No. 18-1531

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nicole D. Nelson,
Plaintiff-Appellant,

v.

Great Lakes Educational Loan Services, Inc.,
et al.,
Defendants-Appellees.

On Appeal From The United States District Court
For the Southern District of Illinois
3:17-cv-00183-NJR-SCW

***UNOPPOSED AMICUS CURIAE* BRIEF OF THE NATIONAL CONSUMER LAW CENTER, BROOKLYN LEGAL SERVICES CORPORATION A, CONSUMER ACTION, CONSUMERS UNION, HOUSING AND ECONOMIC RIGHTS ADVOCATES, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MARYLAND CONSUMER RIGHTS COALITION, MOBILIZATION FOR JUSTICE, NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER, NEW YORKERS FOR RESPONSIBLE LENDING, NORTHWEST SIDE HOUSING CENTER, PROJECT ON PREDATORY STUDENT LENDING, STUDENT DEBT CRISIS, THE INSTITUTE FOR COLLEGE ACCESS & SUCCESS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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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):

National Consumer Law Center, Brooklyn Legal Services Corporation A, Consumer Action, Consumers Union, Housing and Economic Rights Advocates, Lawyers' Committee for Civil Rights Under Law, Maryland Consumer Rights Coalition, Mobilization for Justice, National Association of Consumer Bankruptcy Attorneys, National Consumer Bankruptcy Rights Center, New Yorkers for Responsible Lending, Northwest Side Housing Center, Project on Predatory Student Lending, Student Debt Crisis, The Institute for College Access & Success

(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:

National Consumer Law Center

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X

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N/A

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). No _X_

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Pursuant to Fed. R. App. P. 29, counsel for *amici curiae* states that none of the parties to the above-captioned dispute, and none of their counsel, authored this brief in whole or in part. No person other than *amici* made a monetary contribution to preparation or submission of this brief.

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CONCISE STATEMENT OF THE IDENTITY AND INTERESTS OF *AMICI*

This brief is submitted by the National Consumer Law Center ("NCLC"), and by fourteen other non-profit organizations that work on behalf of students and student loan borrowers, consumers, low-income individuals, and civil rights. Counsel for amici have met and conferred with counsel for both the Plaintiff and the Defendant. Both parties have consented to the filing of this amicus brief.

NCLC is a non-profit organization specializing in consumer issues on behalf of low-income people. NCLC has a nationally recognized expertise in student loan law and publishes a widely-used treatise on student loan law, *Student Loan Law* (5th ed. 2015), *updated at* www.nclc.org/library. NCLC's Student Loan Borrower Assistance Project provides information about student borrowers' rights and seeks to increase public understanding of student lending issues and to identify policy solutions to promote access to education and lessen student debt burdens. The Project's attorneys provide direct representation to low-income student loan borrowers, many of whom are the subjects of unfair, abusive, deceptive or otherwise unlawful conduct by student loan servicers.

NCLC also consults with civil legal services organizations across the country, including *amici* Brooklyn Legal Services Corporation A, Housing and Economic Rights Advocates, Mobilization for Justice, and the Project on Predatory Student Lending, that represent borrowers in their local communities who have been harmed by servicer errors and misconduct. Through this work, *amici* have seen the harm to student borrowers caused by illegal student loan servicing practices.

Additional *amici* are described in the Addendum.

INTRODUCTION AND SUMMARY OF ARGUMENT

Currently in the United States, nearly 43 million people owe over $1.4 trillion on their federal student loans and roughly a quarter of those borrowers are delinquent or in default on their loans.[1] Loan servicers, which are lenders themselves or are hired by lenders, play a critical role in ensuring student loan borrowers are aware of their options for repayment and avoiding default, and for accessing those options by communicating with borrowers about the repayment of their loans, processing payments, and assisting with problems. In this role, servicers wield substantial power over borrowers' financial stability. When servicers act abusively and deceptively, in this case by systematically steering borrowers into repayment options that are expensive for borrowers and lucrative for servicers, the harm can be long-term and irreparable. Those harms are disproportionately borne by low-income borrowers and borrowers of color and their families.

Contrary to the district court's opinion, the U.S. Department of Education regulations on servicer behavior are far from robust, and historically, its enforcement of borrower protections has been woefully insufficient. As record numbers of Americans struggle to afford their student loans, private enforcement of state consumer protection laws is critical to hold servicers accountable and to redress the harm done to borrowers impacted by illegal servicer conduct.

