No. [18-1531]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NICOLE DENISE NELSON,
individually and on behalf of all others
similarly situated,
Plaintiff,

vs.

GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., and DOES, 1-10,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
(No. 3:17-CV-00183-NJR-SCW)

MOTION BY CENTER FOR RESPONSIBLE LENDING AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC. FOR LEAVE TO FILE AMICUS MEMORANDUM IN SUPPORT OF PLAINTIFF-APPELLANT

.

Michael C. Landis U.S. PIRG EDUCATION FUND, INC. 1543 Wazee Street, Suite 400 Denver, CO 80202	William Corbett Center for Responsible Lending 302 W. Main Street Durham, NC 27609

CIRCUIT RULE 26. 1 DISCLOSURE STATEMENT

1. The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

   CENTER FOR RESPONSIBLE LENDING
   UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC.

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   CENTER FOR RESPONSIBLE LENDING
   UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC.

3. The parent corporations and any publicly held companies that own ten percent or more of the stock of the party represented by the attorneys:

   N/A

Dated: July 2, 2018

Respectfully submitted,

/s/ William R. Corbett
William R. Corbett
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Counsel for Movants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Cir. R. 26.1 of the Local Rules of the United States Court of Appeals for the Seventh Circuit, and Fed. R. App. P. 29:

Center for Responsible Lending (CRL) is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. CRL is a supporting organization of the Center for Community Self-Help, which is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. Neither CRL nor the Center for Community Self-Help has issued shares or securities.

United States Public Interest Research Group Education Fund, Inc. is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. It has no parent company and issues no stock.

Dated: July 2, 2018

Respectfully submitted,

/s/William R. Corbett
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Counsel for Movants

Center for Responsible Lending and United States Public Interest Research Group Education Fund, Inc. hereby request leave to file the accompanying amicus memorandum in support of plaintiff-Appellant. Counsel for movants has conferred with counsel for all parties regarding this motion. Counsel for plaintiff-appellant stated that they consent to this motion. Counsel for defendants-appellees stated that they would not oppose this motion.

Movants are two nonprofit consumer organizations that work to protect and defend the rights of consumers through education, advocacy, policy, research, and litigation. Movants anticipate that the position of the Department of Education on the preemptive scope of the Higher Education Act, as amended, will be raised in the course of this appeal. Movants' memorandum is intended to provide context and analysis regarding the Department of Education's recent statements to assist the Court in assessing their persuasive weight. In particular, movant's believe a recent notice published in the Federal Register by the Department of Education regarding preemption of state law[1] is not entitled to deference, is inconsistent with the Department's recent past position on preemption, and presents a flawed analysis of the scope the HEA's preemptive effect. Amici believe that their memorandum will shed important light on the validity of the Department's position and the impact upon

[1] Federal Preemption and the State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 FR 10619, (March 12, 2018).

consumers should it be given significant persuasive weight. Movants thus believe that the memorandum will aid the Court as it considers this appeal.

In addition, movants bring to the Court a rich understanding of consumer protection needs and value of the ability of student borrowers to bring claims under state law. In particular, they have extensive knowledge of the harms that consumers experience from harmful student loan servicing practices. Further information on the proposed amici and their interests in this matter follows below.

Center for Responsible Lending (CRL) is a nonprofit, nonpartisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions that, since 1980, has provided more than $7 billion in financing to 131,000 families, individuals, and businesses underserved by traditional financial institutions. Additionally, CRL's research and policy reports and recommendations have addressed numerous issues within the mission and activities of the CFPB, including auto loans, debt collection, mortgage lending, payday lending, and student loans.

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is an independent, non-partisan, non-profit organization that works for consumers and the public interest. Through research, public education, and outreach, U.S. PIRG Education Fund serves as a counterweight to the powerful special interests that threaten our health, safety, and financial well-being. Through its Higher Education Project, U.S. PIRG Education Fund is working

to make higher education affordable and decrease the amount of student loan debt that individual borrowers are often forced to incur. It is also working to ensure that student loan borrowers are able to successfully manage repayment of their student loans, which means ensuring that borrowers are treated fairly by their student loan servicers. U.S. PIRG Education Fund believes that strong state consumer protections are of vital importance for the tens of millions of student loan borrowers across the United States.

CONCLUSION

For the foregoing reasons, the Court should grant the movants leave to file an amicus memorandum in opposition to the parties' joint request for a stay of agency action.

Dated: July 2, 2018

Respectfully submitted,

/s/William R. Corbett

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Counsel for Movants

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will cause it to be served electronically on all registered counsel.

/s/William R. Corbett
William R. Corbett

Counsel for Movants

No. [18-1531]

IN THE UNITED STATES COURT OF APPEALS
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NICOLE DENISE NELSON,
individually and on behalf of all others
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vs.

GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., and DOES, 1-10,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
(No. 3:17-CV-00183-NJR-SCW)

[PROPOSED] BRIEF OF CENTER FOR RESPONSIBLE LENDING AND UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC. AS AMICI CURIAE IN SUPPORT APPELLANT NICOLE D. NELSON, URGING REVERSAL

.

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   N/A

Dated: July 2, 2018

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United States Public Interest Research Group Education Fund, Inc. is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. It has no parent company and issues no stock.

