

No. 19-8005

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

COMMONWEALTH OF PENNSYLVANIA
By Attorney General Josh Shapiro,

Plaintiff-Appellee,

v.

NAVIENT CORPORATION; NAVIENT SOLUTIONS, LLC.

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
No. 3-17-cv-01814
Hon. Robert D. Mariani, U.S. District Judge

**BRIEF OF AMICUS CURIAE STUDENT BORROWER PROTECTION
CENTER, SENIORLAW CENTER, CENTER FOR RESPONSIBLE
LENDING, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER
LAW, AND COMMUNITY LEGAL SERVICES OF PHILADELPHIA
SUPPORT OF APPELLEE THE COMMONWEALTH OF
PENNSYLVANIA AND URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF AUTHORSHIP AND FUNDING

In accordance with Federal Rule of Appellate Procedure 26-1, Amici Curiae Student Borrower Protection Center, SeniorLAW Center, Center for Responsible Lending, New Jersey Citizen's Action, The Lawyers' Committee for Civil Rights Under Law, and Community Legal Services of Philadelphia, by and through their attorneys, disclose that each of them is a registered non-profit corporation and has no parent corporation, and that no publicly held corporation owns 10% or more of its stock. Each is authorized to file this amicus brief by its governing documents.

The Student Borrower Protection Center further discloses that it is funded through and affiliated with the Resources Legacy Fund, a tax-exempt 501(c)(3) organization, and that no publicly held corporation owns 10% or more of Resources Legacy Fund's stock.

Center for Responsible Lending further discloses that it is an affiliate of the Center for Community Self-Help, a non-profit community development financial institution (CDFI), whose other affiliates include two credit unions. No publicly held corporation owns 10% or more of the Center for Community Self-Help's stock.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici further state that (i) no party's counsel authored this brief in whole or in part, (ii) no party

or party's counsel contributed money intended to fund the preparation or submission of the brief, and (iii) no person other than amici curiae and its members and counsel contributed money intended to fund the preparation or submission of this brief.

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STATEMENT OF IDENTIFICATION AND INTEREST

Amici are non-profit organizations dedicated to protecting the interests of student loan borrowers, older people, minorities, and marginalized communities.

The Student Borrower Protection Center is a non-profit organization focused on alleviating the burden of student debt for Americans by engaging in advocacy and policymaking to protect borrowers' rights and advance economic opportunity for the next generation of students.

The SeniorLAW Center is a non-profit organization dedicated to seeking justice for older Pennsylvanians by using the power of the law, educating the community, and advocating on local, state and national levels. It provides legal advice, representation and advocacy for older clients and consumers, including those facing diverse student loan issues.

The Center for Responsible Lending 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.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization founded in 1963 at the request of President John F. Kennedy to vindicate the civil rights of African Americans and other racial and ethnic minorities. This charge includes combatting

racial discrimination which hinders educational opportunities and economic security for racial minorities and other disadvantaged populations.

New Jersey Citizen's Action is a statewide grassroots non-profit organization that fights for social, racial and economic justice, by combining on the ground organizing, legislative advocacy, and electoral campaigns.

Community Legal Services, Inc. is a non-profit organization which provides free legal assistance to low-income Philadelphians in civil matters. CLS attorneys represent consumers in a wide range of matters to maintain economic security, including direct client representation to address student loan problems.

SUMMARY OF THE ARGUMENT

Currently in the United States, approximately 43 million people owe over \$1.4 trillion on their student loans.¹ Americans owe more in student loan debt than for auto loans, credit cards, or any other non-mortgage debt.² Student loan servicers play a critical role in these borrowers' financial lives, from receiving and applying payments to interacting with struggling borrowers to facilitate repayment

¹ See U.S. DEP'T OF EDUC., FEDERAL STUDENT AID, DATA CENTER, FEDERAL STUDENT LOAN PORTFOLIO, available at <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>.

² Zack Friedman, *Student Loan Debt Statistics In 2019: A \$1.5 Trillion Crisis*, FORBES (Feb. 25, 2019), <https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/#47aae5ab133f>.

and prevent default.³ A competent servicer can assist financially distressed borrowers in accessing income-driven repayment (IDR”). Unfortunately, servicer misrepresentations can increase the cost of struggling borrowers’ loans and delay repayment. The consequences of servicers’ misconduct can be catastrophic for struggling borrowers’ financial and personal lives.⁴

The consequences of servicer misconduct fall disproportionately on members of vulnerable communities who are more likely to struggle with repayment, including older borrowers and borrowers of color. Older borrowers often face limited and declining income and less access to technology, which increases the likelihood that they are exposed to servicer misrepresentations. Unfortunately, older borrowers may also experience cognitive changes that increases the risk that they will be harmed by those misrepresentations.

Borrowers of color are also more likely than their white peers to experience servicer misrepresentation. First, historical practices preventing inter-generational wealth-building mean that borrowers of color graduate with more student loan debt than their white counterparts. Second, the over-representation of students of color

³ See 12 C.F.R. § 1090.106(a) (defining “student loan servicing”).

⁴ Research indicates people with insurmountable debt have elevated rates of neurosis, psychosis, alcohol dependence, and drug dependence. See generally Rachel Jenkins et al., *Debt, Income, and Mental Disorder in the General Population*, 38 PSYCHOL MED. 1485 (2008).

in the student bodies of predatory, for-profit schools and ongoing workplace discrimination mean that borrowers of color are more likely to struggle with repayment of those loans. Servicer misrepresentations increase the costs of those loans and erect another barrier to wealth building, perpetuating the cycle.

