship on a borrower, a holder may fulfill its regulatory requirements by using the process outlined in the Nov.17, 2022, Department of Justice Guidance to United States Attorneys (hereinafter "November 2022 Guidance" or "Guidance"), including any revised or updated version of the Guidance issued by the Department of Justice. This letter supersedes and replaces DCL GEN-15-13.

Background: Department regulations currently allow a holder to stipulate to the existence of certain facts and recommend that the bankruptcy court find that repayment of a student loan would cause an undue hardship in appropriate cases if it follows a two-step analysis. First, a holder must evaluate a borrower's undue hardship claim and determine whether the holder believes that repayment would constitute an undue hardship. If the holder determines that requiring repayment would impose an undue hardship, the holder should stipulate to the existence of certain facts and recommend discharge. This responsibility includes recommending that a bankruptcy court grant full or partial discharge of student loan debts in appropriate cases. Second, if the holder determines that requiring repayment would not impose an undue hardship, the holder must then evaluate the cost of objecting to the borrower's claim of undue hardship in court and may concede discharge if the costs of defending the adversary proceeding exceed the cost of the amount owed. This letter clarifies that a holder may fulfill its regulatory requirements as to the first step of the analysis by following the process outlined in the November 2022 Guidance.

On Nov. 17, 2022, the Department of Justice, in coordination with Education, released new Guidance for Assistant United States Attorneys (AUSAs) defending adversary proceedings where borrowers are seeking to discharge student loan debt held by Education. This Guidance was the product of careful legal analysis, decades of bankruptcy litigation experience, and a recognition that there are likely more borrowers eligible for an undue hardship discharge in bankruptcy than currently seek one. Some borrowers have been deterred from seeking discharge of student loans in bankruptcy due to the historically low probability of success and mistakenly believing that student loans are ineligible for discharge. Other student loan borrowers have been dissuaded from seeking relief due to the cost and intrusiveness entailed in pursuing an adversary proceeding.

In clarifying through this letter that holders (other than the Department) may fulfill their regulatory obligations by following the analysis and process outlined in the November 2022 Guidance, Education seeks to allow parity and consistency in the undue hardship analysis across loan holders. Consistent with the Guidance, Education through this letter seeks to promote three goals:

1. To set clear, transparent, and consistent expectations for discharge that borrowers understand regardless of whether they are represented by counsel;

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

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

Undue Hardship Analysis: Under the first step of existing Department regulations, a holder must not oppose discharge where it believes continued repayment would constitute an undue hardship. The November 2022 Guidance identifies specific, objective criteria that may be used to evaluate claims of undue hardship. The Guidance explains that consideration of student loan debt discharge requires an evaluation of a borrower's past, present, and future financial circumstances, and is intended to apply in

jurisdictions that follow either the *Brunner* test, *see Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395 (2d Cir. 1987), or a "totality of circumstances" test, *see, e.g., In re Long,* 322 F.3d 549 (8th Cir. 2003), to determine undue hardship. An analysis of these factors, briefly discussed below, can be found in the Guidance.

The first factor in the discharge analysis under the Guidance seeks to determine whether the borrower can presently maintain "a minimal standard of living" while making student loan payments. To address this factor, the Guidance directs AUSAs to use the IRS Standards to determine the borrower's "allowable" expenses and compare those allowable expenses to the borrower's income. If the borrower's allowable expenses exceed their gross income, this element of the analysis is satisfied. In addition to the IRS Standard expenses, the Guidance allows borrowers to identify circumstances in which their actual expenditures fall below the expenses required to maintain a minimal standard of living and to project the expenses they would incur if able to address needs that are currently unmet or insufficiently provided for. These projected expenses may be used in assessing the borrower's financial circumstances.

The second factor in the analysis is whether the borrower's current inability to repay the debt while maintaining a minimal standard of living will likely persist for a significant portion of the repayment period. The Guidance directs AUSAs to rely on certain facts that create a presumption that this factor is satisfied. While these presumptions are rebuttable, we expect that to be uncommon and only based on concrete factual circumstances. Mere conjecture about the borrower's future ability to pay is not enough.

The third factor for discharge is whether a borrower has demonstrated good faith regarding the repayment of student loan debt. This analysis depends upon the borrower's actions relative to their loan obligation. Good faith may be demonstrated in numerous ways, and the good faith inquiry "should not be used as a means for courts" or AUSAs "to impose their own values on a debtor's life choices." *Polleys*, 356 F.3d at 1310. The Guidance directs AUSAs to evaluate whether the borrower has taken an action that demonstrates good faith. Where the borrower has taken at least one of those actions and in the absence of countervailing circumstances, the borrower should be found to have demonstrated good faith.