Dated: July 2, 2018

Respectfully submitted,
/s/William R. Corbett
William R. Corbett

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Constitution

Cases

Regulations and Statutes

Litigation Documents

Other Authorities

STATEMENT OF IDENTIFICATION

The **Center for Responsible Lending ("CRL")** is a non-profit organization dedicated to eliminating abusive practices in the market for consumer financial services and to ensuring that consumers benefit from the full range of consumer protection laws designed to prohibit unfair and deceptive practices by financial services providers. CRL is an affiliate of Self-Help, a nonprofit community development financial institution based in North Carolina, with retail credit union branches North Carolina, Virginia, Florida, California, Wisconsin, and Illinois.

CRL seeks to focus attention on and end abusive consumer lending practices, including student loan servicers' failure to comply with their contractual and statutory obligations to borrowers. CRL seeks to promote and protect the traditional role of states in consumer protection and, in particular, recently has advocated for states to take a larger role in the oversight of student loan servicing companies servicing loans of borrowers within their borders. State enforcement actions and borrower lawsuits are often essential to uncovering and stopping such practices. Because the federal law does not provide borrowers with a remedy for contractual or statutory violations by loan servicers, CRL believes it is essential that student loan borrowers are able to seek relief under generally applicable state laws if their servicer violates its obligations. Accordingly, CRL supports reversal of the District Court's order, which would not only eliminate an important avenue for consumers to seek redress on their own behalf, but would also threaten the ability of States to exercise their traditional police powers.

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is an independent, non-partisan, non-profit organization that works for consumers and the public interest. Through research, public education, and outreach, U.S. PIRG Education Fund serves as a counterweight to the powerful special interests that threaten our health, safety, and financial well-being. Through its Higher Education Project, U.S. PIRG Education Fund is working to make higher education affordable and decrease the amount of student loan debt that individual borrowers are often forced to incur. It is also working to ensure that student loan borrowers are able to successfully manage repayment of their student loans, which means ensuring that borrowers are treated fairly by their student loan servicers. U.S. PIRG Education Fund believes that strong state consumer protections are of vital importance for the tens of millions of student loan borrowers across the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the last decade, student loan debt has exploded, with education borrowing outpacing all other consumer loan debt. According to statistics from the Department of Education, 42.6 million Americans held $1.4 trillion in outstanding federal student loan debt as of June 2018.[1] Almost three-fourths (71%) of students who graduated from four-year colleges in 2012, the latest year data is available, carried student loan debt, with an average debt load of $29,400 at graduation, representing a 25% increase from 2008.[2] These increases in student loan debt can be attributed to a number of factors, including a greater number of students attending college, particularly among low- and moderate-income students, increasing costs of attendance, and greater attendance at costly for-profit schools.

Under this debt load, borrowers frequently struggle to repay loans. As of the end of 2017, about 11% of all student loan debt was severely delinquent or in default.[3] Recent research suggests that for those students who began college in 2004, nearly 40% of borrowers may default on their student loans by 2023.[4] Certain groups struggle more to repay their loans than others. For example, African-American

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[1] Dep't of Educ., Federal Student Aid Portfolio Summary, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited July 2, 2018).

[2] The Inst. for Coll. Access & Success, Quick Facts about Student Debt (Mar. 2014), https://ticas.org/sites/default/files/pub_files/Debt_Facts_and_Sources.pdf.

[3] Fed. Reserve Bank of N.Y., Quarterly Report on Household Debt and Credit: 2017: Q4 (Feb. 2018), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q4.pdf.

[4] Judith Scott-Clayton, *The Looming Student Loan Default Crisis is Worse than We Thought* (Brookings Inst., Evidence Speaks Rep., Vol. 2, No. 34, Jan. 2018), https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf.

bachelor's degree graduates "default at five times the rate of white [bachelor's degree] graduates" while the default rate for undergraduates who enroll in for-profits schools is almost three times that of public four-year undergraduates.[5][6] Many seniors, the fasting growing segment of student loan borrowers, are also in trouble – from 2005 to 2015, the average federal student debt for borrowers age 60 and older grew from $12,100 to $23,500, and in 2015, almost 40% of all federal student loan borrowers age 65 and older were in default.[7]

Though there are numerous factors that may determine successful repayment of student loans, the company or companies that service and collect the loans are one critical piece. These student loan servicers and debt collectors, and their actions in pursuing payments, can play a significant role in a borrower's ability or inability to repay their loans. Servicers are charged with not only receiving and processing payments from borrowers but also evaluating borrowers for income-driven repayment programs, discharges, and other plans that can help borrowers manage their payments. Recently, reports and enforcement actions by state and federal regulators suggest that, at best, servicers are not properly doing their jobs in assisting borrowers, and, at worst, are engaging in practices that have contributed greatly to

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[5] *Id.*

[6] Judith Scott-Clayton, *What Accounts for Gaps in Student Loan Default, and What Happens After* (Brookings Inst., Evidence Speaks Rep., Vol. 2, No. 57, June 2018), https://www.brookings.edu/wp-content/uploads/2018/06/Report_Final.pdf.