Therefore, we ask that this Court conclude that the Plaintiff's consumer protection claims under Illinois state law are not preempted by federal law and reverse the district court's dismissal of the Plaintiff's claims.

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[1] *See* U.S. Dep't of Educ., Federal Student Aid, Data Center, Federal Student Loan Portfolio; *see also*, Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of Public Input and Recommendations for Reform (Sept. 2015).

ARGUMENT

I. Student Loan Servicers' Unfair, Deceptive, and Unlawful Practices Harm Borrowers and Cause Default and Increased Debt

A. Widespread servicer misconduct threatens 43 million student loan borrowers

The scale of the federal student loan servicing industry and the impacts of its actions are vast. Americans now owe more in student loan debt than they do for auto loans, credit cards, or any other non-mortgage debt.[2] Federal data shows that nearly a quarter of the 43 million student loan borrowers are in distress on their loans.[3]

With the assistance of a competent and efficient servicer, financially distressed borrowers may avoid default by accessing flexible repayment plans, loan cancellation programs, or deferments or forbearances—mechanisms that temporarily stop payments—appropriate for their circumstances. Unfortunately, as has been extensively documented, the student loan servicing industry has long been rife with misconduct. The four largest servicers of federal student loans have a documented history of "widespread servicing failures" that "create obstacles to repayment, raise costs, cause distress" and "driv[e] borrowers to default."[4] According to an October 2014 report by the Consumer Financial Protection Bureau ("CFPB"), misbehavior in the student loan servicing industry included allocating payments to maximize late fees, misrepresenting minimum payments, charging illegal late fees, failing to provide accurate tax

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[2] *See* Fed. Reserve Bank of N.Y., Household Debt and Credit Report: Q1 2018 (May 2018).

[3] *See* U.S. Dep't of Educ., Federal Student Aid, Data Center, Federal Student Loan Portfolio; *see also*, Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of Public Input and Recommendations for Reform (Sept. 2015).

[4] Consumer Fin. Prot. Bureau. CFPB Concerned About Widespread Servicing Failures Reported by Student Loan Borrowers (Sept. 29, 2015).

information, misleading consumers about bankruptcy protections, and making illegal debt collection calls.[5]

Problems with enrolling and renewing borrowers in income driven repayment plans, such as the ones complained of by the Plaintiff in this case, are particularly prevalent. Income-driven repayment ("IDR") is at the heart of affordable loan repayment options offered by the Higher Education Act ("HEA") which governs the federal student loan program. IDR plans require borrowers to pay only a set percentage of their income toward their student loan bills, and can require a small or even zero monthly payment from the borrower.[6] Remaining on an IDR plan provides the borrower with sustainable loan repayment and a path to forgiveness of any remaining balance after twenty or twenty-five years of IDR payments.[7]

Despite the abundant benefits to the financial health of borrowers and their families, IDR programs remain consistently inaccessible for many borrowers, with documented low levels of participation by eligible borrowers.[8] Entering a borrower into an IDR plan is time-intensive and expensive for servicers, so servicers fail to invest resources in ensuring that borrowers understand and successfully access the most affordable and sustainable repayment plan. Instead, servicers steer many borrowers into forbearances and deferments, which are profitable for the servicer and costly to the borrower, and servicers have misrepresented that borrowers have no other repayment options.

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[5] Consumer Fin. Prot. Bureau, Supervisory Highlights: Fall 2014 (Oct. 28, 2014).

[6] 20 U.S.C. §§ 1087e(d)(1)(E) (applicable to Direct Loans), 1098e (FFEL). See 34 C.F.R. §§ 682.215 (FFEL), 685.221 (Direct Loan).

[7] *Id.*

[8] U.S. Gov't Accountability Office, Federal Student Loans: Education Could Do More to Help Ensure Borrowers are Aware of Repayment and Forgiveness Options, Report No. GAO-15-66 (Aug. 2015).

An NCLC client had this experience as she struggled to afford her student loan payments after completing a medical assistant program at a local for-profit school. Every year, she dutifully contacted her servicer and submitted documentation of her financial hardship. Nevertheless, despite clear eligibility for a zero dollar payment, she has never been enrolled in an IDR plan. When this borrower came to NCLC, she had never even heard of IDR options. Instead, each year when she called her servicer to discuss her financial situation and options, she was directed into a number of forbearances. She has been out of school since 2012 and is still in good standing on her loan, due to her extreme diligence. However, the servicer's actions steering her towards forbearance have wasted years she could have spent in an affordable repayment plan, working toward the eventual resolution of her loan.