The good faith inquiry should not disqualify borrowers who may not have meaningfully engaged with the repayment process due to possible misinformation, wrongful income driven repayment plan (IDR) determinations, or a lack of adequate information or guidance. Studies have shown that the servicing of student loan debt has been plagued at times by administrative errors and the dissemination of confusing and inaccurate information, and that these issues may have affected borrowers' responses to their loan obligations. The Consumer Financial Protection Bureau has found that borrowers have been wrongfully denied IDR enrollment and that monthly payments have been inaccurately calculated. See, e.g., Consumer Financial Protection Bureau, Supervisory Highlights Fall 2022 and Summer 2021. The Bureau has also found that servicers falsely but affirmatively represented to borrowers that loans were never dischargeable in bankruptcy. See Consumer Financial Protection Bureau, Supervisory Highlights Fall 2014 and Fall 2015. These problems have also given rise to a lack of trust by borrowers in the repayment process.

Finally, the Guidance does not provide an exhaustive list of circumstances that can support a finding that the undue hardship factors have been satisfied. A holder should carefully consider all facts that may support a discharge.

Documentation of Undue Hardship: To meet the goals discussed above, the Department of Justice in coordination with Education developed both legal guidance and an attestation form to gather key information from debtors outside the formal discovery process in the adversary proceeding. To assist the holder in evaluating a borrower's past, present, and future financial circumstances, a borrower should typically be asked to provide relevant information using the form attestation included with the November 2022 Guidance. In most cases, that form should elicit sufficient information to determine whether a borrower can demonstrate an undue hardship without formal discovery. If a holder uses a different method, it should nevertheless request information about the borrower's income and expenses to enable the holder to evaluate the borrower's present ability to pay and should also seek information that will help the holder evaluate the other two factors. In cases where the information provided by the borrower demonstrates undue hardship, holders should stipulate to the facts underlying the undue hardship claim and recommend discharge to the court or otherwise effectuate discharge in accordance with the local jurisdiction's practice without further discovery. In some cases, additional informal clarification of the information provided on the attestation may be necessary, but holders need not engage in formal discovery to confirm facts demonstrating a debtor meets each factor of the Guidance analysis.

Regardless of the method used by the holder to collect relevant information, where the borrower demonstrates sufficient evidence to satisfy each factor identified in the Guidance, a holder satisfies its obligations under the regulations by recommending discharge to the court and stipulating to the facts necessary for that finding.

Provision of Account Information to Borrower: One primary goal of the Guidance is to reduce the need for formal discovery prior to a stipulation. Holders are encouraged to facilitate this goal by providing borrowers and their counsel with all loan servicing and educational records available. In addition, holders may provide a summary cover sheet that identifies key facts about the borrower's educational or servicing histories, including whether the borrower satisfies any of the criteria within each element described above, to the extent that information is known by the holder.

Conclusion: This letter provides holders with a consistent and practical approach for handling student loans in an adversary proceeding. By following the November 2022 Guidance, holders comply with their obligations under Education regulations while reducing the burden on holders and borrowers in adversarial proceedings. By following the Guidance, a holder should be able to document the facts necessary to stipulate to an undue hardship claim and recommend discharge to the court in appropriate circumstances. This will allow all parties to avoid costly and time-consuming formal discovery while providing for consistent treatment for borrowers with Direct, FFELP, and Perkins loans, regardless of what entity holds the loan.

Sincerely,

Nassar H. Paydar
Assistant Secretary
Office of Postsecondary Education

November 17, 2022

GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN BANKRUPTCY LITIGATION

I. Introduction

This memorandum provides guidance (Guidance) to Department of Justice (Department) attorneys regarding requests to discharge student loans in bankruptcy cases. Developed in coordination with the Department of Education (Education), this Guidance will enhance consistency and equity in the handling of these cases. In accordance with existing case law and Education policy, the Guidance advises Department attorneys to stipulate to the facts demonstrating that a debt would impose an undue hardship and recommend to the court that a debtor's student loan be discharged if three conditions are satisfied: (1) the debtor presently lacks an ability to repay the loan; (2) the debtor's inability to pay the loan is likely to persist in the future; and (3) the debtor has acted in good faith in the past in attempting to repay the loan.