[7] Consumer Fin. Prot. Bureau, Snapshot of Older Consumers and Student Loan Debt (Jan. 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf.

the increase in debt.[8] [9] [10] [11] [12] Thus, the question whether student loan servicers are immunized from state claims brought by individual consumers or by the States themselves has implications for millions of consumers and billions of dollars of lending.

Plaintiff-appellant, on behalf of a putative class, seeks reversal of the District Court's decision, which dismissed plaintiff-appellant's state law claims on the grounds that the Higher Education Act (HEA), as amended, preempts plaintiff-appellant's claims. The District Court, relied on a specific provision of the HEA. As plaintiff-appellant's brief explains, the District Court's reasoning that the HEA preempts state consumer protection laws designed to remedy unfair, deceptive, and fraudulent acts and practices because claims brought under such laws are effectively "failure to disclose claims" is flawed in its interpretation of the relevant HEA provision and misreads the Ninth Circuit case on which it relies. Appellant's Brief at 3.

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[8] *Consumer Fin. Prot. Bureau v. Navient Corp., et al*, No. 17-CV-00101, 2017 WL 191446 (M.D. Pa. Jan. 18, 2017).

[9] *Commonwealth of Mass. v. Pa. Higher Educ. Assistance Agency*, No. 1784-CV-026282 (Ma. Sup. Ct. Feb. 28, 2018), *available at* http://www.mass.gov/ago/docs/consumer/com-of-ma-v-pheaa-complaint-8-23-17.pdf.

[10] *Commonwealth of Pa. v. Navient Corp. and Navient Solutions, LLC*, No. 17-CV-01814 (M.D. Pa. Oct. 5, 2017), *available at* https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf.

[11] *State of Ill. v. Navient Corp., et al*, No. 2017CH00761 (Ill. Cir. Ct. Jan. 18, 2017), *available at* http://www.illinoisattorneygeneral.gov/pressroom/2017_01/NavientFileComplaint11817.pdf.

[12] *State of Wash. v. Navient Corp., et al.*, No. 17-2-01115-1 (Wash. Super. Ct. Jan. 18, 2017), *available at* https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/20170118ComplaintRedacted.pdf.

Since the District Court's dismissal order, the Department of Education (Department) has opined that the Department believes that the HEA and its implementing regulations preempt virtually any "state regulatory regime or the application of existing consumer protection statutes" that affects loans covered by either the HEA's Federal Family Education Loan Program (FFELP) or the Direct Loan Program. Federal Preemption and the State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 FR 10619, (Mar. 12, 2018) (2018 Notice). The 2018 Notice evinces a broad, unlimited conception of preemption, but also specifically addresses the provision of the HEA that the District Court largely relies on as the basis for dismissal of the case at bar, 20 U.S.C. § 1098g. As is the case with the District Court's decision, the 2018 Notice overreads the HEA's preemption authority, not just as to § 1098g, but also as to the reach of any preemption under the HEA more generally. It disregards the substantial evidence from the Act that Congress did not intend through the HEA to displace the traditional role of states in consumer protection. It also purports to deprive student loan borrowers of virtually any private remedy for the wrongs of their student loans servicer.

Amici submit this brief to explain why the 2018 Notice should not guide the Court's decision in this case. The 2018 Notice is flawed in a number of ways and is not entitled to deference or substantial weight. It is well-settled that agency interpretations related to preemption are not entitled to "*Chevron*" deference. As this brief will show, the 2018 Notice also does not deserve the persuasive weight Courts

often afford an agency's interpretation because it lacks thoroughness, consistency, and persuasiveness. It is inconsistent with recent prior statements from the Department. Its assessment of potential conflicts between state and federal law lacks thorough analysis and disregards fundamental aspects of preemption doctrine. Finally, the 2018 Notice should not be given persuasive weight because, like the District Court's opinion, it eliminates the well-established role for state consumer protection and vital consumer remedies traditionally available under state law in the absence of any private right of action in the HEA.

ARGUMENT

I. THE 2018 NOTICE IS NOT ENTITLED TO DEFERENCE OR SUBSTANTIAL PERSUASIVE WEIGHT

A. Courts Do Not Defer to an Agency's Interpretation on Preemption

"The Supremacy Clause of the Constitution makes federal law 'the supreme Law of the Land.' U.S. Const. art. VI, cl. 2. As a result, federal statutes and regulations properly enacted and promulgated 'can nullify conflicting state or local actions.' ... Pursuant to the applicable principles, state law is preempted under the Supremacy Clause in three circumstances: (1) when Congress has clearly expressed an intention to do so ('express preemption'); (2) when Congress has clearly intended, by legislating comprehensively, to occupy an entire field of regulation ('field preemption'); and (3) when a state law conflicts with federal law ('conflict preemption')." *Coll. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 595-96 (4th Cir. 2005) (citations omitted).

"[A]gencies have no special authority to pronounce on pre-emption absent delegation by Congress," and the Supreme Court has never "deferred to an agency's conclusion that state law is pre-empted." *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009). Rather, "[w]here ... Congress has not authorized a federal agency to pre-empt state law directly, the weight this [C]ourt accords the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness"; that is, the agency's decision is entitled only to "*Skidmore*" deference. *Id.* at 556, (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Numerous Courts of Appeals have applied *Wyeth* and evaluated agency claims of preemption under *Skidmore* deference. *See Grosso v. Surface Transportation Bd.*, 804 F.3d 110, 116-17 (1st Cir. 2015) (citing a list of circuit court decisions). Even where done through a legislative rule that carries the force of law, courts are not compelled to adopt the agency's analysis as their own to "supplant [the courts'] independent preemption analysis." *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1024 (8th Cir. 2015).