This client's experience is far from unique, and state enforcement actions targeted at this type of misbehavior tell similar stories. Several state attorneys general (including those from California, Illinois, Massachusetts, and Washington) and the CFPB have sued servicers for similar failures related to enrolling borrowers in IDR.[9]

B. Servicer misconduct causes long-term financial harm

The consequences of servicers' misconduct are significant and, at times, catastrophic for borrowers' financial lives. According to a April 2017 CFPB report based upon student loan borrower complaints, sloppy practices by servicers created obstacles to repayment, raised the

[9] *See Consumer Fin. Prot. Bureau v. Navient Corp.*, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017); Press Release, Att'y Gen. of Cal., Attorney General Becerra Charges Navient Corporation, Largest Student Loan Servicer, with Deceitful Practices and Debt-Collection Misconduct in Lawsuit (June 28, 2018); Press Release, Att'y Gen. of Il., Attorney General Madigan Sues Navient And Sallie Mae For Rampant Student Loan Abuses (Jan. 18, 2017); David Gutman, State AG Sues Student Loan Company, Alleging Unfair And Deceptive Practices, *Seattle Times* (Jan. 18, 2017); Press Release, Att'y Gen. of Mass., AG Healey Secures $2.4 Million, Significant Policy Reforms in Major Settlement with Student Loan Servicer (Nov. 22, 2016).

costs of debt, caused distress, and ultimately contributed to driving struggling borrowers to default.[10]

Steering borrowers into deferment and forbearance, as alleged in this case, can significantly increase the amount a borrower pays over the life of the loan. Borrowers accrue mounting interest during forbearances and deferments on unsubsidized loans, which is ultimately capitalized into their loan principal and causes interest to be charged upon interest. The U.S. Government Accountability Office ("GAO") recently estimated that a borrower owing $30,000 in federal loans who spent three years in a forbearance would pay $6,742 more than a borrower on a 10-year standard repayment plan who did not spend any time in forbearance.[11] The GAO further stating that encouraging "forbearance over other options that may be more beneficial, such as [IDR] plans," will continue to place some borrowers "at risk of incurring additional costs without any long-term benefits."[12]

For the client described in the section above, the capitalization of interest has caused the principal balance on her unsubsidized loan to grow from around $4,000 to $4,600. Additionally, she will be obligated to make payments on this loan for five more years than would have been necessary.

Moreover, unlike under an IDR, the time a borrower spends in a forbearance and in most deferments does not count towards federal student loan forgiveness. As a result, forbearances and most deferments extend the repayment time-period, which in turn further the total amount a borrower ultimately repays.

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[10] Consumer Fin. Prot. Bureau, CFPB Monthly Snapshot Spotlights Student Loan Complaints (Apr. 2017).

[11] U.S. Gov't Accountability Office, Federal Student Loans: Education Could Improve Direct Loan Program Customer Service and Oversight: Highlights, Report No. GAO-16-523, 19 (May 16, 2016).

[12] *Id.* at 20

Importantly, servicer misconduct is not limited to steering borrowers into forbearances and deferments. As a recent New York Times article highlighted, one borrower working in a public service job learned after eight years that his repayment plan did not qualify for public service loan forgiveness, a program that would have forgiven his loans after ten years of repayment, even though he had repeatedly asked his servicer whether he was on track for such forgiveness. As a result, this borrower will need to make nearly a decade's worth of additional payments likely totaling tens of thousands of dollars, all because he was incorrectly advised about his repayment plan.[13]

Servicing errors have also caused thousands of teachers to have their TEACH grants (federal grants given to encourage teachers to teach in high need areas) converted into Federal Direct Loans. Data obtained by Public Citizen, Inc. through a Freedom of Information Act request demonstrates that one servicer hired by the Department of Education to oversee the TEACH Grant program appeared to have erroneously converted more than 15,000 TEACH Grants to loans, amounting to an error rate of 38 percent among all conversions.[14] Significant problems with respect to erroneous conversions have continued under a successive servicer as well.[15]

As these examples show, the consequences of widespread servicing abuses are causing far too many borrowers extreme financial harm by increasing borrowers' payments and the period of time those payments are due.