The enforcement of traditional state consumer protection laws is critical to redress harm done to borrowers impacted by unlawful servicer conduct. There is no evidence that Congress intended 20 U.S.C. § 1098g to preempt the state's traditional power to prohibit affirmative misrepresentations. This Court should therefore adopt a narrow reading of that statute, consistent with states' traditional responsibility to protect its constituents from unfair or deceptive business practices.

ARGUMENT

- I. Misrepresentations by Student Loan Servicers Inflict Financial Harm on Vulnerable Populations, Including Older Borrowers and Persons of Color.**
 - A. Older Student Loan Borrowers Comprise a Growing Segment of this Intergenerational Population, and May Face Financial and Cognitive Issues that Threaten Their Own Financial Security in Retirement.**

Student debt is no longer just a young persons' issue. As of December 2018, approximately 8.4 million Americans aged 50 and older owe \$289.5 billion in

student loans, approximately 20% of total student loan debt.⁵ This represents a 512% increase from the \$47.3 billion owed by that cohort in 2004, making the growth of student loan debt among older borrowers the greatest among any age group.⁶ A 2017 analysis by the Consumer Financial Protection Bureau reveals that from 2012 to 2017, total student loan debt for borrowers aged 60 and above increased by 72% in New Jersey, 107% in Pennsylvania, and 146% in Delaware.⁷

Many of the growing number of older borrowers face challenges that make them more reliant on their loan servicers for assistance and more vulnerable to misrepresentations by those servicers.

- 1. Older student loan borrowers face financial and access issues that make them more likely to be negatively impacted by servicer misrepresentations.**

Poverty is a serious problem for older Americans. An analysis of U.S. Census Bureau data found that “[m]ore than 15 million older adults had incomes below 200% of poverty” measured against the Census Bureau’s official poverty

⁵ Lori Trawinski et al., *The Student Loan Debt Threat: An Intergenerational Problem*, p. 4, AARP PUBLIC POLICY INSTITUTE (May 2019), available at <https://www.aarp.org/content/dam/aarp/ppi/2019/05/the-student-loan-debt-threat.doi.10.26419-2Fppi.00064.001.pdf>.

⁶ *Id.* at pp. 1, 4.

⁷ CONSUMER FINANCIAL PROTECTION BUREAU, OLDER CONSUMERS AND STUDENT LOAN DEBT BY STATE, Table 3 (August 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_older-consumers-and-student-loan-debt-by-state.pdf.

measure (representing 30% of that age cohort), a number that “increases to more than 21 million (42.0%)” when measured against the Census Bureau’s Supplemental Poverty Measure.⁸ Moreover, older Americans who live on low, fixed incomes face the additional challenge of few if any options to increase their income or reduce poverty while costs of housing, health care, and other basic human needs continue to rise.

Whether living in poverty or not, older adults face challenges balancing obligations, often within a fixed income. Increased student loan indebtedness adds to these challenges, forcing difficult choices. For example, the Consumer Financial Protection Bureau found that 39% of those 60 and older with a student loan skipped health or dental care, compared to 25% of those without a student loan.⁹ Unsurprisingly, being forced to choose between debt and basic needs pushes older adults into greater challenges.

The data show that record numbers of older student loan borrowers are struggling with repayment. Delinquency rates for student loan borrowers over 60

⁸ Juliette Cubanski et al., *How Many Seniors Live in Poverty*, p. 1, HENRY J. KAISER FAMILY FOUNDATION (Nov. 19, 2018), <https://www.kff.org/medicare/issue-brief/how-many-seniors-live-in-poverty/>.

⁹ CONSUMER FINANCIAL PROTECTION BUREAU, SNAPSHOT OF OLDER CONSUMERS AND STUDENT LOAN DEBT, p. 13 (January 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf

in the Third Circuit increased slightly from 2012 to 2017, but due to the growing number of older borrowers, the number of older borrowers in delinquency on their student loans has jumped by 93% in New Jersey and Pennsylvania, and 106% in Delaware, far above the 80% increase experienced by the nation as a whole.¹⁰

Older borrowers also have worse student loan outcomes when compared to younger cohorts. AARP reports that “[d]ata compiled by the Government Accountability Office (GAO) found that federal student loan borrower defaults increase with age.”¹¹ In 2015, approximately 29% of federal student loan borrowers between 50 and 64 were in default; for borrowers aged 65 and above, the default rate rose to 37%.¹² Conversely, default rates for those below 50 was 17%.¹³

Many older borrowers, particularly those with low income, also have less access to technology that could help them to find answers to their student loan questions. The Pew Research Center concluded that “internet and broadband

¹⁰ CONSUMER FINANCIAL PROTECTION BUREAU, OLDER CONSUMERS AND STUDENT LOAN DEBT BY STATE, Tables 4 and 5 (August 2017), https://files.consumerfinance.gov/f/documents/201708_cfpb_older-consumers-and-student-loan-debt-by-state.pdf.

¹¹ Lori Trawinski et al., *The Student Loan Debt Threat: An Intergenerational Problem*, p. 5, AARP PUBLIC POLICY INSTITUTE (May 2019), <https://www.aarp.org/content/dam/aarp/ppi/2019/05/the-student-loan-debt-threat.doi.10.26419-2Fppi.00064.001.pdf>.

¹² *Id.*

¹³ *Id.*

adoption among older adults varies substantially across a number of demographic factors – most notably age, household income and educational attainment.”¹⁴ For example, only half of older people with household income between \$30,000 and \$50,000 per year, and only 27% of those with annual household income below \$30,000, have home broadband.¹⁵ As a result, the older borrowers most in need of accurate information about managing their student loans are least able to access it on the Department of Education’s website,¹⁶ nonprofit resources,¹⁷ or through technology hosted by their servicers.