B. The 2018 Notice Lacks the Thoroughness, Consistency, and Persuasiveness to Justify According Weight to the Department's Assertions of Preemption

"The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.,* 533 U.S. 218, 227–28, (2001) (citing *Skidmore*).

The 2018 Notice asserts a broad preemption of state law without having first sought public comment, in particular comments from states.[13] That the Department announced its position without seeking public comment does not deny it of any weight, but it is only entitled to some deference. *See id. (citing Reno v. Koray,* 515 U.S. 50, 61, (1995)). Here, however, the Department has swiftly shifted positions, as is described below, following what appears to have been a coordinated campaign by student loan servicers to seek immunity from liability for state law claims.[14] [15]

Contrary to the 2018 Notice's declaration that it "is not a new position," 2018 Notice at p.4, the Department has never asserted a theory of preemption as sweeping and broad as that in the 2018 Notice. The 2018 Notice asserts that "other State-law claims 'would create an obstacle to the achievement of congressional purposes' and were therefore barred by conflict preemption principles." *Id*. at 10620 (quoting *Chae v. SLM Corp.*, 593 F.3d 936, 950 (9th Cir. 2010)). Though the Department points to past statements for support for the consistency of its position, these past statements narrowly assert preemption where state law requirements actually conflict with federal law and make compliance with it impossible. As evident from other recent

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[13] Federal Preemption and the State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 FR 10619, (Mar. 12, 2018) (2018 Notice).

[14] Letter from James Bergeron, Nat'l Council of Higher Educ. Res., to Kathleen Smith, U.S. Dep't of Educ. (July 17, 2017), https://c.ymcdn.com/sites/www.ncher.us/resource/resmgr/images/letters-testimony/2017/07-18-17_NCHER_Letter_to_ED_.pdf.

[15] John L. Culhane, *Trade Association Asks ED to Confirm Preemption of State Student Loan Servicing Requirements for Federal Student Loans*, Consumer Finance Monitor (July 6, 2017), https://www.consumerfinancemonitor.com/2017/07/06/trade-association-asks-ed-to-confirm-preemption-of-state-student-loan-servicing-requirements-for-federal-student-loans/.

statements to which the 2018 Notice does not refer, the Department previously has taken a much different approach to the application of state law to student loan servicing and debt collection.

The 2018 Notice references an earlier statement by the Department that addressed application of state debt collection laws. Guaranteed Student Loan Program 55 Fed. Reg. 40120-1 (Oct. 1, 1990) (1990 Interpretation). However, in the 1990 Interpretation, the Department clearly expressed its intent to limit the preemptive effect when it stated that "the preemptive effect of these regulations extended no farther than is reasonably necessary to achieve an effective minimum standard of collection action." *Id.* Moreover, the 1990 Interpretation was limited to explaining the preemptive scope of specific regulations previously adopted by the Department and only to those state laws that "would prohibit, restrict, or impose burdens" on a debt collector's completion of specific steps required with respect to delinquent and defaulted loans. *Id. See Williams v. Educ. Credit Mgmt. Corp.*, 88 F. Supp. 3d 1338, 1346 (M.D. Fla. 2015).

In addition, the 1990 Interpretation provided what the 2018 Notice does not—an explanation of which state laws the Department viewed its regulation not to preempt. 1990 Interpretation at 40122 ("The regulations do not preempt State law that would affect the conduct of litigation or the enforcement of judgments."). The 1990 Interpretation also evidences a concern by the Department that in preempting state law, it should avoid depriving consumers of a private remedy, pointing out that borrowers would still have redress through the Federal Fair Debt Collection Practices

Act, which would continue to apply to most of the loans covered by the preemption. 1990 Interpretation at 40121.

Illustrating how limited the effect of the 1990 Interpretation has been, as recently as January 2016, the Department informed the State of Maryland of its position that application of the Maryland Collection Agency Licensing Act to student loan servicers would not be preempted by federal law, noting that the Department's contracts with the servicers generally require they "must comply with State and Federal Law."[16] Based on information that is publicly available, the contracts continue to include this provision.[17]

The 2018 Notice also points to a Statement of Interest submitted by the United States in *Chae. Nelson v. Great Lakes Educ. Loan Serv., Inc.*, UNREPORTED No. 18-1531 (7th Cir. 2018). As discussed in more detail below, that brief does not articulate an expansive view of preemption, but rather argues that the plaintiff's claims were preempted only "in so far as they challenge the adequacy of lender disclosures and forms and notices approved by the Department." *Nelson* at p. 10. The brief engages in a detailed, specific discussion of why the remaining aspects of the plaintiff's claims are preempted on narrow express preemption grounds, illustrating that the United States at the time viewed preemption determinations to require more than sweeping

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[16] Letter from the U.S. Dep't of Educ. to Jedd Bellman, Assistant Commissioner, State of Md. (Jan. 21, 2016), *available at* https://na-production.s3.amazonaws.com/documents/Dept. of Ed Response.1.21.2016 dORyoLm.pdf.

