CASE NO.: 18-14490
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMANDA LAWSON-ROSS and TRISTIAN BYRNE,

Appellants,

v.

GREAT LAKES HIGHER EDUCATION CORP.,

Appellee.

On Appeal from the United States District Court
for the Northern District of Florida
Gainesville Division
Case No. 1:17-cv-00253-MW-GRJ

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Amanda Lawson-Ross and Tristian Byrne v. Great Lakes Higher Education Corp.
Appeal No. 18-14490

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. Rule 26.1-1, Appellants' hereby certify that the following is a list of all persons and entities that have an interest in the outcome of this case:

1. Breslow, Brandon, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne
2. Byrne, Tristian
3. Centrone, Gus, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne
4. Conigliaro, Matthew, Appellate counsel to Appellee Great Lakes Higher Education Corp.
5. Flo, Theodore, District Court and appellate counsel to Great Lakes Higher Education Corp.
6. Fulford, Martha, Appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne
7. Great Lakes Educational Loan Services, Inc., corporate subsidiary of Great Lakes Higher Education Corp.
8. Great Lakes Higher Education Corp.
9. Gross, Merrick, District Court counsel to Great Lakes Higher Education Corp.

10. Jones, The Honorable Gary J., United States Magistrate Judge

11. Lawson-Ross, Amanda

12. Nelnet, Inc. (NYSE: NNI), owner of Great Lakes Educational Loan Services, Inc.

13. Paolini, Christopher, District Court counsel to Great Lakes Higher Education Corp.

14. Walker, The Honorable Mark E., United States District Judge

15. Yanes, Katherine Earle, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne

16. Zibel, Daniel A., Appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne

/s/ *Katherine Earle Yanes*
Katherine Earle Yanes

STATEMENT REGARDING ORAL ARGUMENT

This appeal presents a question of first impression in this Circuit regarding the extent to which a provision of the Higher Education Act preempts state law causes of action for affirmative misrepresentations by servicers of student loans. This is a significant issue that is likely to recur in future cases. It is the opinion of the undersigned counsel that the decisional process in this case will be aided by oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

PUBLIC LAWS

REGULATIONS

OTHER AUTHORITIES

STATEMENT OF SUBJECT-MATTER & APPELLATE JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1332(a) because the matter in controversy exceeds $75,000, exclusive of interest and costs, and is between citizens of different states. Plaintiff-Appellants Amanda Lawson-Ross ("Lawson-Ross") and Tristian Byrne ("Byrne") are both citizens of Florida, and Defendant-Appellee Great Lakes Higher Education Corporation ("Great Lakes") is a Wisconsin corporation, is headquartered in Wisconsin, and is a citizen of Wisconsin. Doc. 24 ¶¶ 8-10. The District Court also had subject matter jurisdiction under 28 U.S.C. § 1332(d)(2) because the matter in controversy exceeds $5,000,000, exclusive of interest and costs, and is a class action in which the named plaintiffs, Lawson-Ross and Byrne, and Great Lakes are citizens of different states.

On September 20, 2018, the District Court entered a Judgment dismissing Lawson-Ross and Byrne's claims with prejudice. Doc. 45. Lawson-Ross and Byrne timely filed a notice of appeal. Doc. 46. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the District Court err when it held that Lawson-Ross and Byrne's claims that Great Lakes made affirmative misrepresentations were expressly preempted by 20 U.S.C. § 1098g, which preempts the application of state law "disclosure requirements"?

STATEMENT OF THE CASE AND OF THE FACTS

This case is about the ability of student loan borrowers to assert rights under state consumer protection laws to remedy affirmative misstatements made by student loan servicers. Appellants Amanda Lawson-Ross and Tristian Byrne have each alleged, on behalf of themselves and similarly situated borrowers, that Great Lakes, the servicer of their federal student loans, specifically and systematically made false statements that led them to believe that they were complying with the terms of the Public Service Loan Forgiveness ("PSLF") program, a federal program designed to encourage and reward individuals who seek and obtain higher education in order to pursue careers in public service. As alleged in the Amended Complaint ("Complaint"), Doc. 24, Great Lakes, to advance its own pecuniary interest, encouraged borrowers to contact it for individualized advice, stating that its representatives were "trained to understand all of [borrowers'] options," and that Great Lakes was "here to serve" borrowers. Doc. 24 ¶ 29. But Great Lakes then falsely advised Lawson-Ross and Byrne of their eligibility for PSLF. *Id.* ¶¶ 38, 41-44, 49-55. Great Lakes further falsely informed Lawson-Ross and Byrne that, with each monthly payment, they would be one step closer to loan forgiveness. *Id.*

As a direct result of Great Lakes' alleged affirmative misstatements, Lawson-Ross, Byrne, and a putative class of similarly situated borrowers continued to make monthly payments on their existing loans, believing that they were on track for loan

forgiveness. *Id.* ¶¶ 45, 55, 60. In reality, however, had Great Lakes been truthful to them, Lawson-Ross and Byrne would have learned that the type of student loans they had were *not* eligible for PSLF, but rather that they needed to consolidate their loans into a different type of loan in order to be eligible for forgiveness under the PSLF program. As alleged in the Complaint, Great Lakes' conduct gave rise to claims for Breach of Fiduciary Duty, Negligence, Unjust Enrichment, and Breach of Implied-in-Law Contract under Florida common law, and also violated the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.72. *See* Doc. 24 at 17-23.

The District Court dismissed the Complaint. Relying on a narrow provision of the Higher Education Act of 1965, as amended ("HEA"), that prohibits the application of state law "disclosure requirements" to federal student loans, the District Court held that federal law expressly prohibits a student loan borrower from using state consumer protection laws designed to remedy affirmative falsehoods and misrepresentations because such statements are nothing more than the servicer's "failure to provide accurate information," or, "in other words," a "disclosure." Doc. 44 at 8.

I. The Higher Education Act and Student Loan Servicing

The HEA was passed in 1965 "to address the pressing need to provide financial assistance to students in higher education." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004).

Student loan servicers play an integral part of the financial aid process, as a student loan borrower will rarely interact with the lender or holder of her student loan after her loan is originated. Most student loan borrowers communicate exclusively with a loan servicer who handles the day-to-day interactions with borrowers and who must abide by the HEA and its implementing regulations. *See, e.g.*, 34 C.F.R. § 682.203(a). Student loan servicing encompasses an array of acts and responsibilities, including receiving and applying payments to a student loan borrower's account, maintaining account records, and other "[i]nteractions with a borrower, including activities to help prevent default on [on student loans], conducted to facilitate" repayment. 12 C.F.R. § 1090.106(a)(iii) (Consumer Financial Protection Bureau defining "student loan servicing").[1] Lawson-Ross and Byrne allege that Great Lakes' principal responsibilities include managing

[1] Department of Education ("Department") regulations broadly define a "[t]hird-party servicer" as an entity that "contract[s] with a lender or guaranty agency . . . to administer . . . any aspect of the lender's or guaranty agency's FFEL programs required by" statute, regulation, or other applicable "arrangement, agreement or limitation." 34 C.F.R. § 682.200. In the case of servicers of loans held by the government, such as federal Direct Loans, *see infra* n. 3, servicers act by contract with the Department.

borrowers' accounts, processing monthly payments, assisting borrowers to learn about, enroll in, and remain in alternative repayment plans, and communicating directly with borrowers about the repayment of their loans. Doc. 24 ¶ 26.

II. Public Service Loan Forgiveness

The core of the allegations by Lawson-Ross and Byrne relate to misrepresentations about eligibility for PSLF. Passed by Congress in 2007, and signed into law by President George W. Bush, PSLF was designed to encourage students to enter public service through a program providing student loan debt relief. *See* College Cost Reduction and Access Act of 2007 (CCRAA), Pub. L. No. 110–84 § 401 (2007); *see also* H. Rep. 110-210 at 48 (June 25, 2007) (noting "concern[] with the growing number of individuals who do not choose to enter into lower paying professions, including, "first responders, law enforcement officers, firefighters, nurses, public defenders, prosecutors, early childhood educators, librarians, and other public sector employees," because "of growing debt due to student loans."). PSLF provides student loan borrowers with forgiveness of any balance remaining after a borrower on a qualifying repayment plan has made 120 payments after October 1, 2007, on an eligible Direct Loan. 20 U.S.C. § 1087e(m)(1). Borrowers

must also be employed in the public service during the period in which the 120 payments were made and at the time of forgiveness. 20 U.S.C. § 1087e(m)(3)(B).[2]

An "eligible Federal Direct Loan" is a Federal Direct Stafford Loan, Federal Direct PLUS Loan, or Federal Direct Unsubsidized Stafford Loan, or a Federal Direct Consolidation Loan, § 1087e(m)(3)(A), all of which are loans for which the federal government is the lender. Borrowers with other types of federal student loans, such as those issued under the Federal Family Education Loan Program ("FFEL" or "FFELP") or Perkins Loans program are not eligible for PSLF. Doc. 24

[2] As defined in the statute, a "public service job" means "a full-time job in emergency management, government (excluding time served as a member of Congress), military service, public safety, law enforcement, public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics), public education, social work in a public child or family service agency, public interest law services (including prosecution or public defense or legal advocacy on behalf of low-income communities at a nonprofit organization), early childhood education (including licensed or regulated childcare, Head Start, and State funded prekindergarten), public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services, or at an organization that is described in section 501(c)(3)" of the Internal Revenue Code. 20 U.S.C. § 1087e(m)(3)(B)(i). The term also includes jobs "teaching as a full-time faculty member at a Tribal College or University," as well as "other faculty teaching in high-needs subject areas or areas of shortage (including nurse faculty, foreign language faculty, and part-time faculty at community colleges), as determined by the Secretary." 20 U.S.C. § 1087e(m)(3)(B)(ii).

¶ 36.[3] Student loan borrowers who have these types of ineligible federal student loans may consolidate their loans into a Direct Consolidation Loan and become eligible for the PSLF program, but any payments they have made prior to consolidation do not count toward the 120 payments required for the program. *Id.; see also* 34 C.F.R. § 685.219(c)(1)(iii) (tying PSLF eligibility to "eligible Direct loans"); *id.* § 219(b) (defining "eligible Direct loan" to include a Direct Consolidation loan). Repayment plans that are eligible for PSLF include income-based or income-contingent repayment plans. 20 U.S.C. § 1087e(m)(1)(A)(i), (iv).

III. Factual Allegations

A. The Plaintiffs

Amanda Lawson-Ross earned her Masters in 2009 and her Ph.D in Counseling Psychology in 2013 from the University of Akron. Doc. 24 ¶ 39. Since graduating with her Ph.D, she has worked at the University of Florida Counseling Center and the Florida Gulf Coast University Counseling and Psychological Services Office. *Id.* As alleged in the Complaint, Dr. Lawson-Ross borrowed student loans in

[3] Effective in 2010, Congress ceased the origination of new FFEL loans and transitioned entirely to a "Direct Loan" program wherein the United States serves as the lender and contracts with non-governmental entities to service loans issued by the Department. 20 U.S.C. § 1071(d); *see also* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201 *et seq.*, 124 Stat. 1029, 1074. Federal Direct Loans "have the same terms, conditions, and benefits" as those issued under FFEL. 20 U.S.C. § 1087e(a)(1). The express preemption provision at issue in this case, 20 U.S.C. § 1098g, applies equally to Direct Loans and FFEL loans. 20 U.S.C. § 1098g (referring to loans "made, insured, or guaranteed").

order to finance her education, with the expectation that her loans would be forgiven under PSLF. Doc. 24 ¶ 40. She has diligently attempted to qualify for the PSLF, regularly contacting Great Lakes, her student loan servicer, to ensure that she was on track to qualify for PSLF. *Id.* ¶ 41. Until July 2017, Dr. Lawson-Ross was told by Great Lakes representatives that she was on track to benefit under the PSLF program and would not need to complete any additional paperwork until she had completed ten years of public service. *Id.* ¶ 42. In approximately July 2017, a Great Lakes representative informed Dr. Lawson-Ross for the first time that she was not eligible for the PSLF. *Id.* ¶¶ 43, 44. The majority of her loans were not Direct Loans and were therefore ineligible, and had never been eligible for, forgiveness under the PSLF program, despite the assurances Dr. Lawson-Ross had received from Great Lakes. *Id.* ¶ 44. None of the payments Dr. Lawson-Ross has made have counted for PSLF purposes. *Id.* ¶ 47. If Great Lakes had not misinformed Dr. Lawson-Ross, she would have taken action to ensure she was eligible for PSLF. *Id.* ¶ 46.