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[13] Ron Lieber, *A Student Loan Nightmare: The Teacher in the Wrong Payment Plan*, N.Y. Times (Oct. 27, 2017).

[14] Danielle Douglas-Gabriel, *"This situation . . . made my first four years of teaching so much harder": How a grant became a loan*, Wash. Post, Mar. 30, 2018.

[15] *See* Cory Turner and Chris Arnold, *Dept. Of Education Fail: Teachers Lose Grants, Forced To Repay Thousands In Loans*, National Public Radio (Mar. 28, 2018).

C. Servicer misconduct leads to increased defaults and exposes borrowers to aggressive federal debt collection practices

Federal data show that more than one in four federal student loan borrowers are delinquent or in default on their federal student loans.[16] In recent years, between 11% and 15% of all federal student loan borrowers have defaulted within two fiscal years of entering repayment.[17] Many of these defaults could be prevented, particularly in light of a unique feature of federal student loans. Borrowers do not officially default on their loans until they have missed 270 days of payments. In this window of time, competent and effective servicers can help financially distressed borrowers avoid default and its devastating consequences by accessing flexible repayment options authorized by the HEA.

Unfortunately, unchecked servicer misconduct that steers borrowers into forbearances leads many borrowers to default. Although in some circumstances, forbearances and deferments can be useful, they offer borrowers only a temporary reprieve. Ultimately, when borrowers who are unable to afford standard payments are led to believe that their only option is forbearance or deferment, and their available forbearances or deferments are exhausted, default—and its consequences—may become unavoidable.

For example, default damages borrowers' credit histories, increasing the cost of access to further credit and potentially erecting barriers to accessing employment and housing. As the CFPB aptly explained in its 2015 report on student loan servicing, "the consequences of borrowers' failure to satisfy an obligation can be particularly injurious" for those borrowers who

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[16] *See* U.S. Dep't of Educ., Federal Student Aid, Data Center, Federal Student Loan Portfolio; *see also*, Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of Public Input and Recommendations for Reform (Sept. 2015).

[17] U.S. Dep't of Educ., Briefing on FY 2013 3-Year Official Cohort Default Rates [3] (Sept. 28, 2016).

have limited credit history."[18] Consequences can extend beyond student lending because "consumer credit profiles serve as a precondition to employment, housing, and access to credit, and consequently, servicing errors can have spillover effects on many other aspects of borrowers' lives and livelihoods."[19]

These devastating consequences are intensified for student loan borrowers because the federal government has collection powers against defaulted student loans that far exceed the collection powers of most unsecured creditors. Wielding these tools, the government often siphons thousands of dollars from borrowers already experiencing financial distress through its coercive collection powers. The government can garnish a borrower's wages without a judgment, seize tax refunds (including the Earned Income Tax Credit), and seize portions of federal benefits such as Social Security.[20] The amount the government seizes using these tools often is far greater than the amounts borrowers would have been required to pay under an IDR plan. These punitive collection activities often push low-income households to or over the financial brink.

D. Abusive and deceptive servicing practices disproportionately hurt families of color and their communities

Quality servicing is especially critical for addressing racial disparities in student loan outcomes. Students of color face additional barriers in repaying their student debt due to structural inequities in family wealth, education, and employment. For generations, government-sanctioned policies kept African-American families from accumulating wealth through such practices as redlining, restrictive covenants, lending discrimination, and encouraging

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[18] Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of Public Input 140-141 (Sept. 2015).

[19] *Id.*

[20] NCLC, *Student Loan Law* Ch. 9 (5th ed. 2015), *updated at* www.nclc.org/library.

neighborhood segregation.[21] With less wealth than their white peers, Black students are more likely than other racial groups to borrow and to borrow more for their education.[22] A 2016 analysis found that the average Black student graduated with about $7,400 more student loan debt than their white peers.[23] Disparities in income alone do not explain the gap,[24] and these disparities only widen after graduation.[25] This same 2016 analysis found that the Black-White student debt gap more than tripled to a $25,000 difference in just four years after graduation.[26] Black and Latino students are also overrepresented in high-cost, low-quality for-profit colleges and universities, which are notorious for encouraging students to take on greater amounts of debt while failing to provide increased employment prospects.[27] As a result, the issues facing the for-profit sector—including higher than average loan balances and higher default rates—have a greater impact on students of color.[28] Discrimination in the labor market represents another