[17] Contract between the U.S. Dep't of Educ. and Great Lakes Educ. Loan Serv., Inc. (ED-FSA-09-D-0012) (June 17, 2009), *available at* https://www2.ed.gov/policy/gen/leg/foia/contract/greatlakes-061709.pdf. (Great Lakes Contract).

generalities about the interaction of state law requirements with the HEA. The 2018 Notice opts for discussion of the Ninth Circuit's holding in *Chae,* rather than discussion of the United States' brief. As discussed below, and as plaintiff-appellant's brief illustrates in more detail, the 2018 Notices misreads the holding in *Chae*. *See Nelson* at 12. The 2018 Notice also does not discuss those federal court decisions that distinguished *Chae* or correctly applied *Chae's* narrow holding.

To the extent that the 2018 Notice suggests that the Department's regulations have a broad preemptive effect, it is also inconsistent with the Department's past approach to expressing preemption through its legislative rulemaking. In these limited circumstances, the Department's regulations expressly specify which regulatory provisions have preemptive effect and limit that preemption to actual conflicts. *See, e.g.*, 34 C.F.R. § 682.410(b)(9) (provisions of referenced paragraphs preempt state law "that would conflict with or hinder satisfaction of the requirements of those provisions"); 34 C.F.R. § 682.411(o) (similar standard for preemption under section). Moreover, broad preemption of state law is inconsistent with the Department's regulations. These rules explicitly contemplate that the "basic agreement" between the Department and the Guaranty Agency that administers the FFELP, require that the Guaranty Agency "ensure that all program materials meet the requirements of Federal *and State law*." 34 C.F.R. § 682.401(c)(5) (emphasis added). Likewise, contracts between the Department and loan servicers provide that servicers of FFELP and Direct Loan Program student loans are "responsible for maintaining a full understanding of all federal *and state laws and regulations* and

FSA requirements and *ensuring that all aspects of the service continue to remain in compliance as changes occur*."[18]

The 2018 Notice also points to a Statement of Interest filed on January 8, 2018, by the United States in *Massachusetts v. PHEAA,* an action brought by the Massachusetts Attorney General in state court. That Statement does address some of the same theories of preemption discussed in the 2018 Notice, but it hardly represents evidence of the Department's consistency. Moreover, as the Massachusetts Superior Court observed, in denying dismissal of Massachusetts's state law claims, the Statement of Interest "does not actually argue that any of the [state law claims are] preempted by federal law, or that any of the alleged misconduct at issue here is affirmatively allowed by federal law." Memorandum and Order Denying Defendant's Motion to Dismiss, *Commonwealth of Mass. v. Pa. Higher Educ. Assistance Agency*, 15, No. 1784-CV-026282 (Ma. Sup. Ct., Feb. 28, 2018). The Statement of Interest instead only "cautions that some of the injunctive relief that the Commonwealth asks for in its complaint may conflict with [federal law]." *Id*.

Unmentioned in the 2018 Notice is the Statement of Interest that the United States filed in *Sanchez v. ASA Coll., Inc.* in January 2015, which addressed the notion that the HEA preempts state law as follows: "Nothing 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

[18] Great Lakes Contract, Sec. C.1.4.3, p. 20 (emphasis added).

establish an exclusive administrative review process of student claims brought under state or federal law, even if the conduct alleged may separately constitute an HEA violation." Statement of Interest of the United States of America, at 2-3, *Sanchez v. ASA Coll., Inc.,* No. 14-CV-5006 (ECF No.64) 2015 WL 3540836 (S.D. N.Y. June 5, 2015).

II. THE 2018 NOTICE'S ASSERTION OF BROAD PREEMPTION THAT WOULD DISPLACE STATE CONSUMER PROTECTIONS IS NOT SUPPORTED BY THE HEA OR PRECEDENT

A. The HEA Does Not Provide Broad Express Preemption or "Occupy the Field" and to the Extent the 2018 Notice Can Be Read to Assert "Field Preemption," It Misreads the HEA

The "two cornerstones of our pre-emption jurisprudence" are, "first, the purpose of Congress is the ultimate touchstone in every pre-emption case" … [and s]econd, [i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth*, 555 U.S. at 565 (internal quotations omitted).

"[C]onsumer protection is a field traditionally regulated by the states … and the Supreme Court has []reaffirmed that there is a presumption against finding implied preemption of state law in these fields…." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125-26 (11th Cir. 2004) (citing *inter alia Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Ligget Group,* 505 U.S. 504 (1992) (referring to the "presumption against the pre-emption of state police power regulations"). Absent a

"clear and manifest" indication that Congress intended to preempt state law, federal law cannot preempt "the historic police powers of states." *Medtronic, Inc. v. Lohr*, 518 U.S. at 485. The evidence for Congress's intent to preempt the states' traditional role in consumer protection must be compelling. *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990). "[T]he presumption against preemption is even stronger against preemption of state remedies ... when no federal remedy exists." *Coll. Loan,* 396 F.3d at 597 (4th Cir. 2005).