Tristian Byrne graduated from Kaplan University with an Associate's degree in Applied Science in Criminal Justice. Doc. 24 ¶ 48. She works for the Office of the Sheriff of Pinellas County, Florida. *Id.* ¶ 49. In approximately January 2016, Ms. Byrne learned about the PSLF program and asked Great Lakes whether she would qualify for the program. Doc. 24 ¶ 49. Great Lakes told Ms. Byrne that all that was required for her to qualify for the PSLF program was to work full time and have her

human resources department complete an application for her, and that once she made 120 payments, the remaining balance would be forgiven. *Id.* ¶¶ 50, 51. Ms. Byrne submitted the completed application to Great Lakes, but did not hear anything back. *Id.* ¶ 52. In about May 2017, Ms. Byrne submitted another application to Great Lakes. Doc. 24 ¶ 53. Several months later, in September 2017, Ms. Byrne was informed that, despite Great Lakes' prior representations, she did not qualify for PSLF. *Id.* ¶ 54. Ms. Byrnes' student loans were FFEL loans and not Direct Loans. *Id.* ¶¶ 48, 54. None of the loan payments Ms. Byrne has made have counted for PSLF purposes. *Id.* ¶ 56. If Great Lakes had not misinformed Ms. Byrne, she would have taken the steps necessary to ensure she was eligible for the PSLF program. *Id.* ¶ 55.

B. The Putative Class

Many student loan borrowers have reported similar experiences with Great Lakes. Doc. 24 ¶¶ 57-62. According to the federal Consumer Financial Protection Bureau, 10 percent of all federal student loan servicing complaints in a recent sample involved the PSLF program, many relating to Great Lakes. *Id.* ¶¶ 57-59. As a result of these issues, borrowers make years of payments they believe qualify for the PSLF program before learning their loans do not qualify for the program. *Id.* ¶ 60.

C. Great Lakes Higher Education Corporation

Great Lakes is one of the largest student loan servicers in the United States. Doc. 24 ¶ 25. It services more than $238 billion in federal and private student loans.

Id. Great Lakes' responsibilities as a student loan servicer include informing borrowers about available repayment plans and communicating with them about the repayment of their loans. *Id.* ¶ 26.

The Department specifically encourages borrowers to consult their federal student loan servicers with questions about their loans. Doc. 24 ¶ 37. Likewise, Great Lakes holds itself out as the authority borrowers should consult for advice regarding their student loans, telling borrowers they should not obtain independent advice regarding their student loans and should "Call us, instead." *Id.* ¶ 29. Borrowers are told Great Lakes' representatives "have access to your latest student loan information and are trained to understand all of your options." *Id.*

Great Lakes is contractually obligated to assist borrowers whose loans it services. Doc. 24 ¶ 66. Lenders or loan holders contract with Great Lakes to administer all aspects of federal student loan repayment, including responding to borrowers' questions about student loan repayment and loan forgiveness programs. *Id.* Great Lakes has incentives not to provide borrowers accurate information regarding PSLF eligibility; it loses the right to service the loans of customers who are pursuing forgiveness under PSLF. *Id.* ¶¶ 64, 65. Further, Great Lakes rewards its customer service representatives for keeping average call times low, incentivizing them to end calls quickly rather than take the time needed to provide borrowers with accurate advice and information. *Id.* ¶ 68.

IV. The District Court Proceedings

On October 16, 2017, Lawson-Ross filed a complaint asserting state law causes of action against Great Lakes on behalf of herself and similarly situated borrowers. Lawson-Ross and Byrne filed an Amended Complaint on January 31, 2018, *see* Doc. 24, in which they asserted that Great Lakes' conduct violated Florida statutory and common law because Great Lakes, acting in its own pecuniary interest, held itself out as a resource for individuals to use in order to determine the most financially-beneficial path to student loan repayment, while routinely providing incorrect information to borrowers who inquired as to their eligibility for the PSLF program.

On February 28, 2018, Great Lakes filed a Motion to Dismiss for Failure to State a Claim. Doc. 26. The parties subsequently submitted extensive briefs, including supplemental briefing regarding a Notice of Interpretation issued by the Department of Education. *See* Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619-01 (Mar. 12, 2018) (the "Notice"). On September 20, 2018, relying principally on the Notice and an unpublished district court decision in *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 2017 WL 6501919 (S.D. Ill. Dec. 19, 2017), the District Court held that Plaintiffs' claims were

preempted by § 1098g. Doc. 44. The same day, the Court issued a final Judgment dismissing the claims. Doc. 45.

On October 22, 2018, Lawson-Ross and Byrne timely filed a Notice of Appeal. Doc. 46.

SUMMARY OF THE ARGUMENT

The Higher Education Act expressly preempts state law in only a few "isolated" areas. *Cliff v. Payco Gen. Am. Credits, Inc*., 363 F.3d 1113, 1124-25 (11th Cir. 2004) (citing 20 U.S.C. §§ 1078(d) (state usury laws), 1091a(a) (statute of limitations), 1091a(b)(1)-(3) (certain costs and charges), and 1099 (now renumbered 1098g) (disclosure requirements)). One of those provisions, 20 U.S.C. § 1098g, provides that "[l]oans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. § 1070 *et seq*.) shall not be subject to any disclosure requirements of any State law." The HEA does not provide that individual borrowers, such as Lawson-Ross and Byrne, may not use state consumer protection laws to assert causes of action against loan servicers for affirmative misrepresentations, nor does it evince an intent to strip student loan borrowers of judicial recourse to assert state law consumer protection claims. Nor does the statute expressly bar state attorneys general from enforcing state consumer protection laws on behalf of their citizens, which is an apparent consequence of the District Court's holding.

In this case, Lawson-Ross and Byrne do not assert that Great Lakes violated Florida law by failing to make any disclosures regarding PSLF that were required by the HEA or any other source of law. Rather, Lawson-Ross and Byrne's claims are premised *entirely* on the separate, general duty that when Great Lakes provided them with information about their own status for purposes of the PSLF program, it was obligated not to provide false information. This is the same duty – *i.e.*, the duty to act truthfully – that applies to *all* businesses operating in the State of Florida. Lawson-Ross and Byrne do not claim that Great Lakes had to tell them anything. Instead, they assert that Great Lakes failed in its fundamental obligation to tell the truth and not act misleadingly.

Given these allegations, the District Court's analysis erred in two key respects:

First, the District Court failed to recognize that the plain text of § 1098g preempts only those state laws that place affirmative requirements onto servicers of federal student loans. This is true on the face of the provision, insofar as it refers to state law "disclosure requirements," and also when read together with the history and context of that provision. There is simply nothing in the statute that suggests that the application of state consumer protection laws to day-to-day interactions between a consumer and servicer, that are neither standardized nor required, are preempted. Indeed, courts considering the HEA and numerous other statutes have distinguished

laws that require affirmative statements or disclosures from the more general obligation not to speak untruthfully or deceptively.

Second, the District Court erred in relying on the Notice of Interpretation promulgated by the Department. Although the District Court correctly considered the Notice to be an interpretive statement, subject to the "sliding scale" measure of deference afforded under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the court erred in finding the Notice persuasive and worthy of deference. *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001). Far from "well-reasoned and sensible," as the District Court stated, Doc. 44 at 8, the Notice's discussion of § 1098g is conclusory, mischaracterizes judicial precedent, and sharply departs from the Department's prior statements regarding the scope of express preemption without acknowledgment or justification.

At bottom: because the HEA provides no private right of action for aggrieved student loan borrowers, the District Court's decision, if affirmed, will leave no judicial recourse against servicers for false, fraudulent, unfair, or deceptive statements by servicers. *See* Doc. 44 at 9 (acknowledging the result of its holding). But there is no indication in the text, context, or history of § 1098g that this is the result Congress intended. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996). It is "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Dan's City Used Cars, Inc. v.*

Pelkey, 569 U.S. 251, 265 (2013) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

STANDARD OF REVIEW

Preemption is an affirmative defense and Great Lakes, as the defendant, bears the burden of proof. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 251 n.2 (2011). The issue of "whether federal law preempts a state law claim" is reviewed de novo. *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 646 (2018). This Court similarly reviews *de novo* the decision of the District Court to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010).

ARGUMENT

Through 20 U.S.C. § 1098g, Congress sought to preempt the application of state law "disclosure requirements" to loans authorized by Title IV of the HEA. Yet the text of that provision, together with its structure, context, and history, makes clear that § 1098g does not preempt state law claims to remedy harms caused when Great Lakes made false and deceptive statements to Lawson-Ross and Byrne. Instead, the text, structure, context, and history of § 1098g make clear that Congress sought only to bar the application of state laws that place affirmative "requirements," onto servicers of federally issued or guaranteed student loans, to make "disclosure[s]."

Where "a federal law contains an express pre-emption clause," such as in § 1098g, a court considering the applicability of a state law must address both "the substance and scope of Congress' displacement of state law." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). The "ultimate touchstone" of a court's preemption analysis is the "purpose of Congress." *Id.* (quoting *Medtronic*, 518 U.S. at 485). "[T]he historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria*, 555 U.S. at 77 (noting presumption against express preemption of the historic police powers of the States); *see also, e.g.*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Arizona v.*

United States, 567 U.S. 387, 441 (2012) (Alito, J. concurring in part, and dissenting in part) ("Because state police powers are implicated here, our precedents require us to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest.").[4] Consumer protection laws, including those alleged by Lawson-Ross and Byrne, are "well within the scope" of historic state police powers. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 150 (1963); *Cliff v. Payco Gen. Am. Credits, Inc.,* 363 F.3d at 1126.

As discussed in Part I below, the plain text of § 1098g, when read in context and with its history, establishes Congress did not intend to preempt state law prohibitions on fraudulent, unfair, and deceptive conduct, *i.e.*, "the types of common law and state law claims at issue in this case," Doc. 44 at 6. Indeed, nothing about § 1098g bars the application of state laws that are not predicated on a state law duty

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[4] This presumption has not been altered by a recent holding, outside of the context of historic state police powers, that appears to eliminate the disfavoring of express preemption in certain cases. *Puerto Rico v. Franklin Cal. Tax-Free Trust,* 136 S. Ct. 1938, 1946 (2016). In *Franklin*, the statute at issue was outside of the context of state police powers. In addition, the Court held the language of the Bankruptcy Code at issue was "plain" and thus the Supreme Court "beg[a]n" and "end[ed]" its analysis there. 136 S. Ct. 1946. In contrast, the analysis in *Altria* "beg[a]n … with the assumption that the historic police powers of the States," are not to be preempted, absent a showing of a "clear and manifest" Congressional intent, 555 U.S. at 77. *Altria* remains binding and there remains a presumption against preemption in cases involving historic state police powers. *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018) (holding that presumption against preemption still applies to claims invoking state historic police powers, after *Franklin*); *see also Ass'n des Elevuers de Canards et d'Oies du Quebec v. Becerra*, 870 F.3d 1140, 1146 (9th Cir. 2017) (cert. pending).

to make affirmative disclosures. And the claims brought by Lawson-Ross are not premised on such a duty, but rather are based "on a more general obligation, the duty not to deceive." *Cipollone*, 505 U.S. at 528-29. Thus, because the District Court held that "[c]laims that a servicer provided inaccurate information" are "no different" from claims that they failed to properly make required disclosures, *see* Doc. 44 at 9, the District Court erred and the decision should be reversed.

Part II below establishes that the District Court also erred in the nature and extent of its reliance on the Department's 2018 Notice. The Notice is, at most, entitled to the sliding scale of deference under *Skidmore*. However, because it was published without the benefit of public comment and lacks indicia of reasoned consideration, the Notice is not persuasive and should not be deferred to. *Buckner v. Florida Habilitation Network, Inc.*, 489 F.3d 1151, 1155 (11th Cir. 2007). Not only does the Notice dramatically expand and distort the scope of the primary case on which it relies, *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010), it also makes sweeping and conclusory statements about the meaning of § 1098g without considering the plain language, context, or history of the statute. And, despite its claims to the contrary, the Notice sharply departs from the limited scope of federal preemption previously articulated by the Department.

I. THE DISTRICT COURT'S HOLDING THAT AFFIRMATIVE MISREPRESENTATIONS ARE PREEMPTED IS INCONSISTENT WITH THE PLAIN LANGUAGE, CONTEXT, AND STRUCTURE OF § 1098g.

Irrespective of any presumptions, the task of analyzing § 1098g begins with "'the plain wording of the clause,' which necessarily contains 'the best evidence of Congress' preemptive intent." *Murphy v. Dulay*, 768 F.3d 1360, 1367 (11th Cir. 2014) (quoting *OPIS Mgmt. Res., LLC v. Sec'y, Florida Agency for Health Care Admin.*, 713 F.3d 1291, 1294 (11th Cir. 2013)). "Also relevant, however, is the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc.* 518 U.S. at 486 (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (opinion of O'Connor, J.)) (internal citations omitted).

A. The plain language of § 1098g does not preempt claims based on affirmative misrepresentations by student loan servicers.

The plain language of § 1098g, preempting affirmative state law "disclosure requirements," makes clear that its scope does not reach claims based on affirmative misrepresentations to student loan borrowers. Rather, the provision preempts the application of any state laws that "require[]" servicers to affirmatively make certain "disclosure[s]." Yet the common law and statutory claims brought by Lawson-Ross

and Byrne do not affirmatively require Great Lakes to make any disclosures. Those laws simply obligate Great Lakes to speak truthfully, non-deceptively, and non-fraudulently. Indeed, if Congress intended to "preclude all common-law causes of action" to remedy false and fraudulent statements, "it chose a singularly odd [pair of] word[s] with which to do it." *Medtronic,* 518 U.S. at 487.