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[21] *See, e.g.,* Amy Traub, Laura Sullivan, Tatjana Meschede, and Tom Shapiro, Demos, The Asset Value of Whiteness: Understanding the Racial Wealth Gap (2017); Katie Nodjimbadem, Smithsonian.com, The Racial Segregation of American Cities Was Anything But Accidental (2017) (explaining that these racial inequities in wealth persist today and have worsened in recent decades; a recent study noted that between 1983 and 2013, the median Black household wealth declined from $6,800 to $1,700 and the median Latino household wealth declined from $4,000 to $2,000, while the median White household wealth increased from $102,000 to $116,800); Asante-Muhammad, D., Collins, C., Hoxie, J., & Nieves, E., Institute of Policy Studies, The Road to Zero Wealth: How the Racial Wealth Divide is Hollowing out America's Middle Class (September 2017).

[22] Mark Huelsman, Demos, The Debt Divide: The Racial and Class Bias Behind the "New Normal" of Student Borrowing (2015).

[23] Scott-Clayton, J. & Li, J, The Brookings Institute, Black-White Disparity in Student Loan Debt More Than Triples after Graduation (October 2016).

[24] Michal Grinstein-Weiss, Dana C. Perantie, Samuel H. Taylor, Shenyang Guo, and Ramesh Raghavan, Racial Disparities in Education Debt Burden among Low- and Moderate-Income Households, Children and Youth Services Review Volume 65, 166–174 (June 2016).

[25] Scott-Clayton, Black-White Disparity, *supra* note 23.

[26] *Id.*

[27] Leadership Conference on Civil & Human Rights, Gainful Employment: A Civil Rights Perspective 2 (2014).

[28] Peter Smith and Leslie Parrish, Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees' Futures, Center for Responsible Lending (October 2014).

barrier to repayment. Once in the workforce, graduates of color have lower wages than their white peers, even when controlling for education level.[29] These factors combine to create an environment in which borrowers of color are left with debt but insufficient means for repayment.

It is therefore not surprising that Black and Latino student borrowers experience higher rates of default than white borrowers (49 percent, 36 percent, and 21 percent respectively).[30] Black and Latino borrowers also report higher rates of late payment on student loans as compared to white borrowers (49 percent, 41 percent, and 32 percent respectively).[31] Moreover, this debt becomes more burdensome over time for Black students: the typical African American student who started college in 2003-04 and took on debt owed 113% of what they originally borrowed 12 years later, compared to the typical white borrower, who owed around 65% of their original loan balance.[32]

Racial disparities in default rates disproportionately expose borrowers of color to government offsets and other damaging debt collection practices. The impact of the Department's default collection tools extends beyond borrowers' immediate families and into their surrounding communities. Research by the Washington Center for Equitable Growth found that zip codes with higher shares of African Americans or Latinos show much higher delinquency rates on their student loans.[33] The government's collection practices have the disastrous effect of systematically removing wealth from communities of color through seizures

[29] Bureau of Labor Statistics data shows that median weekly earnings for Latino students with a Bachelor's degree are only 83 percent of what whites earn. For Black Bachelor's degree holders, their weekly median earnings are only 79 percent of what whites earn. Bureau of Labor Statistics, Median weekly earnings by educational attainment in 2014 (published 2015).

[30] Ben Miller, Center for American Progress, New Federal Data Show a Student Loan Crisis for African American Borrowers (2017).

[31] Financial Capability in the United States 2016, Financial Industry Regulatory Authority (2016).

[32] *Id.*

[33] Marshall Steinbaum and Kavya Vaghul, How the Student Debt Crisis Affects African Americans and Latinos, Washington Center for Equitable Growth (Feb. 17, 2016).

of wages, tax refunds, and benefits to service student debts and huge collection fees. In effect, such practices systematically strip wealth from families and communities which are already economically disadvantaged and disproportionately of color.