Older borrowers’ financial struggles and relative lack of access to technology mean that they may require more direct telephonic interaction with loan servicers to manage their student loan debt. Unfortunately, this is the primary medium in which the alleged misrepresentations are made. To compound the problem, older borrowers face additional challenges that leave them more susceptible to servicer misrepresentations, and illustrate the importance of a state law remedy.

¹⁴ Monica Anderson and Andrew Perrin, Tech Adoption Climbs Among Older Adults, PEW RESEARCH CENTER (May 17, 2017), <https://www.pewinternet.org/2017/05/17/technology-use-among-seniors/>.

¹⁵ *Id.*

¹⁶ *E.g.*, <https://studentaid.ed.gov/sa/repay-loans>.

¹⁷ *E.g.*, <https://www.studentloanborrowerassistance.org/resources/>.

2. Older people – even those who are not in decline – experience natural cognitive changes that may impair financial decision-making.

Because even otherwise functional older adults experience declines in cognitive functions affecting financial decision-making and the ability to spot misrepresentations, older student loan borrowers are particularly vulnerable to being misled over the telephone.

Normal aging processes lead to predictable age-related changes in cognitive ability that can affect the ability to make financial decisions, and to distinguish sound advice from misrepresentations, particularly with unfamiliar subjects like student loan repayment plans. One study found that

On average, starting in an individual's 30s or 40s, reaction speed starts to slow, working memory starts to deteriorate, and other components of fluid intelligence begin to weaken, with noticeable declines in fluid intelligence widespread by the time people are in their 50s and 60s...With respect to [everyday] tasks, older adults have a harder time reading or hearing when confronted with distractions, are more prone to making errors when asked to perform under time pressure, and are less able to acquire and transfer new information.¹⁸

Fluid intelligence incorporates memory, attention and information processing. Research has found that normally aging individuals are more likely to

¹⁸ See Anek Belbase and Geoffrey T. Sanzenbacher, *Cognitive Aging: A Primer*, p. 3, CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE (Nov. 2016), https://crr.bc.edu/wp-content/uploads/2016/10/IB_16-17.pdf.

develop deficits in the area of financial judgment than in their ability to carry out basic tasks.¹⁹ For borrowers experiencing difficulty in repaying their student loans, phone conversations with a servicer are commonly stressful and involve the discussion of new information related to the suitability of loan repayment options. This can make older student loan borrowers more vulnerable to misrepresentations and steering.

3. The impact of servicer misrepresentations on older persons can be devastating.

Older borrowers often face both decreased income and increased health care costs. The median retirement account balance among working Americans is \$0.00, and 57% do not own any retirement account assets in a 401(k) plan or individual retirement account.²⁰ For those nearing retirement, 68% of individuals 55 to 64 have retirement savings of less than their annual income.²¹ Where student loan servicers' misrepresentations increase the cost of loans, result in unnecessary

¹⁹ *Id.* at pp. 1.

²⁰ Diane Oakley et al., *Retirement in America – Out of Reach for Most Americans?*, pp. 10, 18, NATIONAL INSTITUTE ON RETIREMENT SECURITY (Sept. 2018), https://www.nirsonline.org/wp-content/uploads/2018/09/SavingsCrisis_Final.pdf.

²¹ *Id.* at p. 11.

payments, or lead to default, older borrowers in financial difficulty may be pushed into more severe financial straits or even bankruptcy.²²

The federal government's extraordinary collection powers applicable to those in student loan default can be particularly devastating for low-income older borrowers who are most likely to default. The Treasury Offset Program allows the Treasury to offset a defaulted borrower's income tax refund, and even a portion of his or her Social Security retirement or disability benefits.²³ For those older borrowers still working, the Department of Education can require an employer to garnish a portion of the borrower's wages.²⁴ As demonstrated above, older borrowers are more likely to default than other cohorts. Data also shows that older defaulted borrowers were more likely to be subject to a federal offset: 5% of borrowers ages 65+ in default were subject to offsets, as were 3% of those ages 50-

²² This Court's ruling on preemption will affect claims arising from a wide variety of student loan servicer misrepresentations that will adversely affect student loan borrowers in ways that are both immediate—for example, misrepresentations that result in a failure to receive forgiveness under the Public Service Loan Forgiveness program—and over the life of the loan.

²³ See 31 U.S.C. § 3716(c)(3)(A)(i); *Lockhart v. United States*, 546 U.S. 142, 145-47 (2005) (discussing Social Security offset for defaulted federal student loan). The Department of Education's website explains the Treasury Offset Program's application to defaulted student loans. See <https://studentaid.ed.gov/sa/repay-loans/default/collections#treasury-offset> (last accessed August 27, 2019).

²⁴ 20 U.S.C. § 1095a.

64, compared with only 2% of defaulted borrowers under age 50.²⁵ The GAO identified critical problems with the Treasury Offset Program’s application to older borrowers in a report diplomatically entitled “Social Security Offsets, Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief.”²⁶

The GAO found that the Treasury Offset Program reduces many older borrowers’ Social Security retirement or disability benefits below the federal poverty guideline. Federal law protects only \$9,000 each year in Social Security benefits from offset, a figure that has not been updated for 23 years.²⁷ The protection of Social Security benefits at rates below the federal poverty level is particularly devastating because 69% of Social Security beneficiaries report that those benefits are the only guaranteed source of monthly income.²⁸ The GAO

²⁵ Lori Trawinski et al., *The Student Loan Debt Threat: An Intergenerational Problem*, p. 5, AARP PUBLIC POLICY INSTITUTE (May 2019), <https://www.aarp.org/content/dam/aarp/ppi/2019/05/the-student-loan-debt-threat.doi.10.26419-2Fppi.00064.001.pdf>.