The "disclosure" language in § 1098g suggests that Congress intended to preempt *only* state laws that required the provision of these "disclosures." Although neither the word "disclosure" nor the phrase "disclosure requirements" is defined in the HEA, the context of HEA's use of the word "disclosure" suggests that it refers only to the standardized provision of the core terms of the loan transaction, and not, as the District Court held, the more fundamental duty to act honestly. *See, e.g.*, *Cipollone*, 505 U.S. at 528-29; *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1201-02 (11th Cir. 2004); *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217 (11th Cir. 2002). Nor does the use of the term "disclosure" suggest that Congress intended to preempt laws governing routine, day-to-day communications between servicers and borrowers.

HEA Section 433, codified at 20 U.S.C. § 1083(a), provides the most clear indication of what constitutes a "disclosure." In that section, Congress articulated nineteen separate pieces of information that comprise the "required disclosure[s]" that must be made "in simple and understandable terms" before a federal loan is

disbursed.[5] These disclosures may be made "by written or electronic means, including as part of the application material provided to the borrower, as part of the promissory note evidencing the loan, or on a separate written form provided to the borrower." *Id.* Strongly suggesting that a "disclosure" is different from a communication, the disclosures required by § 1083(a) consist entirely of standardized information about the core terms of the transaction, such as the fact that the funds must be repaid, the name of the lender, the principal amount, fee information, the interest rate, information about prepayment and capitalization, a description of repayment options, statements regarding deferment and forbearance, and information about loan forgiveness and default. 20 U.S.C. § 1083(a)(1)-(19).

The Department's regulations[6] also show that not all communications between a borrower and a servicer are "disclosures," and expressly distinguish a

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[5] A prior version of § 1083 existed in 1982 when § 1098g was enacted. Pub. L. No. 96–374, § 433A, 94 Stat. 1367 (1980). Congress then quickly amended these disclosure requirements shortly after the enactment of § 1098g. Pub. L. 97-301, § 13(a)(1), 96 Stat 1400 (1982); Pub. L. 98-79, § 3, 97 Stat 476 (1983). Congress has also expanded the disclosure requirements over the years. Pub. L. 100-50, § 10(z), 101 Stat. 346 (1987); Pub. L. 102-325, § 426, 106 Stat. 548 (1992); Pub. L. 103-208, § 2(c)(53), (54), (k)(4), 107 Stat. 2468, 2485 (1993); Pub. L. 105-244, § 428, 112 Stat. 1704 (1998); Pub. L. 110-315, § 434(a), 122 Stat. 3247 (2008).

[6] These regulations generally mirror the requirements of 20 U.S.C. § 1083. By way of example only, the Department's regulations require lenders to disclose to borrowers certain information at the time of, or prior to, repayment. *See* 34 C.F.R. §§ 682.205(a)(2)(i)-(xiv). These disclosures include information such as the name and contact information for the lender, *id.* § 682.205(a)(2)(i), the scheduled start date

"disclosure," on the one hand, from an "other communication[]" between a borrower and either a lender or servicer, on the other. *See* 34 C.F.R. § 682.205(a)(4)(ii). Indeed, the Department recently amended its regulations and explicitly acknowledged that a borrower having trouble making her payments would have "contact" with her servicer as a result of a required disclosure. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 78 Fed. Reg. 65,768, 65,769 (Nov. 1, 2013). The Department assumed that this "contact" would be either as a result of an "earlier disclosure" or "from other contact

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for repayment, *id.* § 682.205(a)(2)(ii), balance and interest capitalization information, *id.* §§ 682.205(a)(2)(iii)-(iv), (viii), information about fees charged, *id.* § 682.205(a)(2)(v), the repayment schedule, *id.* § 682.205(a)(2)(vi), terms of consolidation loans, *id.* § 682.205(a)(2)(vii), prepayment information, *id.* § 682.205(a)(2)(ix), repayment benefits and plans, *id.* §§ 682.205(a)(2)(x)-(xii), information about defaults, *id.* § 682.205(a)(2)(xiii), and contact information for additional resources for receiving "additional advice and assistance on loan repayment," *id.* § 682.205(a)(2)(xiv). Each of these disclosures must be made "in simple and understandable terms" at a point in time prescribed in the regulation. 34 C.F.R. § 682.205(a)(1). The Department also requires Direct Loan servicers to make certain "disclosures" to borrowers. *See* Office of the Under Sec'y, *Advancing the Student Aid Bill of Rights – An Update on Deliverables*, U.S. Dep't of Educ., https://sites.ed.gov/ous/2015/12/advancing-the-student-aid-bill-of-rights-an-update-on-deliverables/ (announcing requirements for "disclosures," including quarterly statements while borrowers are in school or their grace period, pre-transfer notifications when the servicer changes, additional information on initial correspondence on Public Service Loan Forgiveness and Teacher Loan Forgiveness programs, and enhancements to monthly billing statements).

between the [servicer] and the borrower." *Id.* As a result of this "contact," the Department decided an additional "repayment disclosure," pursuant to 34 C.F.R. § 682.205(a)(4)(i), would be confusing, so eliminated the requirement, confirming that the Department expects "contacts" between borrowers and servicers beyond the conveyance of disclosures required by federal law. *Id.* at 65,781.[7]

Put simply: the HEA and its implementing regulations address the contents of the written disclosures loan servicers such as Great Lakes are required to provide. They provide no guidance regarding what loan servicers may or may not communicate in informal telephonic communications like those at issue in this case.

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[7] Interpreting the term "disclosure requirement" to mean the provision of precise, standardized information about the terms and conditions of the transaction is consistent with the use of that term in other consumer lending statutes. *See e.g.*, Consumer Leasing Act, 15 U.S.C. § 1667a (requiring "consumer lease disclosures" that consist of "a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner" information including payment amount, other charges, "the number, amount, and due dates or periods of payments"); Electronic Funds Transfer Act, 15 U.S.C. § 1693c (requiring "disclosures" provided "at the time the consumer contracts for an electronic fund transfer service" of the "terms and conditions of electronic fund transfers involving a consumer's account," including "any charges," "the consumer's right to stop payment of a preauthorized electronic fund transfer and the procedure to initiate such a stop payment order" and "the telephone number and address of the person or office to be notified in the event the consumer believes than [sic] an unauthorized electronic fund transfer has been or may be effected"); Truth in Savings Act, 12 U.S.C. § 4302 (requiring "disclosure" "in a clear and conspicuous manner" of interest rate, minimum balance requirements, and minimum initial deposit requirements on advertisements for certain deposit accounts). In many cases, because disclosures are so standardized and regulatory requirements for how information is presented are so precise, implementing agencies have authority to promulgate model forms. *See, e.g.*, 15 U.S.C. § 1667f(b); 15 U.S.C. § 1693b(b); 12 U.S.C. § 4308(b).

And significantly, they do not attempt to regulate affirmative misrepresentations like those Great Lakes representatives made to Lawson-Ross and Byrne. *See, e.g.*, *Genna v. Sallie Mae*, No. 11-cv-7371 LBS, 2012 WL 1339482, at *8 (S.D.N.Y. Apr. 17, 2012) (finding claims based on statements that were "neither authorized by the Secretary of Education nor conformed to any explicit dictates of federal law," not preempted under § 1098g.); *see also infra* Section I.C. (discussing cases in which courts note the distinction between required disclosures and informal communications).

B. The Structure and Context of § 1098g Show that Congress Did Not Intend to Preempt Claims for Affirmative Misrepresentations.

The structure and context of § 1098g confirms that Congress did not intend to disrupt traditional consumer protection law in this area. Section 1098g was codified in the same provision in which Congress exempted federal student loans from the disclosure requirements of the Truth in Lending Act ("TILA") and state disclosure requirements.[8] Pub. L. 97-320, § 701, 96 Stat. 1538 (1982). At the time, TILA and its implementing regulation required a creditor to make certain disclosures for each

[8] Section 701(a) of Pub. L. 97-320 exempted HEA Title IV loans from coverage under TILA, while § 701(b) provided that "Loans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 … shall not be subject to any disclosure requirements of any State law." Pub. L. 97-320, § 701, 96 Stat. 1538.

transaction, including the creditor's identity, the amount being financed, any finance charges, the annual percentage rate, any variable rate, the payment schedule, the total amount of payments to be made, any demand features, and additional information about prepayment, late payments, and assumption.[9] Congress was concerned about lenders and servicers being required to provide duplicative disclosures, since TILA's coverage overlapped with comparable disclosures required under the HEA for federal student loans. *See* S. Rep. 97-536, at 42, *reprinted in* 1982 U.S.C.C.A.N. 3054, 3096.[10]

At the time § 701 was codified, TILA permitted states to apply to the Federal Reserve Board ("Board") for a determination of whether a state law disclosure is "substantially the same in meaning as disclosure required under this subchapter." 15

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[9] *See* Truth in Lending; Revised Regulation Z, 46 Fed. Reg. 20,848, 20,902-03 (April 7, 1981) (codified at 12 C.F.R. § 226.18 effective April 1, 1981).

[10] The report noted that "all disclosures required under the Truth in Lending Act are currently being provided to students receiving loans under … the Higher Education Act of 1965." *Id.* It further explained that "the committee believes that the exemption from Truth in Lending provisions for these students [sic] loans will help eliminate duplicative paperwork for students, post-secondary educational institutions, state guarantee agencies and lenders" and would "still provid[e] all disclosures and protections to students that are currently required under the Act." *Id.* The same Senate Report later explicitly tied together the TILA amendments in § 701(a) to § 701(b) of the Public Law, which added what is now codified at 20 U.S.C. § 1098g. *Id.* at 71, *reprinted in* 1982 U.S.C.C.A.N. at 3125 ("This section exempts from the Truth in Lending Act and from disclosure requirements of any state law loans that are made, insured or guaranteed under any program authorized by Title IV of the Higher Education Act of 1965.").

U.S.C. § 1610(a)(2) (1982). If the Board determined that the state-required disclosure was substantially the same in meaning as a disclosure required by TILA, "then creditors located in that State may make such disclosure in compliance with such State law in lieu of the disclosures required by" TILA. *Id.*; *see also* 12 C.F.R. § 226.29 (1982). Accordingly, if Congress had stopped at § 701(a), and had not adopted § 701(b), now codified as § 1098g, creditors in states that had adopted disclosures approved by the Board as substantially the same as those in TILA would likely have been subject to both the state law disclosure requirements and the HEA disclosures, resulting in precisely the confusion and duplication the legislative history indicates Congress sought to avoid. Accordingly, it stands to reason that Congress had these state law disclosures in mind when it enacted § 1098g and exempted federal student loans from TILA because those disclosures would be just as duplicative as the TILA disclosures.[11]

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[11] There are several indications that Congress was concerned about state truth in lending disclosures when it enacted § 1098g. For example, during the legislative process, one senator stated that "[s]ome 23 States have enacted their own truth-in-lending provisions. As is true with respect to the Federal [TILA], State disclosure laws serve no useful purpose in connection with loans made under title IV of the Higher Education Act of 1965. It is therefore appropriate that the proposed exemption apply as well to State laws." 97 Cong. Rec. 19,897, 19,916 (daily ed. Aug. 9, 1982) (statement of Sen. Heinz). Further, the civil liability provision in TILA authorizes liability for failure to comply with state law "disclosure requirements" that have been determined to be "substantially the same" as those imposed by TILA, 15 U.S.C. § 1640, adding to the inference that "disclosure requirements" in § 1098g similarly meant to refer only to state truth in lending act requirements.

In contrast, nothing in the structure or context of § 1098g indicates that Congress intended to preempt individuals or state enforcement agencies from using the historical powers of the states to protect student loan borrowers from consumer harms, especially those from affirmative misstatements. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 696 (3d Cir. 2016), *cert. denied sub nom*. *AVCO Corp. v. Sikkelee*, 137 S. Ct. 495 (2016).[12]

C. Courts Consistently Distinguish Statutes Preempting Disclosure Requirements from Prohibitions on Affirmative Misstatements.

Both within and outside the context of the Higher Education Act, courts routinely distinguish state laws that violate a federal prohibition against required

[12] Other features of the HEA suggest that Congress envisioned a separate body of law and remedies to enable individual borrowers to remedy individualized wrongs by a lender or service. For example, the HEA permits the Secretary to broadly "limit, suspend, or terminate the continued participation of an eligible lender" for failing to comply with the mandatory disclosure provisions, but does not permit the Secretary to impose targeted, less drastic sanctions on a lender or servicer for acting unfairly, deceptively, or providing misleading information. *See* 20 U.S.C. § 1083(f)(4). Nor does the statute "provide a basis for a claim for civil damages." *Id.* § 1083(f)(2)(B). Accordingly, for the Secretary to address a single claim of an individualized misrepresentation by a loan servicer under the FFEL program, the Secretary is limited to severe remedies such as limiting, suspending, or terminating *the lender's* participation in the student loan programs.

statements, on the one hand, from the application of state laws predicated on the "more general obligation … not to deceive," on the other. *Cipollone*, 505 U.S. at 528-29.