Far from presenting compelling evidence that Congress intended to entirely displace state law, the language of the HEA suggests that, at most, Congress intended preemption to be "narrow and precise." *See Keams v. Tempe Technical Institute, Inc.,* 39 F.3d 222, 225-26 (9th Cir. 1994). The Act includes only "isolated preemptive provisions that expressly preempt certain state laws," suggesting Congress did not intend to preempt state law more generally. *Cliff*, 363 F.3d at 1124. "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67, (1989) (internal quotation marks omitted); see also *Wyeth*, 555 U.S. at 1194 (discussing the presumption against pre-emption). The "presumption against finding implied preemption of state [consumer protection] law … is reinforced by those provisions of the HEA … that *expressly preempt isolated provisions of state law*." *Cliff*, 363 F.3d at 1125-26 (emphasis added).

Courts have rejected arguments that the HEA supports implied preemption, including the Ninth Circuit, the same circuit that authored the *Chae* opinion. *See Keams*, 39 F.3d 222. In *Keams*, the Ninth Circuit found that an "implication [theory of preemption] cannot be reconciled with the narrow and precise preemptions expressed. It is apparent from the language of the express preemption clauses [in the HEA] that Congress expected state law to operate in much of the field in which it was legislating. Thus, there can be no inference that Congress 'left no room' for supplementary state regulation." *Keams,* 39 F.3d at 225-26 (quoting *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280–81, (1987)). Even in its expansive reading of HEA preemption authority, *Chae* acknowledged "under our precedent field preemption is off the table to resolve this case involving the HEA and its attendant federal regulations." *Chae v. SLM Corp.*, 593 F.3d 936, 942 (9th Cir. 2010).

The breadth and ambition of the 2018 Notice in sweeping aside virtually all state law runs counter to the decisions of the numerous courts that have found that the HEA does not occupy the field. *See, e.g.*, *Keams,* 39 F.3d at 225-226; *Cliff*, 363 F.3d at 1125-26; *McComas v. Financial Collection Agencies*, No. 96-0431, 1997 WL 118417 (S.D.W. Va. Mar. 7, 1997). This is not an instance of an agency exercising authority clearly delegated by Congress or interpreting an ambiguous statutory provision. Rather, it is the assertion of an expansive preemption authority that is not supported by the statute, nor necessary to carry out the purposes of the Act. "The fact that the [Department] has promulgated extensive regulations pursuant to the HEA does not, standing alone, persuade us to the contrary. The existence of comprehensive federal

regulations that fail to occupy the regulatory field do not, by their mere existence, preempt non-conflicting state law. … To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive." *Coll. Loan,* 396 F.3d at 598 (quoting *Hillsborough County*, 471 U.S. 707, 717 (1985)) (other internal citations omitted). Though the 2018 Notice does not use the term, what it suggests is that the HEA creates preemption because it "occupies the field." The 2018 Notice does not and cannot point to any statutory delegation providing authority, explicit or implicit, to preempt state law generally.

B. The 2018 Notice Misapplies Conflict Preemption and Otherwise Fails to Clearly Articulate Actual Conflicts

Even without express preemption or field preemption, the HEA and its implementing regulations could create conflict preemption to the extent that a particular state law makes it impossible to comply with both or that state law obstructs or frustrates the objectives and purposes of the federal statutory scheme. *See Wyeth*, 555 U.S. 555.

"Impossibility pre-emption is a demanding defense." *Wyeth*, 555 U.S. at 571-73 (holding that Wyeth had failed to demonstrate that it was impossible to comply with both federal and state requirements because there was no indication that FDA would have prohibited strengthening of warning label to comply with state law). "The mere possibility that a claim based on [state law] *might* be preempted by the HEA is not enough for us to conclude that [the state law claim] *is* preempted, especially when it is clear that third-party debt collectors can comply with both the HEA and [the state

law]." *Cliff*, 363 F.3d at 1127 (emphasis in original). Furthermore, "an entire state statute is not preempted because some of its provisions may actually conflict with federal law." *Id.* at 1129 (internal citations omitted). "The correct analysis is therefore whether a claim arising under each of the asserted provisions of [state law] is preempted, not whether the [state law] as a whole is preempted." *Williams*, 88 F. Supp. 3d at 1344.

The 2018 Notice discusses few examples in sufficient detail to examine whether a conflict does exist. Instead, the Department's interpretation focuses primarily on those scenarios where "[t]he interposition of State-law requirements *may* conflict with legal, regulatory, and contractual requirements," 2018 Notice at 10620 (emphasis added), not where conflict does in fact exist. In particular, the 2018 Notice describes state law requiring a shorter time-frame to respond to a borrower request than federal regulations require. This example, however, does not present a scenario where it would be impossible for a servicer to comply with both state and federal requirements. To establish a basis for conflict preemption, the 2018 Notice would have to "demonstrate[] an actual conflict" rather than "assert broadly that 'any potential state law claims [in an area addressed by HEA regulations] are preempted.' … This proves too much. … [C]onflict preemption does not cut such a wide swath." *Murungi v. Texas Guaranteed*, 646 F. Supp. 2d 804, 810 (E.D. La. 2009) (internal citations omitted) (declining to apply conflict preemption). The same is true to the extent that the 2018 Notice argues that state unfair trade practices are preempted by 1098g, as discussed in more detail below.