The aforementioned evidence reflects that borrowers of color are more likely to experience financial distress on their loans than their white counterparts.[34] It is the role of servicers to provide borrowers in such distress with the options for staying in good standing on their loans. It follows that borrowers of color are the most exposed to loan servicers' abusive or deceptive tactics that prevent distressed borrowers from reaching optimal options. Indeed, a recent analysis of the 2016 Survey of Consumer Finances suggests that Black households would disproportionately benefit from greater access to income driven repayment plans. According to the Survey, the highest proportion of Black families report "not making payments" because they are in forbearance, unable to afford payments, or in another loan forgiveness program.[35] Most borrowers in this position, are eligible for an income-driven repayment plan which generally provide the most complete relief. Thus, when borrowers are systematically steered into forbearances instead of income driven plans—as is alleged in this case and discussed above—the adverse consequences will disproportionately be borne by borrowers of color who will face increasing debt rather than enrollment in a manageable repayment plan. Borrowers of color and their communities have a heightened interest in preserving their rights under state consumer protection laws to combat unfair and deceptive practices by student loan servicers. Beyond the irreparable and long-term harm to individual borrowers, insulating servicers from such state law

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[34] *See id.*

[35] Kristin Blagg, The Demographics of Income-Driven Student Loan Repayment, Urban Wire, (Feb. 2018).

claims would exacerbate racial economic gaps and hinder minorities' ability to obtain wealth and security.

II. Enforcement of State Consumer Protection Law Against Student Loan Servicers Is Necessary to Protect Borrowers and Make Them Whole

A. The Department of Education has limited statutory authority and limited political will to act as an enforcement entity

Contrary to the district court's opinion in this case, the Department of Education's regulations on disclosures for repayment options are far from comprehensive, nor has the Department's oversight over its contractors been extensive, or even sufficient. While, the HEA does include "due diligence" requirements which imposes some disclosure requirements,[36] those laws only apply to loans originated by the Federal Family Education Loan Program and not to the $1.1 trillion[37] in outstanding Direct loans. Furthermore, as articulated in Plaintiff's brief, while the Department does have some authority to sanction servicers that violate program requirements, such sanctions are extreme and are unlikely to be used to remedy individual complaints.[38] Notably, the statute does not permit targeted sanctions on servicers for the type of unfair and deceptive practices alleged in this case.[39]

Critically, even with its existing limited authority, GAO and Inspector General studies confirm that the Department's oversight of servicers and debt collectors has been lax.[40] Pertinently, a 2016 GAO report found:

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[36] *See* 20 U.S.C. § 1083.

[37] *See* U.S. Dep't of Educ., Federal Student Aid, Data Center, Federal Student Loan Portfolio.

[38] *See* Appellants' Opening Br. 25-26; 20 U.S.C. § 1083(f)(4).

[39] *Id.*

[40] *See e.g.*, U.S. Gov't Accountability Office, Federal Student Loans: Education Could Improve Direct Loan Program Customer Service and Oversight, Report No. GAO-16-523 (May 16, 2016); U.S. Dep't of Educ., Office of Inspector Gen., Control No. ED-OIG/A04N0004, Final Audit Report (Aug. 24, 2015); U.S. Dep't of Educ., Office of Inspector Gen., Handling of Borrower Complaints Against Private Collection Agencies, Control No. ED-OIG/A06M0012 (July 2014); Federal Student Loans: Oversight of

> [The Department of] Education rewards servicers with additional loan assignment based on performance metrics and pays servicers for each loan they service, but *these metrics and related compensation do not fully align with Education's goals for superior service and program integrity*. Education acknowledged there may be a disincentive, in terms of lack of compensation, for servicers to counsel borrowers on debt relief programs that may benefit the borrower but necessitate loan transfer to a different servicer. Similarly, because no performance metrics relate to compliance with program requirements, *servicers with more compliance errors experience no reduction in assigned loans*, even as their borrowers may experience servicing problems.[41] (Emphasis added.)

Further, although the Dodd-Frank Act gives the CFPB authority to supervise the larger participants in any market for consumer financial products or services that it identifies,[42] the Department of Education has taken the position that it has full oversight responsibility for federal student loans, to the exclusion of the CFPB. On August 31, 2017, the Department terminated two memoranda of understanding between the Department and the CFPB.[43] In the termination letter, the Department stated that it "has full oversight responsibility for federal student loans" and that the handling of complaints related to federal student loans by the CFPB directly was outside the jurisdiction of the CFPB and "complicate[s] the federal student loan process with potentially inaccurate and inconsistent directives."[44]

Because of both the statutory limitations and the lack of oversight, the federal government is failing to protect student loan borrowers from unfair, deceptive, and abusive

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Defaulted Loan, Rehabilitation Needs Strengthening: Testimony Before the H. Subcomm. on Higher Educ. and Workforce Training, Comm. on Educ. and the Workforce, 113th Cong. 8 (2014), (statement of Melissa Emrey-Arras, Dir., Educ., Workforce, and Income Sec., U.S. Gov't Accountability Office).