For example, in *Cipollone*, the Supreme Court examined two claims brought under the Public Health Cigarette Smoking Act of 1969 ("1969 Act"), which provided that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Cipollone*, 505 U.S. at 515. The plurality found that the 1969 Act preempted one, but not both, of the plaintiff's state law fraudulent misrepresentation claims. *Id.* at 527-29.[13] In the first claim, the plaintiff alleged that the defendants, "through their advertising, neutralized the effect of federally mandated warning labels." *Id.* at 527. This, according to the plurality, was entirely "predicated on a state law prohibition" against certain types of statements regarding the hazards of smoking. *Id.* The plurality held that "such a *prohibition* ... is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." *Id*

[13] Although aspects of Justice Stevens' opinion constitute the opinion of the Court, *see infra* n. 15, his opinion only announced a plurality view with respect to the scope of the 1969 Act (joined by Chief Justice Rehnquist and Justices White and O'Connor). The plurality rationale was subsequently applied by the majority of the Court in *Altria Grp., Inc. v. Good*, 555 U.S. 70, 82 (2008).

(emphasis in original). Thus, because the 1969 Act preempted state law advertising requirements, plaintiff's claim was expressly preempted. *Id.*

With respect to the second post-1969 claim, however, the plurality held that a claim for "intentional fraud and misrepresentation both by 'false representation of a material fact [and by] conceal[ment of] a material fact" was *not* expressly preempted. *Id.* at 528-29. This type of claim was predicated on a state law "duty not to make false statements of material fact or to conceal such facts," *i.e.*, the "more general obligation ... not to deceive." *Id.* There was no evidence that Congress intended to proscribe the historic "regulation of deceptive advertising," *id.* at 529, and thus the Court did not find broadly—as the District Court did here—that all misrepresentation claims are disguised failure-to-disclose claims. *See Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1201-02 (11th Cir. 2004) (applying *Cipollone* and finding no preemption of claims "premised on the allegation that defendants made statements knowing their falsity, or with reckless disregard as to their truth or falsity.").

As with the second 1969 Act claim in *Cipollone*, the claims brought by Lawson-Ross and Byrne are not predicated on challenging the use, or adequacy, of federal disclosures. Nor do Lawson-Ross and Byrne seek to "neutralize" any such

requirements.[14] Rather, the claims brought by Lawson-Ross and Byrne are predicated on the "more general obligation ... not to deceive" rooted in Florida common and statutory law.[15]

A growing number of courts have expressly and implicitly recognized this distinction in a number of contexts. For example, within the context of the HEA, although not under § 1098g, this Court in *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217 (11th Cir. 2002), explained that the plaintiffs had failed to state a RICO claim where they "identified no affirmative misrepresentations" by the lender, but instead alleged that the lender engaged in a scheme to defraud the plaintiffs "by failing to disclose information." *Id.* at 1225. Similarly, in a case directly applying *Cipollone*, the Ninth Circuit held in *Chae v. SLM Corp.*, 593 F.3d 936, 942-43 (9th Cir. 2010), discussed in greater detail *infra*, that although § 1098g preempted claims brought to dispute the adequacy of "properly-disclosed" practices required by the HEA, § 1098g did not expressly preempt the more fundamental obligations, rooted in state

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[14] Great Lakes could have acted consistently with all federal disclosure requirements *and* state consumer protection law by not providing false information to borrowers who sought out advertised advice. *See* Doc. 24 at ¶ 29.

[15] Separately, the Court in *Cipollone* also addressed § 5(b) of the 1965 Federal Cigarette Labeling and Advertising Act ("1965 Act"), where Congress expressly prohibited laws that required any "statement relating to smoking and health ... in the advertising of [properly labeled] cigarettes." 505 U.S. at 518 (quoting the 1965 Act). Similar to the "disclosure requirement" language in § 1098g, the Court held that statute barred state laws that "required" particular "statements," and therefore was not properly applied to "pre-empt state-law damages actions." *Id.* at 519-20.

consumer protection law, not to use "fraudulent and deceptive practices apart from" those "properly-disclosed" practices.

Similarly, courts have recognized in matters ranging from criminal prosecutions to ERISA cases the distinction between a failure to disclose and a fraud or affirmative misrepresentation. *See United States v. Steffen*, No. 4:11CR124JCH MLM, 2011 WL 6217082, at *4 (E.D. Mo. Aug. 15, 2011), *report and recommendation adopted*, 2011 WL 6217075 (E.D. Mo. Dec. 14, 2011), *aff'd,* 687 F.3d 1104 (8th Cir. 2012) (granting motion to dismiss bank fraud claim where defendant made no misrepresentations but rather failed to make contractually required disclosures); *In re American Express Co. ERISA Litig.*, 762 F. Supp. 2d 614, 630 (S.D.N.Y. 2010) (dismissing ERISA violation claim where plaintiffs alleged SEC filings "failed to disclose [the defendant's] true financial outlook, but does not point to specific affirmative misrepresentations").

In addressing preemption issues, numerous federal courts have drawn a similar distinction between disclosure requirements, which create an obligation to provide certain specified information or categories of information, and causes of action based on false information having been provided.

The Homeowners Protection Act of 1998 ("HPA") contains an express preemption clause, which provides that the HPA's provisions "shall supersede any provisions of the law of any State relating to requirements for … any disclosure of

information addressed by this chapter." 12 U.S.C. § 4908(a)(1). Claims based on a bank's misrepresentations are not preempted by this provision, however, because such claims "center on whether the Bank misrepresented a fact to the plaintiffs," and proving such a claim does not focus on the statute's disclosure requirements, "but rather on the Bank's alleged false representation to the plaintiffs." *Dwoskin v. Bank of Am., N.A.*, 850 F. Supp. 2d 557, 568 (D. Md. 2012). As the court explained in *Dwoskin*, the plaintiffs' claim in that case did not run afoul of the HPA's preemption provision because the plaintiffs did not seek to impose requirements on the content of the bank's disclosures, but rather "to enforce a general claim that a business cannot tell a customer one thing and then proceed to do another." *Id.* at 569.

Regulations implementing the Home Owner's Loan Act interpreted it as preempting state laws regarding "[d]isclosure and advertising." *McCauley v. Home Loan Inv. Bank, F.S.B.*, 710 F.3d 551, 554-55 (4th Cir. 2013). Courts interpreting this preemption provision have held it does not apply to claims based on "affirmative deception." *Id.* at 557. This is in recognition that "[a]n allegation of affirmative misrepresentation of a material fact is distinct from a failure to disclose claim." *Brown v. Wells Fargo Bank, N.A.*, 869 F. Supp. 2d 51, 61 (D.D.C. 2012); *see also Ololade v. World Sav. Bank*, 2012 WL 13012462, at *6 (C.D. Cal. Jan. 26, 2012) (holding claim "based on affirmative misrepresentations" does not implicate preemption of state-law disclosure requirements because "the requirement that one

not deliberately mislead a contracting party is one of general applicability, not one that imposes new requirements specifically on mortgage lenders"). As a result, a state law cause of action that would serve as "a back door to impose" disclosure requirements would be preempted, but "this is not the case … where the plaintiff is alleging affirmative misrepresentations." *Brown*, 869 F. Supp. 2d at 62.

Similarly, the National Banking Act ("NBA") expressly preempts any conflicting state law, including state laws that impose "disclosure requirements beyond those required by federal law." *Murr v. Capital One Bank (USA), N.A.*, 28 F. Supp. 3d 575, 583 (E.D. Va. 2014). This preemption of state-imposed disclosure requirements does not extend to prohibitions of "misleading statements," *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 726 (9th Cir. 2012), or "affirmative misrepresentations." *Murr*, 28 F. Supp. 3d at 583; *see also Aguayo v. U.S. Bank*, 653 F.3d 912, 926 (9th Cir. 2011) (distinguishing for preemption purposes, a "disclosure," which it described as "an informational statement of terms prior to entering into a transaction" from a "notice," which it deemed a "specific communication of a claim or demand submitted to a party in the course of" a transaction). Courts have also distinguished affirmative misrepresentations from disclosure requirements when analyzing preemption in other contexts. *Whittington v. Mobiloil Fed. Credit Union*, 2017 WL 6988193, at *10 (E.D. Tex. Sept. 14, 2017) (holding Truth in Savings Act regulation preempting inconsistent state law

requirements preempted failure to disclose claim, but a claim that a credit union "made a direct misrepresentation... may not be preempted."); *Fisher v. Monster Beverage Corp.*, 656 Fed. Appx. 819, 823-24 (9th Cir. 2016) (holding Food, Drug, and Cosmetic Act provision preempting state law labelling requirements not identical to federal ones did not preempt claims that "are not seeking further disclosure with respect to nutritional-labeling requirements, but are instead seeking to remove any false or misleading statements or omissions"); *Parker v. J.M. Smucker Co.*, 2013 WL 4516156, at *4 (N.D. Cal. Aug. 23, 2013) (claim not preempted where plaintiff did not argue food company "should have labeled the product differently, just that it should not have included a certain label that is allegedly false or misleading"); *Rice v. Allergan USA, Inc.*, 2018 WL 1618036, at *8 (N.D. Ala. Apr. 4, 2018) (claim medical device company made misleading representation about its product would not be preempted under Medical Device Amendments, but claim company "suppressed information that the company should have disclosed" would be preempted); *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Products Liab. Litig.*, 295 F. Supp. 3d 927, 993 (N.D. Cal. 2018) (state claims were not preempted under automobile emissions control standards of Clean Air Act where they were based on affirmative misrepresentations and not violations of federal regulations, and "the state claims could be established independent of any federal regulatory standard").

* * *

Like many of the above statutory and regulatory regimes, the HEA is an extensive statutory scheme that contains detailed and specific disclosure requirements. Subjecting Great Lakes to state law causes of action if it encourages a borrower to call for guidance and then falsely informs such a borrower that she has taken the steps necessary to qualify for PSLF does not impose a "disclosure requirement." Lawson-Ross and Byrne do not base their claims on any statements that Great Lakes is required to make; instead, the claims are fundamentally based on allegations that Great Lakes, when it spoke, spoke falsely and deceptively. *See, e.g.* Doc. 24 ¶¶ 38, 44, 54, 63, 75, 80, 86, 91, 98. Claims based on affirmative misrepresentations therefore do not seek to impose disclosure requirements within the plain meaning of § 1098g.

II. THE DEPARTMENT OF EDUCATION'S 2018 NOTICE OF INTERPRETATION LACKS THE FORMALITY, THOROUGHNESS, AND CONSISTENCY TO JUSTIFY DEFERENCE AS PERSUASIVE.

As explained above, the plain language, structure, context, and history of § 1098g demonstrate that Congress did not intend to preempt the "general duty" not to make false or misleading statements. *Cipollone*, 505 U.S. at 529. Accordingly, the claims brought by Lawson-Ross and Byrne are not preempted. Rather than rely on these clear markers of Congressional intent, the District Court held Lawson-Ross

and Byrne's claims were preempted based on an interpretation of § 1098g in the recent Notice issued by the Department. Doc 44. at 7-8.

The Department did not issue formal interpretive rule by seeking notice and comment. The District Court correctly noted that, as a result, the Notice is, at most, eligible for *Skidmore* deference. *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001); *Wilderness Watch & Pub. Employees for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1091 n.7 (11th Cir. 2004) (noting "when ... the agency interpretation does not constitute the exercise of its formal rule-making authority" it is accorded consideration based only on the *Skidmore* factors).[16] But even under *Skidmore*, deference is only afforded "depending upon the 'thoroughness evident in its

[16] The Department's failure to seek and obtain public comment with respect to the Notice is indicative of more than just a procedural flaw. Indeed, had the Department sought to "act through adjudication or rulemaking to preempt State law," as opposed to simply issuing interpretive "notice," the Department would have been *required* to obtain public comment. *See* Federalism, Executive Order 13,132 § 4(e), 64 Fed. Reg. 43,255, 43,257. With respect to the interpretation contained in the Notice, had the Department provided interested parties an opportunity to comment, the Department would likely have seen forceful comments in opposition lodged by state officials. *See* Governors Voice Concerns Over New Student Borrower Proposal, March 12, 2018, https://www.nga.org/news/press-releases/governors-voice-concerns-over-new-student-borrower-proposal (urging the Department to "reconsider the scope" of the Notice); Letter to Sec'y DeVos from 26 State AGs, Oct. 23, 2017, https://ag.ny.gov/sites/default/files/devos_letter.pdf (before the issuance of the Notice, urging Department not to issue regulatory guidance on preemption because it would "defy the well-established role of states in protecting their residents from fraudulent and abusive practices, [and would] plainly exceed the scope of the Department's lawful administrative authority, and would needlessly harm the students and borrowers at the core of the Department's mission").

consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Buckner v. Florida Habilitation Network, Inc.*, 489 F.3d 1151, 1155 (11th Cir. 2007) (quoting *Skidmore*, 323 U.S. at 140).