²⁶ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SOCIAL SECURITY OFFSETS, IMPROVEMENTS TO PROGRAM DESIGN COULD BETTER ASSIST OLDER STUDENT LOAN BORROWERS WITH OBTAINING PERMITTED RELIEF, GAO-17-45 (Dec. 2016), <https://www.gao.gov/assets/690/681722.pdf>.

²⁷ See 31 U.S.C. § 3716(c)(3)(A)(ii).

²⁸ CONSUMER FINANCIAL PROTECTION BUREAU, OFFICE FOR OLDER AMERICANS, ISSUE BRIEF: SOCIAL SECURITY CLAIMING AGE AND RETIREMENT SECURITY, p. 7 (Nov. 2015), https://files.consumerfinance.gov/f/documents/201604_cfpb_issue-brief-social-security-claiming-age-and-retirement-security.pdf.

concluded that in 2015 alone more than 70,000 seniors were pushed into or pushed further into poverty due to Social Security offsets from defaulted student debt.²⁹

Older borrowers, their families and communities therefore have a strong interest in holding servicers accountable for their misrepresentations. A broad ruling in this case preempting misrepresentations would simply shift the costs of those misrepresentations onto older Pennsylvanians, their families, and the governmental and non-profit service providers who must step in to support them. There is no evidence that Congress intended such a result, and this Court should not endorse it.

B. Borrowers of Color Are More Likely Than Their White Peers to Be Subjected to and Injured by Servicer Misrepresentations.

1. Historic and systemic racial disparities mean that students of color are more likely to experience difficulty repaying their student loans.

Students of color face additional barriers in repaying student loan debt due to structural inequities in family wealth, education, and employment. Holding

²⁹ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SOCIAL SECURITY OFFSETS, IMPROVEMENTS TO PROGRAM DESIGN COULD BETTER ASSIST OLDER STUDENT LOAN BORROWERS WITH OBTAINING PERMITTED RELIEF, GAO-17-45, p. 2 (Dec. 2016), <https://www.gao.gov/assets/690/681722.pdf>.

servicers accountable for misrepresentations to borrowers is critical for addressing racial disparities in student loan and other economic outcomes.

First, Black students are forced to take on more student loan debt than their white peers. For generations, government-sanctioned policies like redlining, restrictive covenants, lending discrimination, and encouraging neighborhood segregation kept African-American families from accumulating wealth.³⁰ With less familial wealth, Black students are more likely than other racial groups to borrow—and to borrow more—for their education.³¹ A 2016 analysis found that Black students on average graduated with about \$7,400 more student loan debt than their white peers.³² Disparities in income alone do not explain the gap,³³ and these disparities only widen after graduation.³⁴

³⁰ See, e.g., Amy Traub et al., *The Asset Value of Whiteness: Understanding the Racial Wealth Gap*, DEMOS (2017), <http://www.demos.org/publication/asset-value-whiteness-understanding-racial-wealth-gap>; Katie Nodjimbadem, *The Racial Segregation of American Cities Was Anything But Accidental*, SMITHSONIAN (2017), <https://www.smithsonianmag.com/history/how-federal-government-intentionally-racially-segregated-american-cities-180963494/>.

³¹ Mark Huelsman, *The Debt Divide: The Racial and Class Bias Behind the “New Normal” of Student Borrowing*, DEMOS (2015), <https://www.demos.org/publication/debt-divide-racial-and-class-bias-behind-new-normal-student-borrowing>.

³² Judith Scott-Clayton and Jing Li, *Black-white disparity in student loan debt more than triples after graduation*, p. 3, THE BROOKINGS INSTITUTE (Oct. 2016), https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence_speaks.pdf.

Second, students of color are more likely to attend for-profit schools that leave all students ill-equipped for the job market. Black and Latino students are overrepresented in high-cost, low-quality for-profit institutions, which impose greater amounts of debt while failing to provide increased employment prospects and earning power through which to pay it off.³⁵

Third, systemic discrimination in the labor market represents another barrier to repayment.³⁶ The Bureau of Labor Statistics finds that once in the workforce, graduates of color have lower wages than their white peers, even when controlling

³³ Michal Grinstein-Weiss et al., *Racial disparities in education debt burden among low- and moderate-income households*, 65 CHILDREN AND YOUTH SERVICES REVIEW Vol. 166 (June 2016).

³⁴ Judith Scott-Clayton and Jing Li, *Black-white disparity in student loan debt more than triples after graduation*, p. 3, THE BROOKINGS INSTITUTE (Oct. 2016), https://www.brookings.edu/wp-content/uploads/2016/10/es_20161020_scott-clayton_evidence_speaks.pdf.

³⁵ Leadership Conference on Civil & Human Rights, *Gainful Employment: A Civil Rights Perspective*, p. 2, CENTER FOR RESPONSIBLE LENDING (Nov. 2014), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/2014-Gainful-Employment-A-Civil-Rights-Perspective-Oct.pdf>; 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 (Oct. 2014), <http://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf>.