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

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

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

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

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

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

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

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

III. Applicable Law

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

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

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

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

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

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

IV. Discussion of the Applicable Factors

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

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

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

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

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

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

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

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

A. Assessment of Present Circumstances

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

1. Assessment of the Debtor's Expenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Assessment of Future Circumstances

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

A presumption that a debtor's inability to repay debt will persist is to be applied in certain circumstances, including: (1) the debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential;[11] (3) the debtor has been unemployed for at least five of the last ten years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than 'in-school' for at least ten years.[12] The Attestation is designed to identify any such circumstances, and it advises the debtor to disclose all of the circumstances applicable to their situation and not rely exclusively on a single presumptive basis for claiming a continuing inability to repay.

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

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

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

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

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

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

C. Assessment of Good Faith

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Consideration of a Debtor's Assets

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

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

E. Partial Discharge.

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

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

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

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

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

V. Procedures

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

A. Submission of the Attestation

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

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

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

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

B. Time for Attestation

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

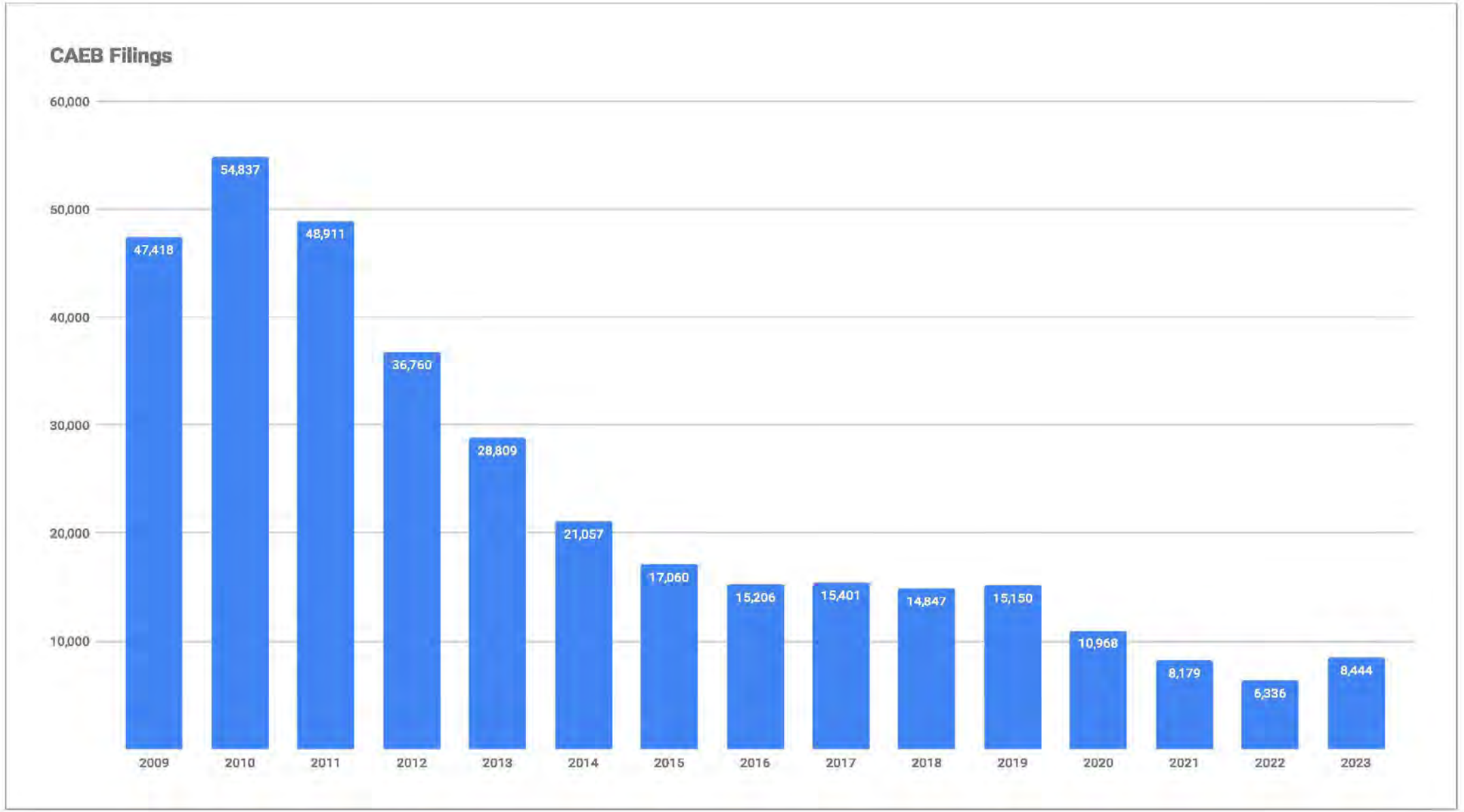
C. Bankruptcy Court Authority

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

VI. Conclusion

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

[22] This memorandum applies only to future bankruptcy proceedings, as well as (wherever practical) matters pending as of the date of this Guidance. This Guidance is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to and does not create any rights, substantive or procedural, enforceable at law by any party in any matter.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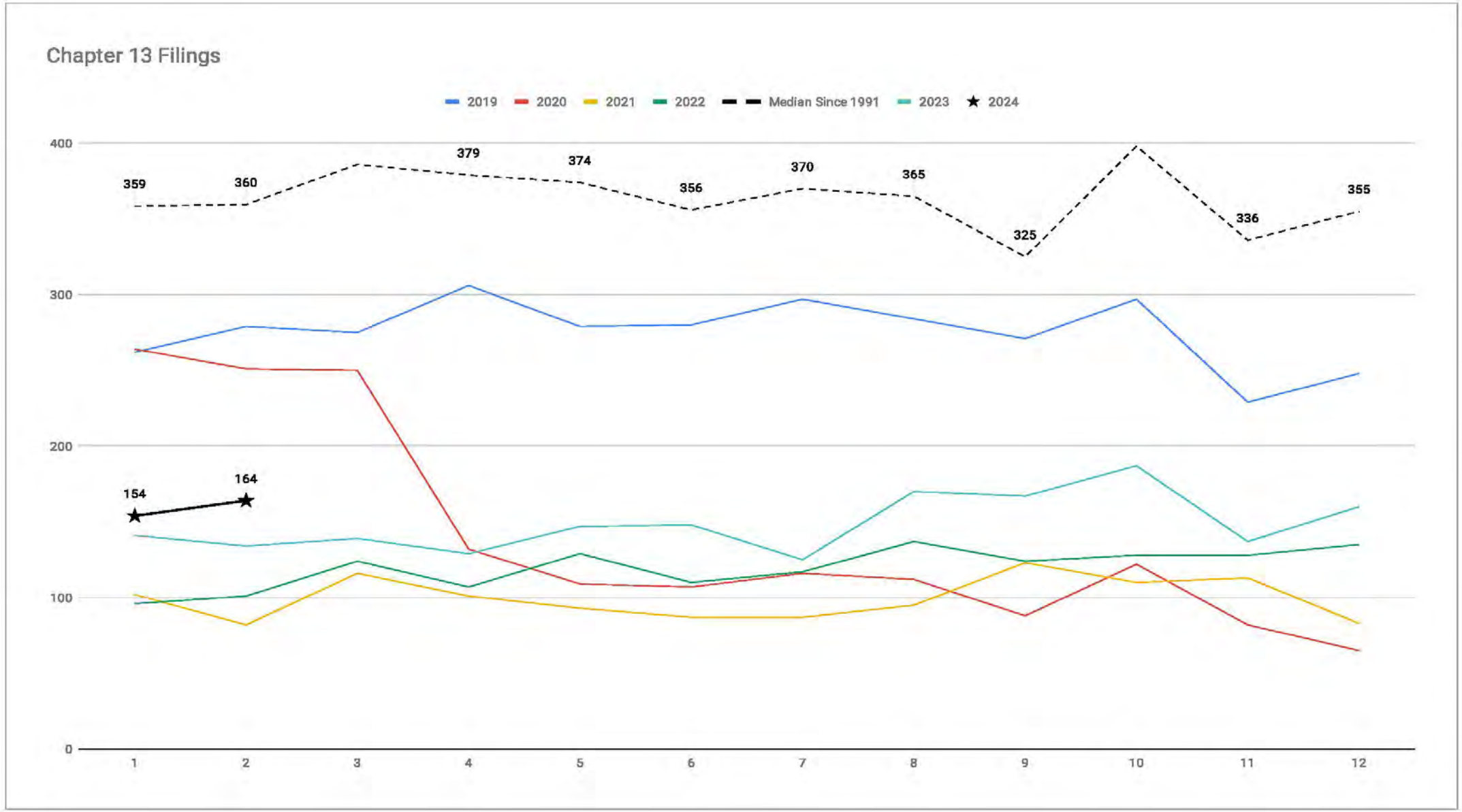
17,060
15,206
15,401
14,847
15,150
10,968
8,179
6,336
8,444
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023