The application of the *Skidmore* factors in this case demonstrates that the Notice is not persuasive and is not entitled to deference. Not only does the Notice consist of purely conclusory statements that lack the "'thoroughness' of 'consideration'" to be considered persuasive, *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1352 (2015), but the Department grossly misstates the holding of the principal case upon which it relies. Finally, the Notice also represents a departure from the Department's prior statements regarding preemption, without even acknowledging or distinguishing those prior positions. *Id.* In short, all of the factors courts consider under the *Skidmore* standard establish that the Notice is not persuasive and weigh against deferring to the Department's Notice of Interpretation. *Id.*; *Student Loan Servicing Alliance v. District of Columbia*, No. 18-0640 (PLF), 2018 WL 6082963, at *28 (D.D.C. Nov. 21, 2018) (applying *Skidmore*, and determining that the Notice is "due no deference whatsoever"); *see also, e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC*, 779 F.3d 74, 83 (2d Cir. 2015) (rejecting *Skidmore* deference where an agency's interpretation was "novel, inconsistent with its positions in other cases, and ultimately unpersuasive").

A. The Notice Does Not Reflect a Thorough Consideration of the Department's Expertise and Judgment.

With respect to the scope of § 1098g, the Department's entire discussion in the Notice is stated in conclusory terms without explanation or justification. Indeed, in its three-paragraph discussion of express preemption, the Notice provides a sweeping interpretation of the phrase "disclosure requirements," extending, without explanation, the meaning of that phrase to include both "informal or non-written communications" with borrowers and even to servicer "reporting to third parties such as credit reporting bureaus." 83 Fed. Reg. at 10,621. The Department offers no reasoning whatsoever and particularly none based in the plain language, context, or policy rationale for why the statutory term "disclosure requirement" should apply to informal or non-written communications (or credit reporting). The Department's discussion of § 1098g lacks any discussion of the interplay between § 1083 "required … disclosures" and the "disclosure requirement" language in § 1098g. There is no discussion of the history of § 1098g, *see supra* Section I.B., including the importance and relevance of the TILA requirements.

The Department's interpretation of § 1098g in the Notice is precisely the sort of sweeping, conclusory statement with unsupported analysis that this Court has found insufficient to justify deference under *Skidmore*. Indeed, a recent decision from the District Court for the District of Columbia noted the District Court's deference to the Notice in this case, engaged in a detailed analysis of the Notice, and

ultimately concluded that the Notice is "not persuasive" and "due no deference whatsoever" under *Skidmore*. *Student Loan Servicing Alliance*, 2018 WL 6082963, at *28.

This Court, under similar circumstances, has refused to afford agency pronouncements deference under *Skidmore*. For example, in *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002), this Court was urged to defer to two Department of Labor opinion letters that had not been subjected to notice and comment rulemaking. Noting that opinions such as those at issue are entitled to "respect" under *Skidmore* "to the extent that those interpretations have the power to persuade," this Court nevertheless held that the opinion letters were "conclusory" insofar as they did not "offer any reasoning" for their conclusions. *Id.* There, as here, "[b]ecause of th[e] lack of explanation" provided by the agency, "it is impossible to weigh the 'validity of its reasoning' or the 'thoroughness [ ] in its consideration.' " *Id.* at 1239 (quoting *Skidmore*, 323 U.S. at 140); *see also, e.g.*, *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 303 (6th Cir. 1998) (applying *Skidmore* and finding that agency opinions "fail to persuade" when they "provide no reasoning or statutory analysis to support their conclusion").

B. The Department's Mischaracterization of Judicial Precedent Further Establishes the Notice's Lack of Persuasive Value.

The Department's mischaracterization of the principal case on which it relies is illustrative of the lack of reasoned analysis throughout the Notice.

The Department cited to *Chae v. SLM Corp*, in which the Ninth Circuit held that § 1098g *does not preempt all state law claims* for fraudulent and deceptive practices by a loan servicer. *Chae*, 593 F.3d at 943 (holding that "the use of fraudulent and deceptive practices" apart from the "properly disclosed" practices in monthly billing statements "are not impacted by any of the [HEA's] express preemption provisions."). Nevertheless, the Department claims precisely the opposite, asserting that "[s]tate-law claims alleging misrepresentation by a student loan servicer were 'improper-disclosure claims' and, therefore, preempted pursuant to section 1098g." 83 Fed. Reg. at 10,621.

In *Chae*, plaintiffs sued Sallie Mae ("SLM") regarding three separate practices SLM used to service student loans. *First*, plaintiffs challenged SLM's use of the "simple daily interest" method of calculating interest. 593 F.3d at 940. Plaintiffs asserted that the loan agreements barred SLM from using that method and required SLM to use an "installment method." *Id.* Plaintiffs alleged that the failure to use the installment method conflicted with FFEL program requirements and violated California law. *Id. Second*, plaintiffs asserted that California law prohibited SLM from charging late fees where SLM also charged simple daily interest. *Id. Third*, plaintiffs challenged, again under California law, SLM's method of setting the first repayment date on particular types of loans known as Consolidation and PLUS loans. *Id.* at 940-41.

The *Chae* plaintiffs pleaded five causes of action under California law: unfair or fraudulent business practices, breach of contract, breach of covenant of good faith and fair dealing, violation of Consumer Legal Remedies Act and unjust enrichment. *Id.* at 941 n.4. On appeal from summary judgment in SLM's favor, the Ninth Circuit considered whether these claims were expressly preempted by § 1098g, *id.* at 941-943, and if not, whether they were preempted under principles of conflict preemption, *id.* at 943-949.

With respect to express preemption, the Ninth Circuit held that one narrow category of factual allegations, "plaintiffs' claims challenging the language in [SLM's] billing statements and coupon books," involved "restyled improper-disclosure claims" expressly preempted by § 1098g. *Id.* at 943. Because these claims were about "properly-disclosed FFELP practice[s]," the language contained in those documents could not "simultaneously be misleading under state law" and were therefore expressly preempted. *Id.*

Importantly, the Ninth Circuit squarely *rejected* SLM's express preemption defense regarding plaintiffs' "remaining claims alleg[ing] breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, *and the use of fraudulent and deceptive practices apart from the billing statements*." *Id.* (emphasis added). "These claims," the Ninth Circuit held, "are not impacted by any of the FFELP's express preemption provisions." *Id.* Indeed, "[a] properly-disclosed

FFELP practice cannot simultaneously be misleading under state law," *id.*, but states can prohibit fraudulent, unfair, or deceptive practices regarding conduct by a servicer that neither constitutes "disclosures" nor touches upon federal "disclosure requirements," without running afoul of § 1098g.

In the Notice, the Department also cited a recent, unpublished opinion of the U.S. District Court for the Southern District of Illinois for the proposition that "Congress intended [section] 1098g to preempt any State law requiring lenders to reveal facts or information not required by Federal law." Notice, 83 Fed. Reg. at 10,621 (quoting *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 17-CV-00183, 2017 WL 6501919, at *4 (S.D. Ill. Dec. 19, 2017)). But, like the Notice, the *Nelson* decision, currently on appeal to the Seventh Circuit, misconstrues the core holding of *Chae*. The *Nelson* decision also fails to examine the context and history of § 1098g, or even note the Supreme Court's longstanding instructions that courts should not lightly find the historic police powers of states to be expressly preempted by federal law. *See, e.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).[17] Yet without explanation, justification, or any indication of reasoned analysis regarding the district court's opinion, the Department cites *Nelson*.

[17] Respectfully, the District Court's discussion of *Chae*, *see* Doc. 44 at 5, simply repeats the same core misreading of *Chae* applied by both the district court in *Nelson* and the Department of Education in the Notice.

In contrast, other district court cases have adopted a narrower interpretation of § 1098g and call into question the Department's assertion that § 1098g preempts claims based on "informal or non-written communications" between borrowers and servicers, including claims based on "misrepresentation[s]." For example, in *Daniel v. Navient Sols., LLC*, 328 F. Supp. 3d 1319, 1324 (M.D. Fla. 2018), the District Court distinguished between a claim that a servicer "failed to disclose the requirements of the PSLF program," from the non-preempted claim that the servicer "made affirmative misrepresentations" to borrowers. In *Davis v. Navient Corp.*, No. 17-CV-00992-LJV-JJM, 2018 WL 1603871, at *2-3 (W.D.N.Y. Mar. 12, 2018), the district court held that § 1098g did not preempt claims that Navient, during telephone conversations, purposefully omitted information regarding the best repayment option for the borrower because the claims arose from "unregulated conduct over the telephone." And in *Genna v. Sallie Mae, Inc.*, No. 11 CIV. 7371 LBS, 2012 WL 1339482 (S.D.N.Y. Apr. 17, 2012), the district court held that § 1098g does not reach statements that do not "conform[] to any explicate dictates of federal law" and noted that "[t]here is nothing in the HEA that standardizes or coordinates how a customer service representative of a … loan servicer … shall interact with a customer … in the day-to-day servicing of his loan."[18] *Id.* at *8.

[18] Recent state court decisions have also rejected the Department's approach. For example, in *State of Illinois v. Navient*, 17-CH-761 (Cir. Ct. Cook Cnty Ill. Ch.

Even courts that have held that § 1098g does preempt certain claims have made clear that § 1098g express preemption is limited to claims, akin to the expressly preempted claims in *Chae*, against servicers for failing "to properly disclose HEA requirements." *See, e.g.*, *Linsley v. FMS Inv. Corp.*, No. 3:11-cv-961, 2012 WL 1309840, at *6 (D. Conn. Apr. 17, 2012) (holding that because the misrepresentation claim was "predicated on FMS's failure to properly disclose the HEA's requirements the plaintiff could "not avoid preemption by relabeling his otherwise-preempted claim as one of misrepresentation and not improper disclosure."). But Lawson-Ross and Byrne are not aware of a single case that has applied the scope of § 1098g express preemption as broadly as interpreted in the Notice.

Div., July 10, 2018), the Illinois Attorney General also sued Navient, a different federal loan servicer, alleging that the servicer was "steering" borrowers into a repayment plan called forbearance. Navient raised an argument akin to that raised by Great Lakes, that "[s]ection 1098g expressly preempts these particular [Illinois Consumer Fraud Act] claims because they seek to impose disclosure requirements that differ from the HEA's otherwise-comprehensive disclosures for federal student loans." Doc. 43 Ex. A at 9. Rejecting that argument, the trial court held "the State's claims concerning practices related to enrolling borrowers in repayment plans . . . are not 're-styled disclosures' because the core of the State's allegations is that [the servicer] schemed to steer borrowers into forbearances, not just that [the servicer] failed to disclose the availability of [repayment] plans." *Id.* at 12. The Washington Attorney General brought similar claims against Navient and the trial court rejected arguments that the claims were preempted by § 1098g. Transcript of Oral Argument at 36-37, *Washington v. Navient Corp*., No. 17-2-01115-1 SEA (Wa. Sup. Ct. July 7, 2017). Pursuant to Eleventh Circuit Rule 36-2, because the transcript of the trial court's ruling in *Washington v. Navient Corp*. is unpublished and not available on the Internet, it is attached as an exhibit to this brief.

C. The Notice is Inconsistent with Prior Statements on the Extent of the Preemptive Scope of § 1098g and the HEA.

Finally, despite its assertions to the contrary, the Notice is inconsistent with longstanding Departmental pronouncements regarding the scope of preemption of state laws as applied to student loan servicing companies, which have far more narrowly defined the extent of the HEA's preemption. Thus, the Notice "fails the *Skidmore* test most notably because the agency's view represents a stark, unexplained change in the [Department's] position." *Student Loan Servicing Alliance,* 2018 WL 6082963, at *12; *see also Young*, 135 S.Ct. at 1352 (finding the extent of deference under *Skidmore* "severely limited" where the agency's asserted position was "inconsistent with positions for which the Government has long advocated.").

Here, the scope of federal preemption is inconsistent with Departmental positions old and new. For example, as recently as 2016, the Department's Office of General Counsel explained that "the Department does not believe that the State's regulation of [loan servicers or private collection agencies] would be preempted by Federal law." Letter of Vanessa A. Burton to Jedd Bellman, Assistant Commissioner, Maryland Dep't of Labor, Licensing and Regulation 2 (Jan. 21, 2016), https://goo.gl/J1KB3e. Moreover, in a Statement of Interest filed in *Sanchez v. ASA College, Inc.*, No. 14-5006, 2015 WL 3540836 (S.D.N.Y. June 5, 2015), "the United States declared that '[n]othing in the HEA or its legislative history even

suggests that the HEA should be read to preempt or displace state or federal laws. Nor is there anything in the HEA or the regulations promulgated thereunder to evince any intent of Congress or [ED] that the HEA or its regulations establish an exclusive administrative review process of student claims brought under state or deferral law, even if the conduct alleged may separately constitute an HEA violation." *Student Loan Servicing Alliance*, 2018 WL 6082963, at *12 (quoting the Statement of Interest).