³⁶ See, e.g., Lincoln Quillian, et al., *Meta-analysis of field experiments shows no change in racial discrimination in hiring over time*, 114(41) PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 10870 (Oct. 2017), <https://www.pnas.org/content/pnas/early/2017/09/11/1706255114.full.pdf>.

for education level.³⁷ Because of the persistent income gap, African Americans are more likely to earn less money after college with which to repay their (higher) student loans. A study by the American Association of University Women concluded that “[g]ender and race gaps in pay can explain much of the differences in how quickly college graduates can repay their student loans.”³⁸

Against these headwinds, students of color are more likely to experience financial distress on their student loans than their white counterparts,³⁹ with Black and Latino borrowers reporting higher rates of late payments compared to white borrowers.⁴⁰ One study found that “[f]our years after graduation 57 percent of Black women college graduates paying off their student loans were unable to meet all of their essential expenses at some point in the past year.”⁴¹ Older borrowers of

³⁷ BUREAU OF LABOR STATISTICS, MEDIAN WEEKLY EARNINGS BY EDUCATIONAL ATTAINMENT IN 2014 (Jan. 2015), <https://www.bls.gov/opub/ted/2015/median-weekly-earnings-by-education-gender-race-and-ethnicity-in-2014.htm>.

³⁸ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, DEEPER IN DEBT, p. 28 (2017), <https://www.aauw.org/resource/deeper-in-debt/>.

³⁹ See Marshall Steinbaum and Kavya Vaghul, *How the student debt crisis affects African Americans and Latinos*, WASHINGTON CENTER FOR EQUITABLE GROWTH (Feb. 17, 2016), <http://equitablegrowth.org/how-the-student-debt-crisis-affects-african-americans-and-latinos/>.

⁴⁰ FINANCIAL INDUSTRY REGULATORY AUTHORITY, FINANCIAL CAPABILITY IN THE UNITED STATES 2016, p. 24 (2016), http://www.usfinancialcapability.org/downloads/NFCS_2015_Report_Natl_Findings.pdf.

⁴¹ AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, DEEPER IN DEBT, p. 30 (2017), <https://www.aauw.org/resource/deeper-in-debt/>.

color also experience significantly more distress than their white counterparts. AARP found that “[a]mong people ages 50 and older, there were significant differences by race. African Americans/Blacks and Hispanics were significantly more likely to exhibit signs of distress (46 and 49 percent, respectively) than Whites (29 percent).”⁴²

These month-by-month struggles accumulate to increase the disparity in outcomes for students of color and their white counterparts. A 2016 analysis found that the Black-White student debt gap more than tripled from \$7,400 to \$25,000 in just four years after graduation.⁴³ Indeed, 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, while the typical white borrower owed around 65% of their original loan balance.⁴⁴ The Urban Institute also found that borrowers

⁴² Lori Trawinski et al., *The Student Loan Debt Threat: An Intergenerational Problem*, p. 8, AARP PUBLIC POLICY INSTITUTE (May 2019), <https://www.aarp.org/content/dam/aarp/ppi/2019/05/the-student-loan-debt-threat.doi.10.26419-2Fppi.00064.001.pdf>.

⁴³ Judith Scott-Clayton and Jing Li, *Black-white disparity in student loan debt more than triples after graduation*, p. 3, THE BROOKINGS INSTITUTE (Oct. 2016), <https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/>.

⁴⁴ Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CENTER FOR AMERICAN PROGRESS (Oct. 16, 2017), <https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/>.

of color defaulted on their student loans at significantly higher rates than their white counterparts. In Pennsylvania, 10% of white borrowers had student loan debt in collections, compared with 25% of non-white borrowers.⁴⁵ In New Jersey, it is 7% of white borrowers and 17% of nonwhite borrowers.⁴⁶ In Delaware, it is 12% and 20%.⁴⁷ The results are devastating:

These racial disparities in default rates extend 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. When combined with the government's collection practices described above, servicer misconduct systematically strips wealth from families and communities which are already economically disadvantaged and disproportionately of color.⁴⁸

The systemic barriers to repayment mean that students of color are more likely than their white peers to be exposed to servicer misrepresentations about forbearance and IDR. Servicers' misrepresentations add to the cost of minority

⁴⁵ THE URBAN INSTITUTE, DEBT IN AMERICA: AN INTERACTIVE MAP (2018), https://apps.urban.org/features/debt-interactive-map/?type=student&variable=perc_stud_debt.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Marshall Steinbaum and Kavya Vaghul, *How the student debt crisis affects African Americans and Latinos*, WASHINGTON CENTER FOR EQUITABLE GROWTH (Feb. 17, 2016), <http://equitablegrowth.org/how-the-student-debt-crisis-affects-african-americans-and-latinos/>.

borrowers' loans, perpetuating and even widening these unjust socioeconomic disparities.

2. Servicer misrepresentations impose additional costs on students of color and reinforce systemic inequality.

Servicer misrepresentations like those described in the Commonwealth's Complaint contribute to the disparate student loan outcomes described above. One analysis found that the highest proportion of Black families report "not making payments" on student loans because they are in forbearance, unable to afford payments, or in another loan forgiveness program.⁴⁹ Most borrowers in this position are eligible for IDR plans, which would help them avoid both default and the increased costs imposed by forbearance.

Misrepresentations that steer borrowers into forbearance as the Commonwealth alleges can significantly increase the amount a borrower pays over the life of the loan. Borrowers accrue mounting interest during forbearances on unsubsidized loans, which is then capitalized into the borrower's principal at the end of each forbearance. The loan's principal balance thereby increases and the

⁴⁹ Kristin Blagg, *The demographics of income-driven student loan repayment*, URBAN WIRE (Feb. 2018); <https://www.urban.org/urban-wire/demographics-income-driven-student-loan-repayment>.

borrower must then pay interest *on that interest* until the loan is paid off. These costs can be staggering.