Chapter 13 Filings
2019
2020
2021
2022
Median Since 1991
2023
2024
400
300
200
100
0
359
360
379
374
356
370
365
325
336
355
154
164
1
2
3
4
5
6
7
8
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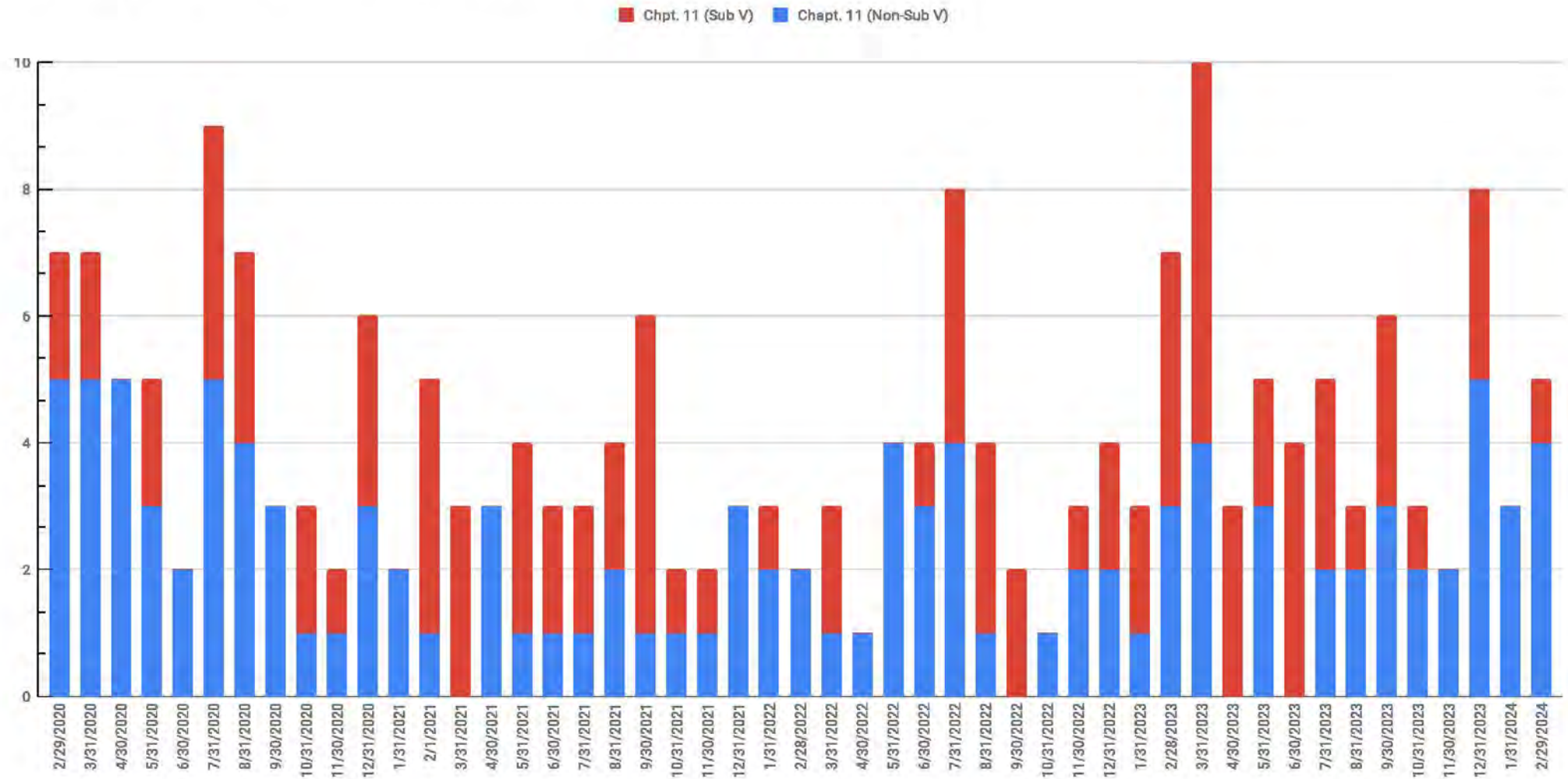
10
11
12

Chapter 11 Since Introduction of Subchapter V Legislation