In addition, in 1990, the Department issued an interpretive rule regarding the preemptive scope of regulations setting out the steps that entities collecting student loans guaranteed by the federal government must take to attempt to collect defaulted student loans ("GSL regulations"). Stafford Loan, Supplemental Loans for Students, PLUS, and Consolidation Loan Programs, 55 Fed. Reg. 40,120 (Oct. 1, 1990). In that interpretive rule, the Department expressly "stresse[d] the limited nature of this action in displacing State rules and authority," stating, consistent with the views espoused in 2015 and 2016, that "the preemptive effect of [the GSL] regulations extended no farther than is reasonably necessary to achieve an effective minimum standard of collection action." 55 Fed. Reg. at 40,121.[19]

[19] Even further, a 2015 amicus brief submitted to the Seventh Circuit in *Bible*, the Department took the "opportunity to make clear that the [HEA] Act does not preempt breach-of-contract claims that are premised on violations of the Act," Brief of the United States as Amicus Curiae, *Bible v. United Student Aid Funds, Inc.*, Case

Given these varying interpretations of the preemptive scope of the HEA, as the district court in *SLSA* properly noted: "the [Department] has not been consistent in its position about the HEA's preemptive effect, and the … Notice does nothing to alleviate or explain those contradictions." *Student Loan Servicing Alliance*, 2018 WL 6082963, at *12. In light of the importance of the "consistency" of an agency's interpretations to the *Skidmore* analysis, the Notice lacks the "power to persuade" and is not entitlyed to deference. *Skidmore*, 323 U.S. at 140.

* * *

For all of these reasons, the District Court erred by relying on the Notice to hold that Lawson-Ross and Byrne's state law claims based on affirmative misrepresentations by their student loan servicer were preempted.

CONCLUSION

The plain language, context, structure, and history of § 1098g unequivocally demonstrate that its preemptive reach must be limited to laws requiring affirmative disclosures and to claims alleging failures to make those disclosures. A state law claim based on the loan servicer's affirmative misrepresentations to the borrower

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No. 14-1806, 2015 WL 3403631 (7th Cir. May 21, 2015). These statements are consistent with how the Department has viewed preemption of claims against other actors involved in the Title IV programs. *Cf.* Program Integrity Issues, 75 Fed. Reg. 66,832, 66,865 (Oct. 29, 2010) ("States should retain the primary role and responsibility for student consumer protection against fraudulent or abusive practices by some postsecondary institutions.").

does not constitute or impose a "disclosure requirement." That is, allowing such a claim does not have the effect of putting words in the loan servicer's mouth; instead, "[s]uch claims are predicated not on a duty" to make required disclosures, "but rather on a more general obligation, the duty not to deceive." *Cipollone*, 505 U.S. at 528-29. When a loan servicer provides information to a borrower, the information it provides may not be false. For these reasons, the Court should reverse the District Court's order granting Great Lakes' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 11,982 words excluding the parts of the brief exempted by FRAP 32(f). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on December 3, 2018, I filed the foregoing with the Clerk of Court using the Electronic Filing System which will send a Notice of Docket Activity to:

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EXHIBIT

Hearing on Defendants' Motion for Limited Dismissal

State of Washington v. Navient Corporation, et al.

July 7, 2017

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THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)
Plaintiff,) Cause No. 17-2-01115-1 SEA
vs.)
NAVIENT CORPORATION; NAVIENT)
SOLUTIONS, LLC; PIONEER)
CREDIT RECOVERY, INC.; and)
GENERAL REVENUE CORPORATION,)
Defendants.)

HEARING ON DEFENDANTS' MOTION FOR LIMITED DISMISSAL

July 7, 2017

Judge Veronica Alicea Galvan Presiding

TRANSCRIBED BY: Catherine Leschi Wilcox, CET-913
Court Certified Transcription

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THE COURT: Thank you. You may all be seated. Good morning everyone.

MR. ROESCH: Good morning, Your Honor.

MR. SHUMSKY: Good morning, Your Honor.

THE COURT: We are present on the record in the matter of State of Washington versus Navient, 17-2-0115-1 [sic]. This is a defense motion to dismiss several claims. I'm going to ask counsels to please identify themselves for the record. On behalf of the plaintiff first?

MR. CALFO: Good morning, Your Honor. Angelo Calfo on behalf of the defendants. I'm sorry, you asked for the plaintiff first.

THE COURT: Yes.

MR. CALFO: I'm so sorry. But, Your Honor, as the Washington lawyer here I wanted to introduce the Court to the lawyers from Kirkland & Ellis, who I'm co-counsel with and I think very highly of, Mike Shumsky and Jennifer Levy.

THE COURT: Good morning.

MR. SHUMSKY: Good morning, Your Honor.

MR. CALFO: Mr. Shumsky will be arguing the motion this morning.

THE COURT: Okay. Thank you.

MS. LEVY: Good morning, Your Honor.

THE COURT: And on behalf of the Attorney General's Office?

MR. ROESCH: Good morning, Your Honor. Benjamin Roesch here on behalf of the State. And with me is my co-counsel, Craig Rader. We will also be joined after her hearing with Judge Andrus finishes by our co-counsel, Tricia McArdle.

THE COURT: Okay. I have received voluminous items from obviously all parties. And I want to deal first things first with the motion to strike that was requested by the plaintiffs in this case with regards to the reply. Essentially, alleging that the reply brought up new issues of law that they did not have time to consider obviously in their original responses. They were not raised at that time.

With regards to that limited issue, the Court is going to strike that. I'm not going to hear the CR 9 arguments at this time. That is obviously stricken without prejudice. If you wish to raise it so that it can be properly briefed and looked at, we shall do so at a later time. But at this time, the Court's not going to consider that argument.

That leaves us with the 12(b)(6) motions, so defense I'm going to allow you 20 minutes. Do you want to reserve any time for rebuttal?

MR. SHUMSKY: Yes, Your Honor. I'd like to reserve about 5 minutes for rebuttal if I could.

THE COURT: Perfect. Come on up. And I'm probably going

to have a few questions for you just so that we're, so you know.

MR. SHUMSKY: Well, thank you once again, Your Honor. I really appreciate the opportunity to be with you here today. My job is obviously to answer your questions and give you some comfort with the case, the arguments that we're presenting here.

For what it's worth, though, just by way of overview, my plan to the extent that a plan is ever a good thing to have when you walk into argument, is to start with a very brief overview of the State's complaint in this case. A very brief overview of the principal defenses that we're raising because as I'm sure you know, it's a limited motion to dismiss. We're not moving to dismiss the complaint in its entirety. So I want to make clear what we're actually moving to dismiss and why.

And then I'd like to spend the bulk of my argument time focusing on what I'm going to characterize as the federal issues in this case. Number One, preemption under the HEA. And Number Two, abstention under the primary jurisdiction doctrine of this State.

So if there are particular things you want --

THE COURT: -- Well, and let me just clarify. I have read the materials. And I understand that you are requesting limited dismissal, specifically in the complaint, first cause

of action 9.4, A through B; 7.3, F through J; 7.3 E, 7.3 K through N; 8.2, A and B under the third cause of action.

So my questions are definitely with regards to some of the federal issues that you have raised. Let's talk first about you're asking in the first cause of action, you're alleging that essentially this, these claims are precluded by the Truth in Lending Act. And I want you to expand on that.

MR. SHUMSKY: Sure. So I'm going to do this in the opposite order from the one that I had planned. I'll talk about TILA first. And then turn to the HEA.

So we're not arguing that these claims are precluded by TILA. What we're arguing is that this Court should apply the doctrine of primary jurisdiction. And that is to say, defer to the relevant federal agencies, who have enforcement responsibility for the kinds of issues that the State is raising.

But before I get too deep into the merits of that arg- --

THE COURT: -- Hold on. Before you get there, why then, what would that do to the State's inherent police powers? I mean, don't the states have inherent police powers that allow them to engage in these types of what they're claiming to be defenses of essentially a public interest?

MR. SHUMSKY: No question about that, Your Honor. States absolutely do have historic police powers and they've got an important role to play in enforcing State law. That having

been said, in certain areas the enforcement of state laws can interfere with a comprehensive, highly reticulated federal regime and put the Court in a position of deciding issues that we think and that the courts have said previously, like this State's Supreme Court in the Vogt decision, the Washington Court of Appeals in the Miller decision, are better left to legislative or adjudicatory bodies that have specialized expertise. And particularly where enforcement of the state laws could interfere with the way that the federal government is enforcing and historically has enforced federal laws that touch on the same subject matter.

But before I get into the particulars of the doctrine, I want to make a very important point up front, so that you understand I think a very important feature of the State's TILA related claims. When we're moving to dismiss the State's -- or rather, moving on primary jurisdiction grounds for you to abstain from resolving the TILA claim, those TILA claims that the State is bringing, claims relating to the TILA, only involve the origination from 2003 to 2007 of private student loan.

And as you know, the State's argument is that these privately issued loan were unconscionable because some percentage of them were issued to students who went to either colleges or universities with low graduation rates, or they were issued to borrowers with little to no credit history

without a documented ability to repay.

And so the curious thing about that is that if lending to those people, people going to one of the many Washington State universities with a low graduation rate. Or like just about every other high school student without an extensive documented credit history is so unconscionable and so unfair, why on earth would the State limit its claims to Sallie Maes or Navients or origination of private student loans, and not also bring claims that it somehow violated Washington law and public policy to make federally backed student loans to those same students?

And there's a simple answer to that, Your Honor. And that's that the HEA compels lenders, like Sallie Mae during the relevant time period, to issue federally backed student loans to those systems. The HEA and the availability of federally subsidized and federally backed loans is one of LBJ's signature Great Society accomplishments designed to provide educational opportunities to every borrower regardless of their credit history, regardless of their documented ability to repay. To open up the doors of higher education to students who otherwise couldn't afford to go.

And so at the end of the day the State's TILA based claim being limited to private student loans boils down to the proposition that it is unconscionable for Navient or its predecessor, Sallie Mae, to issue with their own money loans

to borrowers that federal law expressly requires Sallie Mae and Navient to lend to when that money is federally backed. This is a really strange claim.

THE COURT: Well, isn't that probably because there are specifically expressed preemptions on federally backed loans versus private loans?

MR. SHUMSKY: With respect to disclosure. But the point that I'm trying to make is these claims to the extent that they deal with the origination of a loan to a student based on her characteristics, federal law compels those loans to be issued. And the State's claim is that somehow it becomes unconscionable when Navient's using its own money, instead of federal taxpayer dollars. And that's a very strange claim to make because it's completely at odds with what the federal government's policy is with respect to the issuance of federal loans.

As for TILA primary jurisdiction, the test for primary jurisdiction in this state is very well established. It's a three-part test and I'd like to show you how each of those three parts is satisfied.

Number One, some federal agency or state agency in certain cases has to have the authority to resolve the kinds of issues that are involved in the litigation. Second, that agency has to have special competence, not over every single issue, but over some part of the controversy. And finally,

the issues have to be within the scope of a pervasive regulatory scheme so that state enforcement could pose an obstacle to the achievement of federal objectives and enforcement activities. And that's Vogt, 117 Wn.2d at 554.

First, there is no question that federal agencies have authority over this area. And with apologies, it's complicated, because there are multiple federal agencies that are involved in TILA and HEA enforcement. I think the two relevant agencies here are the Federal Trade Commission and the FDIC. And they have slightly different jurisdictional authority under 15 U.S.C. 1607(a)(1) to (3) and 1607(c).

Essentially, federal statute establishing TILA gives agencies authority to address different types of lending institutions. Certain federal agencies have authority over nationally chartered banks. Some have authority over state chartered banks. Some have authority over savings and loans.

So to the extent that Sallie Mae during this time period was actually a banking institution issuing its own or originating its own loans as the complaint alleges, they would fall under the FDIC's jurisdiction, particularly because the affiliate I think is Sallie Mae Bank of Utah, which would have been an FDIC regulated financial institution.

To the extent that the State's claims are taking issue at Sallie Mae generally, a nonbanking entity that was involved

in the origination of these loans, the FTC Act gives the Federal Trade Commission the authority to regulate institutions like Sallie Mae, who are participating in lending practices and activities.

And those statutes are remarkably broad. They give those federal agencies the authority to target unfair and deceptive conduct, the very kind of thing that the State is alleging here. As well as information relating to the sufficiency of the disclosures, the information that was provided to borrowers, the credit criteria that need to be considered when issuing loans. All because those things, A, deal with consumers. And B, deal with banks and the issuance of credit.

They also and I think it's very important to note have incredibly broad remedial authority. So they could actually offer the very kinds of relief that the State is seeking. For instance, under 12 U.S.C. 1818(B), the FDIC has the authority to order restitution to consumers, reimbursement indemnification, or guarantees against loss. It can rescind agreements and contracts. It can impose civil monetary penalties. And there's a catch-all: it can take such other action as it deems appropriate.

It could do in the exercise of its authority exactly what the State is seeking to do here. FTC can do the very same thing. It has even broader authorities. But again, the

ability to order restitution, rescind or reform contracts. So there is no question here that the State's claim falls squarely within the jurisdiction of the federal agency.

Second, these federal agencies have a special competence in this area. They're used to dealing with claims of unfair and deceptive practices. And not only have they done that generally over time, both the FDIC and the FTC, they've actually done it in this very context. In 2008, for instance, the FDIC entered into a consent decree, judicially enforceable, in federal court with Sallie Mae that criticized among other things and required reform among other things of Sallie Mae's call center and its interaction with borrowers.