Cases interpreting the explicit preemptions in the Department's regulation illustrate that, generally, courts read the preemptive aspects of the HEA and its implementing regulations more narrowly than the Department wishes were the case. *See Williams*, 88 F. Supp. 3d at 1345 (M.D. Fla. 2015) ("There is no reason why it would be impossible to comply with both the federal regulation and the state law."); *McComas,* 1997 WL 118417, at *3 (S.D.W. Va. Mar. 7, 1997) ("Mandating telephone contacts generally certainly does not give the caller license to use abusive or deceptive methods to harass the borrower. There is no conflict between the two mandates."); *Smith v. Collection Techn., Inc.*, No. 15-CV-06816, 2016 WL 1169529, at *9 (S.D.W. Va. Mar. 22, 2016) (following *McComas* in finding no preemption where complaint's allegations did not challenge validity of wage garnishment under HEA, but instead challenged wage garnishment that is conducted in a fraudulent, deceptive, and misleading manner).

Absent "impossibility preemption," state law may be preempted if it poses an obstacle to federal purposes by interfering with the accomplishment of Congress's actual objectives, or by interfering with the methods that Congress selected for meeting those legislative goals. *See, e.g.*, *Coll. Loan*, 396 F.3d at 596 (citing *Gade v. Nat'l Solid Waste Mgmt. Assoc.*, 505 U.S. 88, 103 (1992)). Analyzing this basis for conflict preemption, *Chae* concludes that an important goal of the HEA is "uniformity within the program." *Chae,* 593 F.3d at 947. The 2018 Notice latches on to this language in *Chae,* opining that "the HEA and Department regulations governing the

FFEL Program preempt State servicing laws that conflict with, or impede the uniform administration of, the program." 2018 Notice at 10620.

Among courts, there is hardly a consensus that "uniformity" is a critical purpose of the HEA or that "uniformity" justifies displacement of state law. Courts have declined to find "uniformity" an important goal of the HEA, or have distinguished *Chae*, rather than rely upon "uniformity" to justify broad preemption of state claims. *See Coll. Loan*, 396 F.3d at 597. ("We are unable to confirm that the creation of "uniformity," … was actually an important goal of the HEA. ... [N]either the district court nor the parties have explained how these statutory purposes would be compromised by a lender, such as College Loan, pursuing breach of contract or tort claims against other lenders or servicers."); *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 654 (7th Cir. 2015) (distinguishing from *Chae* on grounds that "Plaintiffs' state law claims were complementary to, not in conflict with, the federal requirements"); *Davis v. Navient Corp.*, No. 17-CV-00992, 2018 WL 1603871, at *3 (W.D.N.Y. Mar. 12, 2018) (declining to follow *Chae* and rejecting defendant's argument that "'because Congress intended to create a uniform structure for serving FFELP loans, which is inconsistent with allowing regulation through state law causes of action'").

The Department's role in implementing regulations under its various loan programs does not relieve the Department of the need to adequately demonstrate how state law would actually frustrate the achievement of the HEA's purposes and objectives. *See Wyeth*, 555 U.S. at 573 (rejecting that state tort claims interfered with

"Congress's purpose to entrust an expert agency … decisions that strike a balance between competing objectives," finding it an "untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law"); *see also Cliff*, 363 F.3d at 1130 ("In fact, many provisions of state consumer protection statutes do not conflict with the HEA or its regulations, and many state law provisions … actually complement and enforce the HEA.") (citing *Brannon*, inter alia).

Finally, the Department's attempt to assert preemption must overcome Congress's silence as to state law remedies. "If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history." *Wyeth*, 555 U.S. at 574.

C. The 2018 Notice Overreads the Scope of the Preemption of State Disclosure Requirements Under Section 1098g

At issue in this case is one of the express preemption provisions under the HEA, 20 U.S.C. § 1098g. That section provides that "[l]oans made, insured, or guaranteed pursuant to a program authorized by title IV of the HEA shall not be subject to any disclosure requirements of any State law." 20 U.S.C. § 1098g. Plaintiff-appellant's brief ably demonstrates the flawed reasoning of the District Court in applying § 1098g to preempt plaintiff's claims. We now discuss the 2018 Notice to demonstrate why the Department's view that § 1098g's preemption covers virtually any communication between a borrower and their servicer deserves even less weight than does the District Court's opinion.

The 2018 Notice argues, quoting the District Court decision, that a disclosure requirement is anything that requires servicers "to reveal facts or information not required by Federal law." 2018 Notice at 10621 (quoting District Court opinion at 4). The 2018 Notice goes further to explain that "Federal law provides a carefully crafted disclosure regime specifying what information must be provided in the context of the federal loan programs." *Id*. With no discussion or description of the cited regulations, the 2018 Notice then concludes that "[t]he Department interprets 'disclosure requirements' under section § 1098g of the HEA to encompass informal or non-written communications to borrowers as well as reporting to third parties such as credit reporting bureaus." *Id*.