The Government Accountability Office (GAO) 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 the 10-year standard repayment plan who did not spend any time in forbearance.⁵⁰ The GAO explained that servicers' encouragement of forbearance over other better options like IDR places borrowers at risk of incurring additional costs without any long-term benefits.⁵¹

The increased costs imposed by the forbearance steering practices alleged by the Commonwealth in turn exacerbate and perpetuate the same systemic inequalities described above for generations to come. For example, student loan borrowers regularly report delaying financial milestones like purchasing a home.⁵²

⁵⁰ U.S. Gen. Accounting Office, *Federal Student Loans: Actions Needed to Improve Oversight of Schools' Default Rates*, GAO-18-163, p. 19 (April 2018), <https://www.gao.gov/assets/700/691520.pdf>.

⁵¹ U.S. Gen. Accounting Office, *Federal Student Loans: Education Could Improve Direct Loan Program Customer Service and Oversight*, GAO-16-523, p. 20 (May 2016), <https://www.gao.gov/assets/680/677159.pdf>.

⁵² *E.g.*, Kelley Anne Smith, *Survey: Student loan debt delays major financial milestones for millions*, BANKRATE (Feb. 27, 2019), <https://www.bankrate.com/loans/student-loans/student-loans-survey-february-2019/>; Annie Nova, *Why buying a home can be almost impossible with massive student loan debt*, CNBC (April 19, 2018), <https://www.cnbc.com/2018/04/19/student-loan-debt-can-make-buying-a-home-almost-impossible.html>.

One analysis found that borrowers enrolled in IDR paid off more per month, on average, than borrowers on standard repayment plans, had higher credit scores, and were more likely to hold a mortgage, “suggesting a positive effect of IDR on homeownership.”⁵³ Where home ownership is delayed because servicer misrepresentations increase borrowing costs and delay loan payoff, borrowers of color experience yet another obstacle to building generational wealth. The same dynamic plays out when delayed student loan payoff caused by servicer misrepresentations delays or diminishes borrowers’ opportunity to pay for their children’s educations. In a recent AARP survey,

[M]illennials and generation Xers also said their student loan debt has prevented or delayed their ability to save for their children’s education. This inability to save increases the likelihood they will need to borrow when the time comes for their children to attend college, thus perpetuating the intergenerational student loan debt cycle.⁵⁴

Borrowers of color and their communities therefore have a heightened interest in preserving their rights under state consumer protection laws to combat

⁵³ Herbst, Daniel J., *Liquidity and Insurance in Student Loan Contracts: Estimating the Effects of Income-Driven Repayment on Default and Consumption*, pp. 4-5 (Working Paper, March 12, 2019), https://drive.google.com/file/d/1A-gq_LIqffY6r2gDTcUK9-Y3ZV8Go6SU/view.

⁵⁴ Lori Trawinski et al., *The Student Loan Debt Threat: An Intergenerational Problem*, p. 2, AARP PUBLIC POLICY INSTITUTE (May 2019), p. 2, <https://www.aarp.org/content/dam/aarp/ppi/2019/05/the-student-loan-debt-threat.doi.10.26419-2Fppi.00064.001.pdf>.

unfair and deceptive practices by student loan servicers. Beyond the harm to individual borrowers, insulating servicers from such state law claims exacerbates racial economic gaps and hinders minorities' ability to obtain wealth and security.

II. 20 U.S.C. § 1098g Cannot Preempt Causes of Action Arising from Servicers' Affirmative Misrepresentations.

Congress drafted 20 U.S.C. § 1098g narrowly, to apply only to state “disclosure” requirements—i.e., state laws that would impose a duty to reveal specific information where such a duty would not otherwise exist. The District Court properly rejected Navient’s attempt to expand § 1098g’s limited preemption of “state disclosure requirements” to reach virtually all misrepresentations made to student loan borrowers.

A. A Servicer’s misrepresentations and false promises concerning its own actions are not preempted under § 1098g.

The Commonwealth alleges that Navient deceived borrowers about its own conduct by representing that it would help borrowers “by identifying options and solutions” and “find an option that fits your budget, simplifies payment, and minimizes your total interest cost.” [Appx. at p. 130, ¶ 108.] Section 1098g cannot preempt state law claims arising from these misrepresentations for two reasons. First, § 1098g, applies only to “*Loans* made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965.” (Emphasis added.) This statutory language is limited to disclosures about the loans

themselves; it cannot be stretched to cover misrepresentations about Navient's actions. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (“[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.”) (internal quotation marks omitted).

Second, where a company voluntarily undertakes a duty, liability for the breach of that duty is not preempted, even if the plaintiff asserts a state law cause of action. In *Cipollone v. Liggett Grp., Inc.*, the plaintiff asserted a breach of express warranty claim against a cigarette manufacturer under a New Jersey statute that provided that where a seller of goods affirms a fact or makes a promise, it “creates an express warranty that the goods shall conform to the affirmation or promise.” 505 U.S. 504, 525 (1992). Liability under this statute did not fall within an express preemption clause covering any “requirement or prohibition based on smoking and health ... imposed under State law....” It reasoned that

While the general duty not to breach warranties arises under state law, the particular “requirement ... based on smoking and health ... with respect to the advertising or promotion [of] cigarettes” in an express warranty claim arises from the manufacturer's statements in its advertisements. In short, a common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a “requirement ... *imposed under State law*” within the meaning of [the express preemption clause].