[41] U.S. Gov't Accountability Office, Federal Student Loans: Education Could Improve Direct Loan Program Customer Service and Oversight: Highlights, Report No. GAO-16-523 (May 16, 2016).

[42] 12 U.S.C. § 5514.

[43] Letter from Kathleen Smith, Acting Under Secretary, and A. Wayne Johnson, COO of Federal Student Aid to Richard Cordray, Director, Consumer Financial Protection Bureau (Aug. 31, 2017).

[44] *Id.*

practices. State consumer protection laws are necessary to fill the void, and as discussed in the next section, to provide borrowers with the relief they need.

B. State consumer protection laws are necessary for borrowers to obtain relief for servicer misconduct

As described in Section I above, there are well known and wide spread problems in the federal student loan servicing industry and those errors and abuses can be financially devastating for borrowers. Borrowers across the country are in desperate need of a remedy for these abusive practices, and state law provides that remedy.

The HEA provides no explicit private right of action to student loan borrowers to directly enforce disclosure requirements or challenge a servicer's failure to comply with other obligations set out in federal law. Neither does the HEA establish a formal or exclusive procedure by which student loan borrowers can seek recourse against student loan servicers through the Department, including for alleged fraud or misrepresentation.

While there are means for private relief through informal complaint systems to the Department and the CFPB, borrowers do not have the right to directly enforce their rights under federal law or to require the federal government to enforce the law on their behalf. To the extent that borrowers have a right to file an agency complaint, there is no statutory language that reflects a Congressional intent to vest exclusive enforcement authority in the agency in a manner that bars state law claims.

A number of factors further limit the impact of public oversight. Agencies can only act selectively and can never address the vast majority of individual violations or make whole all individuals. Additionally, because citizens are more likely than government agencies to be aware of practices that cause borrowers harm, suits by individuals can actually drive regulation and reform by exposing bad practices. Moreover, even if the Department acted more

aggressively to police servicers through termination or sanctions, this would not necessarily lead to relief for individual borrowers harmed by these servicers. Strong government enforcement is an essential piece of the picture, but it is only a piece. Accountability requires that borrowers have the ability to enforce their rights when breached by servicers.

In contrast, every state has a consumer protection law that prohibits the deceptive practices of companies, and many states also prohibit unfair or unconscionable practices as well.[45] As fully articulated in the Plaintiff's opening brief, there is no indication in the legislative history of HEA that Congress intended to insulate servicers from accountability under state laws.

CONCLUSION

As discussed above, servicer abuses are widespread and have costly consequences for student loan borrowers. Unfortunately, the U.S. Department of Education has neither the authority nor the political will to make these borrowers whole. Borrowers need access to the protections and remedies afforded by state law. Companies servicing the second largest financial market in the United States should not be insulated from accountability. For the above reasons, the district court's judgment should be reversed.

Respectfully submitted,

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Dated: July 2, 2018

Counsel for Amici Curiae

[45] Carolyn Carter, National Consumer Law Center, Consumer Protection In The States: A 5-State Evaluation of Unfair and Deceptive Practices Laws (March 2018).

ADDENDUM

LIST OF ADDITIONAL *AMICI*

Brooklyn Legal Services Corporation A is a nonprofit legal services organization that provide free legal services to consumers, homeowners, tenants, and communities.

Consumer Action has been a champion of underrepresented consumers since 1971. A national, non-profit 501(c)3 organization, Consumer Action focuses on financial education that empowers low-to-moderate-income and limited-English-speaking consumers to financially prosper. It also advocates for consumers to advance consumer rights and promote industry-wide change, particularly in the field of personal finance, including student loans.

Consumers Union is the advocacy division of Consumer Reports, an independent, nonprofit organization that works side by side with consumers to create a fairer, safer, and healthier world. As the world's largest independent product-testing organization, Consumer Reports uses its more than 50 labs, auto test center, and survey research center to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications. Consumers Union has been active over the years in numerous policy issues affecting consumers, including fair treatment of student borrowers.