So this is a situation where the federal agency not only meets the first part of Vogt, it has the authority to deal with these issues. But it has special competence over these issues. And, in fact, has done it in the past. And that, frankly, is exactly what the Miller case found about the FDIC equivalent. Here's what Miller said in a case very similar to this one: "Given the pervasive federal regulation of the banking system, including its intent to regulate unfair and deceptive practices and the statutory enforcement function of the Comptroller of the Currency." Going to break the quote for a second. That institution was under the Comptroller of the Currency's regulation, just like the institutions or corporate entities here were under the control of FDIC and

FTC.

But to go back to the quote: "And the statutory enforcement function of the Comptroller of the Currency, the Comptroller is uniquely qualified to regulate and resolve disputes arising in the bank-customer relationship." That's Miller vs. U.S. Bank of Washington N.A., 72 Wn. App. at 422.

And finally, there is the potential and the reality of interference with this comprehensive federal scheme. Again, the FTC and the FDIC have decades of experience dealing with precisely the kinds of issues that the State is raising in this case. And respectfully, I would submit that a State action here threatens to interfere with their enforcement activities, as well as with the broader federal scheme.

And just to point out, I think, one very important fact. It's not like allegations of quote unquote "subprime borrowing" are brand new. Congress has been considering this issues [sic] and these agencies have been considering this issues ever since the financial crisis in 2007 and 2008. And importantly, Congress has actually enacted reforms to TILA in particular that require for the first time creditors or lenders to consider various credit-related factors, ability to repay, in two particular contexts: auto loans and home loans.

But they have made no effort, either as a regulatory matter or as a statutory matter to impose similar restrictions on

student lenders. And there's a reason for that: no high school student applying for credit has a prime credit score, a documented history of accounts that have been open and paid on time for a considerable period of time. The reality is the overwhelming majority of borrowers seeking student loans are what the State derisively calls "subprime" precisely because they don't have a credit history.

And it's for that reason that the expert federal regulators that extensively police this area have not seen fit to take the kinds of action in the student loan context that the State is urging on the Court here. And that Congress and those regulators have taken with respect to auto loans and home mortgages.

THE COURT: So if they're not doing it, why would they do it in this instance?

MR. SHUMSKY: Why would they do it in this instance? To the extent that --

THE COURT: -- You're just telling me that these regulators have not taken the student loans in the same context as they have the other loans. So why would they regulate them at all under this circumstance?

MR. SHUMSKY: Well, Your Honor, I think the issue is not whether or not they're going to seek relief or actually take action. It's whether you should defer to their jurisdiction to consider the set of issues, which is essentially to send a

letter saying, "The State of Washington has expressed concern about the following practices. These are within your wheelhouse, the authority that you exercise. Please consider these kinds of claims." And you defer to their jurisdiction.

And that jurisdiction includes not only the authority to take action, but includes their authority to decide, as the expert regulators of this set of issues, "We're not going to take authority because we don't believe that these are actually unfair or deceptive."

And there's a benefit to doing that, by the way. It's that those agencies are ones who have expertise and special competence in the kinds of line drawing that these claims implicate. And what the State is asking you to do is essentially make a policy judgment that's going to require you to draw some significant lines.

For instance, at what point does a borrower become too much of a credit risk to be extended a loan? What credit score is the permissible cutoff for denying somebody access to a privately-backed higher education loan? That, by the way, federal law compels to be issued when it's federally backed. Is it a credit score of 600? Is it 650? Is it 700? Is it 800? Where do we draw that line?

At what point does a school have such a low graduation rate that it becomes unconscionable to give somebody the opportunity to attend? Is a 44 percent graduation rate too

low, like the Eastern Washington University's graduation rate? So that 44 percent of students who attend one of the state's universities can't get the finance and financial backing that they need to attend? Or is the number 58 percent? Or 60 percent?

And those are really issues that I think are, I won't say beyond the authority, but beyond the special expertise of a court to resolve in an ad hoc litigation that's being brought years after the fact. But they're precisely the kinds of issues that federal authorities and federal regulators have considered for a very long time in looking at credit criteria and lending activities.

So that's, that's our primary jurisdiction argument. And I think it's an important one. But that's the argument that's Count One of the State's complaint here. We have a different argument, if I can, I know I'm taking up a lot of time this morning.

THE COURT: I'm going to allow you to address Count Two briefly.

MR. SHUMSKY: Sure. Well, the HEA is a really important part of this case. And our position, as you know, is that is expressly preempts any state disclosure --

THE COURT: -- You're asking this Court to follow the Chae reasoning.

MR. SHUMSKY: Yeah, we're asking you to follow the Chae

reasoning, which we think is a pretty straightforward reasoning. I have a copy of the statute. But here is the relevant language: "Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act," my brackets, that's a federally-backed loan, "Shall not be subject to any disclosure requirements of any State law." It's broad language. Uses "any" twice. It's unqualified.

And it requires only a couple of things. One, that there's a federally-backed loan and there's no question that the claims in Count Two of the complaint deal with federally-backed loans. And two, it requires that there be a, really any disclosure requirement of any state law.

So the State has two basic arguments. And I'd like to address both of them. Its first argument is somehow this capacious unqualified language only applies and exclusively applies to disclosures that are made during the origination of a loan. Not during the servicing of a loan.

And their principal authority for that is the 1979 edition of Black's Law Dictionary. You're never in a great position when your principal authority is a dictionary instead of a case. But I was really puzzled when I read the State's brief, because they don't actually provide the quotation from Black's Law. So we rooted around. We got the 1979 edition and I'd like to pass you a copy of the actual definition

that's in Black's Law. And I've already provided a copy of this to the State.

And if you look at page 417, under "Disclosure," which is towards the bottom of the right-hand column, there's a paragraph that begins, "Under Truth in Lending Act." And this is what Black's Law says and this is what the State is citing, without quoting: "Under Truth in Lending Act is a term of art, which refers to the manner in which certain information," I'll insert an ellipsis, "Deemed basic to an intelligent assessment of a credit transaction shall be conveyed to the consumer."

It doesn't use the word "origination." It's not limited to pre=origination loans. This is about disclosures of information that is relevant to a credit transaction being given to a consumer. That's exactly what this case is about, Your Honor. This case is all about the disclosures that were being made to students in connection with forbearance and income-based repayment programs. Programs which change the terms of a credit transaction and that have credit consequences. And which are exactly why the State said, "Navient should be held liable for failing to provide additional information to consumers and in connection with those transactions."

The State's principal authority doesn't remotely stand for the proposition that they said it did in their brief. And if

anything only confirms our interpretation of "disclosure" as being unlimited, not limited, that is to say, to pre-origination conduct.

THE COURT: Presuming disclosure is unlimited, are you saying that outside the scope of what is approved through the regulatory scheme by the Higher Education Act, if you engage in disclosures outside of those approved circumstances, would you then not, would a lender not be able to be held responsible by State action?

MR. SHUMSKY: That's correct, Your Honor. And that's exactly what 1098g says. Again, its language is "shall not be subject to any disclosure requirement of any state law." CPA is a state law. And we're talking about disclosure requirements that, again, relate to credit transactions.

One other note about this, by the way. This is a Truth in Lending Act definition. Not an HEA definition. So to the extent that the State is even saying that Black's Law is about the HEA use of the term "disclosure," this, you know, also provides no authority for that.

But again, disclosure is this in context. What we're talking about is information that's material to a credit transaction.

THE COURT: Briefly, I'm going to give you two minutes to address the 7.3, K through N and A through B, which is the CPA issues. And then I'll give you four minutes for rebuttal

afterwards, okay?

MR. SHUMSKY: Sure. Let me split that generous two minutes into one minute and one minute.

I want to address very quickly the other part of the HEA argument, which is, of course, the State's claim that they're not actually challenging disclosures. That they're challenging affirmative misrepresentations. And just for the sake of ease, I've made one more handout, which shows very clearly exactly what the State is claiming in its complaint.

You can look at the quotes in the relevant counts and you can see it's, "Deceptively and unfairly failing to disclose. Deceptively and unfairly failing to appropriately inform borrowers." Or, in the other counts, that Navient's compensation policies led them quote unquote "to offer forbearance" without adequately exploring IDR plans. Or without even mentioning IDR plans at all. Or that it did not inform borrowers of the actual date by which they have to submit the information.

Notwithstanding the State throwing terms around like "steering toward forbearance," which sounds like an affirmative activity. If you actually look at the allegations of the complaint, which is what defines what the State is challenging and the meaning of the counts, they are challenging failures to disclose.

So yes, we're asking you to act in a manner consistent with

Chae or follow Chae, which is to say substance matters, not labels, not buzzwords like "steering." And apply the plain language of 1098.

Finally, the State law claims. And I'm sorry, thank you for indulging me on that. And the other counts. We think that there are a number of independent state law problems with the various counts of the complaint, separate and apart from TILA and from the HEA.

The one I really want to focus on here is the State's attempt to hold Navient liable for representations on its website, like "Call us. We'll help you." There are two things about that. The first thing is federal law, the HEA regulations that the Department of Education has promulgated, actually require Navient to be available to help borrowers in these situations. And to provide contact information and encourage borrowers to call.

And second, if you look at the Department of Education's website, it actually uses some of the same words that Navient did on its website, "If you're having trouble repaying, call your lender. They'll help you find the best option for you." And so what they're really saying is we can be held liable for having said on our website exactly what the Department of Education required us to do and said on its own website.

But the second part of this is purely as a State law matter taking action against Navient because it said it would help

students identify the best option, it's simply not actionable under Washington law. And think about the consequences that would follow from allowing somebody to complain about, "Call us. We'll help you," or "We'll help you pick the best option." If that were the case, I'd have a great lawsuit against Seattle's Best Coffee, because Seattle's Best Coffee isn't. I like Ladro or Victrola when I'm in town.

It's not the kind of thing that's subject to an objective standard or that can really be enforced. And the reality is nobody necessarily expects it's going to be the best or going to be the right necessarily option measured by some universally applicable objective criteria.

But the other thing I want to say is if you actually look at the State's complaint, there's no allegation whatsoever that Navient didn't actually help borrowers. When borrowers called and they said, "I'm having trouble making a payment. What can you do for me?" The State doesn't say we hung up the phone or we told any borrower, "There's nothing that we can do."

Their allegation is we actually did something that helped borrowers. We offered them, and I'm just taking the allegations of the complaint as true. I think they're actually wrong and we will prove if this proceeds to trial that they are wrong. But we offered them a forbearance, a payment holiday that allowed them to not have to make a

payment that otherwise would have thrown them into default. And so the State's claim is not, "You didn't help at all, which is what you said you would do." It's that, "You could have helped them more. That income-based repayment would have been better than forbearance. And so it's not that you didn't do anything or you didn't live up to your promise. It's that you should have gone above and beyond."

And again, we actually think that's untrue and won't be supported by the facts that come out during this case. But I will say as a matter of State law on their own terms, allegations that we can be held liable for saying we wouldn't help aren't even supported by the allegations of the complaint, which make clear time and again, that at worst we did help. We just didn't help in the way the State now with the benefit of hindsight and 20/20 vision says we should have.

THE COURT: Thank you.

MR. SHUMSKY: Thank you, Your Honor.

MR. ROESCH: Good morning, Your Honor. Benjamin Roesch here on behalf of the State of Washington.

THE COURT: Good morning.

MR. ROESCH: Morning. Your Honor, Defendants' motion fails to show that there are no conceivable set of facts consistent with the complaint under which the State is entitled to relief.

THE COURT: Well, isn't that exactly what they're alleging? If it's preempted, then there would be, we don't even have to reach the facts, right?

MR. ROESCH: Well, Your Honor, I think that we need to dig into the Chae case a little bit. Because I don't think it applies on the facts that have been alleged in this case.

And the reason for that is that Chae and, Your Honor, I think this motion should be denied regardless of whether the Court finds that 1098g applies outside of the context of origination. Because the Chae court was about standard form documents. Not the type of oral affirmative misrepresentations that the State has alleged in this case with respect to forbearance steering.

Your Honor, the Chae court didn't announce the broad, all-encompassing rule about re-pled misrepresentations claims being truly a failure to disclose, or alternative disclosure claims that would cut off all of the State's claims under any conceivable misrepresentations that were made. And we know this because of the actual claims made by the Chae plaintiffs.

The Chae plaintiffs put forward a variety of claims under California's analog to Washington's Consumer Protection Act. Some of those claims relating to, related to billing statements, coupon books, and standardized loan applications. The plaintiffs alleged that those standardized documents

confused borrowers and tricked them into thinking that interest would be calculated one way, rather than another.

THE COURT: And to save time I've read the Chae case.

MR. ROESCH: Yeah.

THE COURT: I'm completely familiar with what the holding was in there, as well as the case out of New York that essentially found Chae inapplicable because it was narrowly tailored. So we'll save that time. You don't need to recite those facts.