Id. at 526 (emphasis in original). *See also College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir.2005) (where parties' contract incorporated Higher

Education Act standards, breach of contract action based on violation of federal standards was not preempted).

Just as the statute at issue in *Cipollone* preempted only “requirement[s] or prohibition[s] ... imposed under state law,” § 1098g only reaches “disclosure requirements of any State law.” Navient’s promises to borrowers—whether made on its website or during telephone conversations—created an obligation to act in conformity with its representations, not a “disclosure requirement” under Pennsylvania law. Navient cannot shoehorn its broken promises into §1098g by arguing that it represented only that it would make disclosures required by federal law. [App. Br. at 39-40.] This argument ignores the statutory language, the lessons of *Cipollone* and *College Loan Corp.*, and the fact that no federal law required Navient to make, much less break, promises to borrowers.

B. The Commonwealth’s claims arising from Navient’s affirmative misrepresentations cannot be re-cast as preempted “improper disclosure” claims.

The Ninth Circuit’s decision in *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010), does not support Navient’s attempt to expand § 1098g’s preemption of state “disclosure requirements” to shield it from liability for affirmative misrepresentations. There, the Ninth Circuit applied § 1098g to bar state misrepresentation claims arising from Sallie Mae’s billing statements. 593 U.S. § 942. The *Chae* court reasoned that “[a] properly-disclosed FFELP practice cannot

simultaneously be misleading under state law,” and because the billing statements’ contents were dictated by the Department of Education’s regulations the plaintiff’s claims that they were misrepresentations “are restyled improper-disclosure claims, and are therefore subject to express preemption.” *Id.* at 943. *Chae*’s discussion of *Cipollone* is incomplete and misleading, and neither case supports dismissal of the Commonwealth’s claims.

1. *Chae* and *Cipollone* do not support conversion of the Commonwealth’s misrepresentation claims into preempted “improper disclosure” claims.

In *Cipollone*, the Supreme Court addressed preemption under the Public Health Cigarette Smoking Act of 1969 (the “1969 Act”). That statute mandated specific warnings for packaging and advertisements, and included the following preemption provision: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of” cigarettes. *See Cipollone*, 505 U.S. at 515 (quoting 15 U.S.C. § 1334(b)). The plaintiff asserted two misrepresentation theories.

First, *Cipollone* alleged that Liggett’s advertising “neutralized the effect of federally mandated warning labels.” *Id.* at 527. This “neutralization” theory was based on a state law prohibition on statements minimizing the dangers of smoking. *Id.* The *Cipollone* plurality reasoned that it was preempted:

Such a *prohibition*, however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional

materials. Section 5(b) of the 1969 Act pre-empts both requirements and prohibitions; it therefore supersedes petitioner's first fraudulent-misrepresentation theory.

Id. (emphasis in original).

The *Chae* court latched onto this holding to conclude that certain of the student loan plaintiffs' misrepresentations claims were merely "restyled improper disclosure" claims and therefore preempted by § 1098g. 593 F.3d at 943. But *Chae* failed to address, much less explain, why adopting *Cipollone*'s "restyling" of misrepresentation claims was appropriate in light of differences in preemption clauses that each case interpreted. In *Cipollone*, the clause preempted state laws regardless of whether they constituted a "requirement or prohibition." 15 U.S.C. § 1334(b). There was no need for the *Cipollone* plurality to "restyle" or "recharacterize" the plaintiff's misrepresentation claim as a "requirement" because it was preempted either way.

The *Cipollone* plurality's dictum should not be read, as *Chae* uncritically did, as license to broaden § 1098g, which applies only to state law disclosure "requirements." Just the opposite is true: the 1969 Act shows that Congress knew how to craft broader preemption clauses, and this Court should decline to rewrite § 1098g to broadly reach traditional state consumer protection "prohibitions" on misrepresentations where Congress chose not to do so. In any event, the

Commonwealth's misrepresentation claims are not the type of "disclosure neutralization" that justified recharacterization in *Cipollone*.

Second, *Cipollone* advanced a fraud claim based on affirmative misrepresentations and the concealment of material facts relating to "light" cigarettes, *Cipollone*, 505 U.S. at 528, that is far more analogous to the Commonwealth's claims. The *Cipollone* plurality did not re-characterize this claim, and refused to find preemption because it were predicated "on a more general obligation the duty not to deceive." *Id.* at 528-29. In *Altria*, 555 U.S. at 79-82, the majority reaffirmed that state-law misrepresentation claims based on affirmative representations were not preempted.

Even if *Chae*'s unexamined adoption of the *Cipollone* plurality's dictum was appropriate in some limited circumstances, the Commonwealth's claims are not among them. At most, *Chae* supports the preemption of misrepresentation claims as "restyled improper disclosure" claims where state law would prohibit servicers from making statements required by federal regulations. *Chae*, 593 F.3d at 942-43. Indeed, the *Chae* court declined to recharacterize misrepresentation claims outside the servicer's billing statements, and the Commonwealth's misrepresentation claims do not seek to interfere with "[a] properly-disclosed FFELP [or Direct Loan] practice." *Id.* at 943. The Court should decline Navient's invitation to expand § 1098g's scope beyond Congress's narrow intent.