Housing and Economic Rights Advocates (HERA) is a California statewide, not-for-profit legal service and advocacy organization dedicated to helping Californians — particularly those most vulnerable — build a safe, sound financial future, free of discrimination and economic abuses, in all aspects of household financial concerns.

The **Lawyers' Committee for Civil Rights Under Law** is a tax-exempt, non-profit civil rights organization founded in 1963 at the request of President John F. Kennedy in order to mobilize the private bar in vindicating the civil rights of African Americans and

other racial and ethnic minorities. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of racial discrimination in higher education opportunities affecting racial and ethnic minorities and other disadvantaged populations. As a leading racial justice organization, the Lawyers' Committee has a vested interest in ensuring that equal educational opportunities are available to students of all racial and ethnic backgrounds.

The **Maryland Consumer Rights Coalition** advances economic rights and financial inclusion through research, education, advocacy, direct service, and organizing. Our 8,500 supporters across the state join with us to promote economic inclusion at the local, state, and federal level.

Mobilization for Justice (formerly MFY Legal Services) envisions a society in which there is equal justice for all. Our mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. We do this through providing the highest quality direct civil legal assistance, providing community education, entering into partnerships, engaging in policy advocacy, and bringing impact litigation. We assist more than 12,000 New Yorkers each year, benefiting over 25,000. Mobilization for Justice's Consumer Rights Project provides advice, counsel and representation to low-income New Yorkers on consumer problems, including issues related to student loans.

National Association of Consumer Bankruptcy Attorneys (NACBA) is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. Formed in 1992, NACBA now has more than 2100 members located in nearly all 50 states and Puerto Rico. NACBA provides the most comprehensive educational programs in the country for consumer bankruptcy attorneys with its annual conventions and workshops. NACBA was formed to ensure that the voices of consumer

debtors and their attorneys are heard in the halls of Congress, the Judiciary and other arenas affecting consumer debtors.

The **National Consumer Bankruptcy Rights Center** (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. As predatory lending and abusive debt collection may lead to unnecessary consumer bankruptcy filings, these issues are also within the organization's purview. Consumer debtors with limited financial resources and minimal exposure to court systems are often ill-equipped to protect their rights in the appellate process. NCBRC files amicus curiae briefs in systemically-important cases to ensure that courts have a full understanding of the applicable law, the case, and its implications for consumer debtors.

New Yorkers for Responsible Lending (NYRL) is a statewide coalition of more than 180 groups, which promotes access to fair and affordable financial services and the preservation of assets for all New Yorkers and their communities. NYRL members include community-based organizations, financial institutions, labor unions, legal services organizations, and advocacy groups for affordable housing, community reinvestment, fair lending, and consumers.

The **Northwest Side Housing Center** (NWSHC) is a HUD-Certified, community-based, nonprofit organization that engages, educates and empowers the community. We accomplish our mission through housing counseling, financial education, community organizing, outreach, advocacy and supportive services.

The **Project on Predatory Student Lending** represents students against the predatory for-profit college industry and is part of the Legal Services Center of Harvard Law School and of Harvard University. The Project was formed in 2012 to combat the massive fraud that was being perpetrated against students and taxpayers by for-profit colleges, and government policies that

enable the predatory industry to continue to cheat borrowers and taxpayers. We represent thousands of former students across the country and litigate high-impact cases to protect borrower rights. We have cases against for-profit college companies, and against the Department of Education for enabling and supporting this predatory industry. Many of the Project's clients are people of color, veterans, and immigrants. Most are the first in their family to attend college. The Project's work supports its broader goals of economic justice and racial equality.

Student Debt Crisis is a non-profit (501c4) organization dedicated to fundamentally reforming student debt and higher education loan policies. Student Debt Crisis (SDC) takes a personal approach to member needs—working directly with borrowers to understand their challenges and fears, repayment obstacles and frustrations. SDC tackles the challenges of loan refinancing and consumer protection policies with media and legislators, as well as educating borrowers and higher education experts with lectures, webinars and special events.

The Institute for College Access & Success (TICAS) is a nonpartisan, nonprofit research and policy organization based in Oakland, CA. Our mission is to improve both educational opportunity and outcomes, nationally and in California, so that more students complete meaningful postsecondary credentials without burdensome debt.

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/s Persis Yu
Persis S. Yu

Counsel for Amici Curiae

Dated: July 2, 2018

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.

Dated: July 2, 2018

/s Tara Twomey
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