MR. ROESCH: So I think those facts are important, Your Honor, because the Chae court held that in this context, the context of those documents, the state law prohibition on misrepresenting a business practice is merely the converse of an alternative disclosure claim.

When we get to the end of that analysis, the court again says the plaintiffs' remaining claims allege quote, "The use of fraudulent and deceptive practices apart from the billing statements." These claims are not impacted by any of Phelps or Higher Education Act's express preemption provisions. That holding, the Chae court could not have said that if as Navient suggests, every single thing that they tell borrowers, in fact, is a disclosure and, therefore, preempted.

We can talk about the type of forbearance steering that the State alleges that Navient engaged in. These are oral

misrepresentations made over the phone. We can talk in hypothetical, since we're at a 12(b)(6) hearing. A borrower calls up or answers the phone when she falls behind and Navient starts calling her. The borrower says, "I don't have a job. I can't afford this payment."

Steering, which does, in fact, involve affirmative conduct, I steer my car by putting two hands on the wheel and turning it in the direction I want it to go. Steering can be accomplished through affirmative representations, such as, "Forbearance is your best option. Forbearance will take care of this problem," or "Forbearance is your only option."

Navient has not pointed to any disclosure requirement under federal law requiring it to make statements like that. In fact, those are misrepresentations. For borrowers who don't have a job and who have a chronic inability to make their student loan payments, the income-driven repayment programs are by far the better programs.

And, in fact, placing them into forbearance harms them. While they're on a payment holiday and they don't have to make payments for that two, three, four month period, interest continues to accrue. Interest is then capitalized at the end of the forbearance period onto the principal of their student loan. So that going forward, they're paying interest on that interest.

They're also losing time towards the eventual student loan

forgiveness that happens at the end of, the end of 20 years when you've been on an income-driven repayment program. So the notion that Navient is not helping borrowers enough or in the way that the State would prefer is actually erroneous. Navient is harming these borrowers by requiring them to pay longer on their student loans. And requiring them to pay more interest on their student loans by steering them into forbearance.

Your Honor, none of the State's claims require Navient to speak. We're not alleging that when Navient gets a borrower on the phone the first thing out of the representative's mouth has to be, "Let's see if you qualify for an income-driven repayment program." We're not alleging that Navient, to the extent its disclosures are directed specifically by the Higher Education Act or its implementing regulations, has a duty to say something different. That is the context in which Chae applied.

What we are saying is that when Navient chooses to make a representation, when it has the discretion of what to say, for example, when it's on the phone with these struggling borrowers, it has to makes its representations in a nondeceptive and fair manner. And that, I think, is a critical distinction between Chae and precludes, in fact, the dismissal of the State's federal court based, or federal student loan based claims.

THE COURT: Let's go to the issue of the primary jurisdiction of this Court. Why should this Court take on jurisdiction of this issue?

MR. ROESCH: Well, there's no doubt that the Court has jurisdiction over these issues. And, in fact, the Consumer Protection Act envisions that Washington State courts will take the lead in defining what is unfair and what is deceptive. Those terms are not specifically defined in the statute. And it's this Court's job to make those determinations.

This case, and for reasons we'll talk about in just a few minutes, I think is pretty easy. Sallie Mae was using borrowers as, in its own words, bait. When it knew that it was originating loans that would lead almost inevitably to default. And ruin those borrowers' lives.

THE COURT: Let me bring up this issue. How would they know? I mean, if you're dealing with high school students, how would you know?

MR. ROESCH: Yeah. I think Navient isn't giving itself enough credit for its underwriting process in this case, Your Honor. While lenders in the student loan market don't have the same level of credit information that, say, a mortgage lender has, Navient wasn't just throwing darts at a wall. It had three credit tiers originally that it began lending to. It had excellent. It had good. And it had fair.

As part of its efforts to become the preferred lender, to capture federally guaranteed and prime student loan volume, which was very profitable for it, it agreed with schools to expand its lending portfolio down the credit risk level. It created additional tiers, such as marginal.

Okay. So far so good. Below that it created a tier called "Other." Whatever that means. And below that it created a tier called "Opportunity." These opportunity loans, Navient's own internal documents show, it expected to have default rates of more than 50 percent. And, in fact, for for-profit students who received these type of loans, default rates were often in excess of 75 percent.

But the use of these borrowers as bait to help close the deal with the schools and get access to this federally guaranteed loan volume and make money for itself is unfair precisely, well, because the students are being used as bait. But also because it ignores, I apologize, Your Honor. It ignores standard underwriting practices.

There are a couple quotes from the Massachusetts case against Fremont that I think are particularly apt here. For example, the court says on page 743 of its opinion: "By originating loans with terms that in combination would lead predictably to the consequence of the borrower's default and foreclosure," to break the quote we're in the mortgage context here, "Were within established concepts of unfairness

at the time the loans were made," and thus, in violation of Massachusetts' analog to our Consumer Protection Act.

Going down a little bit further: "The principle had been clearly stated before 2004 that loans made to borrowers on terms that showed they would be unable to pay and were, therefore, likely to lead to default, were unsafe and unsound and probably unfair."

A little bit further down, Your Honor: "Such disregard for basic principles of loan underwriting lies at the heart of predatory lending." That's exactly what Sallie Mae did in this circumstance by choosing to make loans that would lead to default, to borrowers' financial ruins, in order to make money off of other loans and enhance its relationships with the school. Navient acted unfairly under any of the State's definitions of that. It's immoral, it's unscrupulous, and as the Fremont court found, it is within the traditional concepts of unfairness.

So if we can get back for a moment and I think that is important background as we talk about whether this Court should exercise its jurisdiction, or defer instead to the Federal Trade Commission or perhaps the FDIC. First of all, Your Honor, this is not a TILA case. The State has not alleged any violation of TILA. There has not been any explanation so far about how a finding that these loans were unfair and Navient's backroom deals with schools to put

students in these loans were unfair. Or, for that matter, we haven't dealt with the deception side of this, whether concealing from these opportunity students the fact that Navient was only their preferred lender, not because they offered the best terms. Not because they were the easiest to work with. But because those very students had been used as bait.

And from, you know, concealing from these same students backroom deals like the credit enhancement where Navient only funded a portion of the face value of the loan. So, for example, Your Honor, you take out a $100 loan. Navient or its predecessor, Sallie Mae, actually only funds, only parts with $60 of that. And the school basically winks at them and makes up the difference in your tuition.

Normally, Your Honor, when the school is paying for part of your tuition, it's called a scholarship. Here, these borrowers were saddled with additional debt in the form of that credit enhancement.

Finally, these backroom deals involved kickbacks in which schools agreed to pay, for example, 25 percent of Sallie Mae's loss in the inevitable event that these borrowers defaulted.

None of what you've heard today implicates the expertise of the FTC or the FDIC. It's interesting. The pivot away from TILA and interference with TILA's regulatory regime, because,

of course, nothing that this Court holds about unfair or deceptive backroom deals and predatory origination practices prevents anybody from giving TILA disclosures. That regime will remain in place and undisturbed.

Instead, we have arguments that this Court should decline to decide whether practices are unfair or deceptive because federal agencies, like the FTC, should define whether the very same conduct violates the very same standards of unfairness or deception. Under our CPA, that task is delegated to the Court. And I don't think, for example, that there's been any indication that the FDIC has special expertise in student lending. That the FTC has special expertise in the origination of student loans. In fact, the example that was provided in Navient's reply related to scholarship fraud, students sending money to people who promised them scholarships and that turned out to be a scam.

So there's no indication, Your Honor, that we are in a position where the FTC has a long history of either announcing rules or taking this sort of action. This Court is entirely capable of making the type of policy decisions about what is unfair under Washington law without deferring to federal authorities. Who, by the way, it was pointed out, may or may not choose to even move forward. It's been suggested that the Court send a letter to the FTC. The FTC, I mean, who knows? They're down, what, two or three

commissioners at this point. And so nothing is going to happen to give these borrowers relief for years and years down the road. This case is in front of the Court now and it's appropriate for it to proceed.

THE COURT: Thank you. Brief rebuttal? I will hold you to your time this time.

MR. SHUMSKY: You bet, Your Honor. I really just have three very quick points that I want to make. I want to deal first with Chae. Second, I want to deal with the State's oral argument recharacterization of what its complaint actually alleges so that we're clear about that. And three, I want to talk about the Massachusetts mortgage case for a second.

With respect to Chae, we heard two distinctions today. The first distinction is that Chae somehow turned on standard form documents versus oral representations that were made on the phone. With all due respect, Your Honor, that's nonsense. The language that Chae was interpreting in the statute is "any disclosure." Not "any written disclosure" versus "any oral disclosure." Not "any disclosure in a standard form" versus "any disclosure outside of a standard form."

What Chae held is at the end of the day, the substance of an allegation matters. And look again, if you would, at the hand up that I gave you of the quotes from the complaint,

"Failed to adequately discuss. Didn't offer. Failed to disclose." These are disclosure-based claims that fall squarely within the plain language of 1098g. To the extent that Chae can be read to say otherwise, which I don't think it can, but it was wrong. We're talking about the plain language of the statute. And with respect, the State has offered no persuasive way around the unmistakably broad language of 1098g.

Second, we just heard the State argue, for instance, that Navient told borrowers that quote unquote "Forbearance was the only option." Or at one point I believe he said that, "Income-based repayment wasn't available." There is no allegation of that anywhere in the complaint and it's flatly untrue. Federal law required us to tell people about IBR and forbearance every month during repayment.

And, by the way, we also told them that pursuant to federal regulations before the loan was taken out, and before the loans entered repayment. There is an extensive series of Department of Education regulations on that. And no allegation in the complaint that we didn't fulfill those disclosure requirements.

But again, what those claims, even if they were in the complaint and even if they were true, would mean is that had we offered additional information, such as, "IBR is also available. You might want to consider it." Or "Beyond

forbearance there are other options." We could solve what the State is talking about by having made other disclosures. No matter what the State is trying to argue here, the fact of the matter is, those are disclosure-based claims that, again, fall squarely within 1098g.

Finally, the Massachusetts case. We heard the State argue that issuing subprime loans is something that violates the traditional concepts of unfairness. But as I said at the beginning of my argument, that's demonstrably not true in the student loan context because federal law requires companies like Sallie Mae, lenders, to advance student loans to people with exactly the same profile and regardless of where they're going to school, as the kinds of borrowers that the State is talking about in this case.

So the established concepts of unfairness don't remotely bar the extension of credits to people who are looking for an opportunity to receive a higher education in this context. Whatever the case may have been with respect to mortgages, auto loans or other products, the fact that federal law since the Great Society in 1965 has required the issuance of loans to borrowers with this profile forecloses any argument that somehow it's unconscionable or unfair to issue those same students the same kinds of loans, but using the lender's own money instead of federal taxpayer dollars.

THE COURT: Thank you.

MR. SHUMSKY: Thank you, Your Honor.

THE COURT: I'll remind the parties that obviously this is a 12(b)(6) motion. For purposes of a 12(b)(6) motion this Court must consider that everything in the complaint is true. This is not a credibility determination by this Court. This is a legal determination given the nature of the motion that we are in.

Under 12(b)(6) the Court can, must see no set of facts which would entitle the plaintiffs essentially to relief. With regards to the issues of whether this Court will exercise jurisdiction, or find that other regulatory agencies at the federal level have primary jurisdiction and cede to them, this Court will exercise its jurisdiction. The allegations here are on claims of Washington law, claims that involve Washington residents, and are part of the inherent powers of the State to address. And the Court will do so.

With regards to the issue of preemption, which this Court feels really is overarching in many of these claims, the Court is going to deny the motion. This Court understands that there are ways in which something can be preempted, express preemption, field preemption, or conflict preemption. I think this case deals with both express and conflict preemption.

And in this case there is 1098g. It does expressly preempt certain things. But defense proposition asks me to read this

in such a broad context that even though you're following the principles of the law, the practices cannot be questioned. And I, and this Court does not feel that that is the case. There are certainly cases that find that Chae was narrowly tailored to express provisions that have been approved or decided by a regulatory agency that were in the context of what was allowed. Other cases have determined that there can be statements or assertions or affirmations by a lender that take it outside of the context of what is an appropriate disclosure.

Again, in this case, defense would have to say there is no set of facts which could grant the plaintiff relief. Again, the -- with regards to conflict preemption, that exists where it is impossible for a private party to comply with both state and federal law. And in this case I find that that is not applicable. Complying with the principles of state law and the requirements of the HEA are not mutually exclusive.

With regards to the CPA claims, at this point the Court also denies the motions to dismiss those under 12(b)(6). The State has alleged a public interest and an impact and has alleged significant actions by the lender that contravene again assuming all facts are true, the CPA. Accordingly, defense motion is denied.

And if somebody has an order to that effect, I will sign it.

MR. ROESCH: Your Honor, I do.

THE COURT: Today's date is the 7th day of July. Okay. That concludes this matter.

(July 7, 2017 hearing concluded)

C E R T I F I C A T E

STATE OF OREGON)
)
COUNTY OF CLACKAMAS)

I, the undersigned, do hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of July, 2017.

Catherine Leschi Wilcox

Catherine Leschi Wilcox