2. Claims based on servicer misrepresentations about the availability and advisability of IDR are not preempted.

The Commonwealth alleges an over-arching scheme to steer borrowers into forbearances rather than IDR. As the Commonwealth explains, Navient sometimes did so by representing that forbearance was the borrower's only option. [See Appx at p. 135, ¶ 126; p. 137, ¶ 130.] For federal student loan borrowers, this statement is false because it states that other options do not exist or are inapplicable to the borrower, when in fact IDR plans are available. This misrepresentation therefore goes beyond a mere failure to disclose IDR, and the Commonwealth's claim cannot be recharacterized as one for "improper disclosure" even under the logic of *Chae*. The District Court's order should be affirmed on this basis.

Navient's alleged forbearance steering practices necessarily involved interactions between numerous employees and borrowers, and will therefore likely involve variations of the specific misrepresentations detailed in the Commonwealth's "consumer examples." Some of these variations may involve deceptive statements that are less direct, but which are nevertheless not preempted. In affirming the District Court's order, this Court should clarify that claims arising

from misrepresentations that omit material information are not preempted by § 1098g.⁵⁵

It is well-established that “[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.” Restatement (Second) of Torts, § 529 (1977). This fundamental principle follows from the observation that “[a] statement containing a half-truth may be as misleading as a statement wholly false.” *Id.* at comment *a*. States within the Third Circuit embrace this principle.⁵⁶ Misrepresentations of this type are not amenable to the type of re-characterization that resulted in preemption in *Chae*.

The Third Circuit distinguishes between (a) a duty to disclose (which is not at issue here),⁵⁷ and (b) the type of affirmative misrepresentation described in Restatement (Second) of Torts, § 529. In *United States v. Ferriero*, the court recognized that a “fiduciary or other duty” is necessary “to impose liability for

⁵⁵ At a minimum, should the Court determine that it need not reach effect of § 1098g on misrepresentation claims based on statements that are deceptive because they omit material information, it should take care not to inadvertently suggest that such claims are preempted.

⁵⁶ *E.g.*, *Grunstein v. Silva*, CIV.A. 3932-VCN, 2014 WL 4473641, at *37 (Del. Ch. Sept. 5, 2014), *aff'd*, 113 A.3d 1080 (Del. 2015).

⁵⁷ The Restatement (Second) of Torts, § 551 (1977) labels this “Liability for Nondisclosure.” Whether § 1098g preempts a state law claim based on a breach of this duty is not before this Court.

non-disclosure ... where defendants made no actual representation and instead faced potential liability for simply staying silent.” 866 F.3d 107, 121 (3d Cir. 2017). Conversely where “there was an actual misrepresentation,” a defendant faces liability where “in context, [it] was materially false and fraudulent.” *Id.* at 122.

Navient’s statement that a borrower’s only option is forbearance is a straightforward misrepresentation. [See Appx at p. 135, ¶ 126; p. 137, ¶ 130.] Applying Restatement (Second) of Torts, § 529, an affirmative representation that a borrower’s options are “forbearance or deferment” – even absent the word “only” – is deceptive not because it fails to disclose IDR, but because it implicitly misrepresents that either (a) IDR does not exist, or (b) the borrower does not qualify for IDR. The effect of each misrepresentation, whether explicit or by omission, is the same: the borrower is led to believe that IDR is not available and is steered into a disadvantageous forbearance. This deception is particularly acute where Navient promised to identify the borrower’s options and assist in choosing the best one. [Appx at p. 130, ¶ 108.]

Section 1098g does not preempt state law claims based on affirmative representations that are misleading because they omit material information. The law imposes liability on the affirmative misrepresentation that the defendant actually chooses to make. Like the non-preempted express warranty claim in

Cipollone, liability for a misleadingly incomplete representation does not arise from a disclosure requirement imposed by state law, but from a duty undertaken by the servicer when it chooses to speak. *See* 505 U.S. at 526. That a party could have avoided liability by choosing instead to make a complete, non-deceptive statement cannot transmogrify liability for its misrepresentation into a preempted “disclosure requirement.” Indeed, a party may *always* avoid a misrepresentation by choosing to make a non-deceptive statement. Re-casting such claims as preempted “improper disclosure” claims is contrary to the structure of the underlying state law and would stretch § 1098g far beyond Congress’s intent.

CONCLUSION

A broad preemption ruling in this case would deprive injured borrowers of any legal remedy for servicer misrepresentations, shifting the consequences onto borrowers to repay their student loans struggling despite their best efforts. Older borrowers, whose financial circumstances and cognitive changes make them more susceptible to servicer misrepresentations, may lose part of the Social Security benefits they worked for decades to earn. Even worse, misrepresentations to borrowers of color have the capacity not just to harm the borrowers themselves, but to perpetuate and increase the very systemic barriers to socioeconomic advancement that higher education is supposed to break down. Congress did not intend for § 1098g to deprive borrowers of their only remedy for such misconduct.

Amici therefore respectfully request that this Court affirm the district court's ruling that the Higher Education Act does not preempt the Commonwealth's claims.

Date: August 29, 2019

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CERTIFICATE OF COUNSEL

I, Benjamin J. Roesch, hereby certify as follows:

1. I am a member of the bar of this Court.
2. The text of the electronic version of this brief is identical to the text of the paper copies.
3. A virus detection program was run on the file and no virus was detected.
4. This brief contains _____ words in compliance with Fed. R. App. Proc. 29(a)(5). In making this certificate, I have relied on the word count of Microsoft Word, the word-processing system used to prepare the brief.

Date: August 29, 2019

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ALL INFORMATION REQUIRED

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2019, I electronically filed the foregoing Motion for Leave to File Amicus Curiae Brief in Support of Appellee with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I also caused seven copies of the foregoing brief to be served by Federal Express to the Clerk of the Court for the United States Court of Appeals for the Third Circuit.

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