The 2018 Notice justifies this sweeping conclusion of the preemptive scope of § 1098g in part on the United States' brief submitted to the Ninth Circuit in *Chae*. *Id*. ("The United States previously addressed the scope of section § 1098g in its submission to the Ninth Circuit in Chae."). However, that brief illustrates how, prior to the 2018 Notice, the Department and the United States took a significantly narrower view to the scope of § 1098g than the 2018 Notice. The United States' brief argued that § 1098g preempted application to the theory plaintiff's had raised on appeal, that the forms that the Department, pursuant to its regulations, approved and required lenders to use, did not adequately disclose how interest was computed on the loan. *Brief of Plaintiff-Intervenor-Appellee* at 14*, Chae,* Docket No. 22. As noted in plaintiff-appellant's brief, the holding in *Chae* was that a narrow category of factual allegations were expressly preempted by § 1098g. *See Chae,* 593 F.3d at 943

("A properly-disclosed FFELP practice cannot simultaneously be misleading under state law, for state disclosure law is preempted by the federal statutory and regulatory scheme.").

In finding that § 1098g preempts state claims based on misrepresentation, the 2018 Notice also cites the holding in *Chae* that "a State-law prohibition on misrepresenting a business practice 'is merely the converse' of a State-law requirement that alternate disclosures be made." *Chae*, 593 F.3d at 943 (as quoted in 2018 Notice at 15). However, as plaintiff-appellant's brief notes, the *Chae* court's holding is far more narrow than that excerpt might indicate and the legislative history of § 1098g does not support such a broad reading. Plaintiff-appellant's Brief at p. 33-34.

In addition, neither *Chae* nor the United States' brief in that case provide any support for the contention in the 2018 Notice that § 1098g preempts state law from addressing "informal and non-written communications" to borrowers. The 2018 Notice itself provides no examples, explanation, or authority for why Congress would have expected § 1098g to apply to informal communications that were not subject to any standardized requirements under the Department's regulations.

The 2018 Notice misinterprets and misapplies the position taken by the United States as the basis for its newfound view that § 1098g preempts "[s]tate servicing laws [that] attempt to impose *new* prohibitions on misrepresentation or omission of material information." 2018 Notice at 10621 (emphasis added). The position the Department now takes would preempt state laws *whether or not* they addressed an

act or form that was required under the HEA. But the reasoning of the *Chae* court and the United States' brief before that court hinges on the presence of a federal requirement that is in actual conflict with the theory of the state claim.

III. COURTS SHOULD REFRAIN FROM A BROAD READING OF PREEMPTION OF STATE LAW REMEDIES WHERE FEDERAL LAW DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION

The absence of any private right of action under the HEA coupled with its silence as to any broad preemption authority sufficient to supplant state remedies argues against giving the Act a broad reading of implied preemption. "[I]t is, to say the least, '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. at 487 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

"It is well-settled that the HEA does not expressly provide debtors with a private right of action." *Cliff*, 363 F.3d at 1123 (citing *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002) and *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)). Consequently, federal student loan borrowers have no means under federal law to protect their legal interests, or to remedy them when they have been violated.

Outside of the Federal Debt Collection Practices Act, which often may not apply to their claims, the only means by which federal student loan borrowers may pursue their legal rights against a student loan servicer is state law. Thus, broad preemption of state laws of general application leaves borrowers with no means of judicial recourse whatsoever when they are harmed. In *Wyeth,* the Court noted that Congress

had not provided a federal remedy in original adoption of or in any subsequent amendment to the federal statute upon which the preemption was based, finding this to indicate Congress's view that "widely available state rights of action provided appropriate relief for injured consumers" and adding that the absence of a federal remedy suggested Congress "recognized that state-law remedies further consumer protection." *Wyeth,* 555 U.S. at 573-74.

Despite purporting to sweep aside state law remedies which afford private remedies, the only "borrower protections" to which the 2018 Notice can point are the Department's general ability to enforce its own contracts and a "feedback system" through which consumers file complaints and the possibility of elevation of such complaints to an ombudsman. *Id.* at 10622. Based on the 2018 Notice's silence on the subject, none of these options provide borrowers an avenue for compensation of the harms caused by poor, or even unfair, deceptive or otherwise illegal, servicing practices.

CONCLUSION

The undersigned amici believe the 2018 Notice should be given no persuasive weight. It is an informal interpretation that asserts a far broader preemption than is supported by the HEA, its amendments, or the Department's long-standing approach to preemption. The court decisions upon which the 2018 Notice relies do not support the preemptive scope the Department claims. Moreover, if given effect, it would deprive consumers of traditional state law remedies, which often constitute the only effective means by which student loan borrowers can seek redress for the

consequences of many harmful acts by their servicer. Congress did not intend such an effect, and the precedent interpreting the Supremacy Clause does not permit it.

Dated: July 2, 2018

Respectfully submitted,

/s/William R. Corbett

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Seventh Circuit's Local Rule 29 because this brief contains 6,102 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f)).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a:proportionally spaced typeface using Microsoft Word 2016 for Mac using in 12-point Century Schoolbook font for text, and 11-point Century Schoolbook font for footnotes.

Dated: July 2, 2018

Respectfully submitted,
/s/William R. Corbett
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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 2, 2018

Respectfully submitted,
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