No. 18-14490

United States Court of Appeals

for the

Eleventh Circuit

AMANDA LAWSON-ROSS, TRISTIAN BYRNE,

Plaintiffs-Appellants,

– v. –

GREAT LAKES HIGHER EDUCATION CORP.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA IN CASE NO. 1:17-CV-00253-MW-GRJ

BRIEF FOR *AMICUS CURIAE* AMERICAN FEDERATION OF TEACHERS IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and related Eleventh Circuit Local Rules, the undersigned hereby certifies that, in addition to the Certificate of Interested Persons and Corporate Disclosure Statements submitted by Plaintiffs-Appellants, the following persons or entities have an interest in the outcome of this case:

I. Interested Persons

Allison, Ryan, *Attorney for Amicus Curiae*

American Federation of Teachers, *Amicus Curiae*

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II. Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus curiae* certify that no parent corporation or publicly held corporation owns 10% or more of the stock of *amicus curiae*.

/s/ Yelena Konanova
Attorney for *Amicus Curiae*

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS[1]

This brief is submitted by the American Federation of Teachers ("AFT"), as *amicus curiae* in support of Plaintiffs-Appellants Amanda Lawson-Ross and Tristian Byrne ("Plaintiffs"). AFT urges reversal of the district court's decision granting Defendant-Appellee Great Lakes Higher Education Corp.'s ("Great Lakes") motion to dismiss Plaintiffs' state law claims on the basis of preemption by Title IV of the Higher Education Act ("HEA"), 20 U.S.C. § 1098g.

AFT, an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.7 million public employees—including teachers and other school and college support staff; nurses and other healthcare professionals; and correction, parole and other security officers—in more than 3,500 local affiliates nationwide. These individuals, like other public employees, including firefighters, police officers, and district attorneys, dedicate their lives to much needed public service. These public employees often have accrued substantial amounts of student loan debt for higher education required for their professions. These are the very individuals to whom Congress promised forgiveness of federal student loan debt after a decade of payments.

Yet, despite specific statutory promises, AFT's members have reported countless stories of personal and financial ruin after student loan servicers made

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amicus curiae* certify that no party or any counsel for a party in this appeal authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. Counsel for *amicus* further certify that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

affirmative misrepresentations about repayment options and the availability of loan forgiveness. Recognizing how deeply this issue affects its members, AFT has taken the lead on supporting public employees who have been victimized by unscrupulous student loan servicers, including Great Lakes. Among other assistance, AFT offers debt clinics to help guide its members through the student loan debt process. In those debt clinics, many public employees realize for the first time they have been misled about available payment plan options and the promise of federal loan forgiveness. In addition to expending substantial time and resources to support its members through challenging financial circumstances, AFT conducts public policy research and advocates for public employees in the press and through legal and legislative action. AFT has also launched policy initiatives designed to reduce student debt burden and fight exploitative borrowing practices. Despite its best efforts to protect its members and other public employees, surveys of federal student loan borrowers conducted by AFT have revealed that loan servicer misconduct has subjected, and continues to subject, many borrowers to severe financial and emotional harm.

AFT is dedicated to helping public employees obtain relief from the harm caused by loan servicer deception. Stripping States of the power to police loan servicer misconduct, as the district court did in this case, would subject millions of public employees to the abusive practices of loan servicers and leave borrowers without judicial recourse. AFT therefore has a strong interest in the outcome of this appeal and in preserving the traditional role of States in consumer protection.

STATEMENT OF THE ISSUE

Did the district court err when it held that Plaintiffs' state law claims arising from Great Lakes' affirmative misrepresentations were expressly preempted by 20 U.S.C. § 1098g, which preempts only state law "disclosure requirements"?

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

At stake in this appeal is the financial and emotional livelihood of millions of teachers, nurses, and first responders who have dedicated their lives to giving back to their communities and the Nation at large. Instead of taking high-paying jobs in the private sector, these stewards of the public interest have taken on substantial student loan debt to obtain the degrees and certifications necessary to pursue careers in public service. Unfortunately, this choice has come at a devastating cost due to the widespread impact of deception by loan servicers, such as Great Lakes.

Despite their repeated assurances of expertise and guidance, these loan servicers in fact made, and continue to make, misrepresentations to borrowers about the Public Student Loan Forgiveness ("PSLF") program, under which Congress promised to forgive federal student loan debt for public employees after a decade of payments. Their motivation is simple—profit. For one example, these servicers falsely stated that borrowers were "on track" for PSLF when the borrowers' repayment plan did not actually qualify, in an effort to preclude borrowers from actually qualifying for PSLF and thus avoid losing servicing fees upon the transfer of those accounts to a different servicer. Great Lakes and others did so without a care for the life-changing harm borrowers suffer as a result.

Consequently, millions of educators, healthcare professionals, and public employees otherwise qualified for PSLF, who dedicated their lives to working for the public, have been sentenced to a lifetime of debt servitude. Many have lost years of payments that could have qualified for PSLF. Instead of being rewarded for their service, the unsung heroes teaching our Nation's youth, tending to our Nation's sick, and keeping our Nation safe have been forced to declare bankruptcy, foreclose on their homes, take on multiple jobs, postpone retirement, and leave public service altogether to pay off their loans. In some cases, educators who dedicated their lives to teaching—sometimes paying out of their own pockets for students' food and school supplies—have ended up homeless and sleeping in their cars.

This is not the life that public employees deserve.

Nor does the law allow it. Like Plaintiffs in this action, AFT's members—teachers, nurses, and other public employees—have turned to the courts for help, asserting state law claims based on the servicers' affirmative misrepresentations. Rather than address the merits of these claims, servicers have argued, as Great Lakes did here, that borrowers' state law claims are preempted by Title IV of the HEA, 20 U.S.C § 1098g. That is wrong. Section 1098g preempts only state law "disclosure requirements," not longstanding prohibitions on affirmative misrepresentations that have been historically policed by the States.

The district court in this action erroneously concluded that Plaintiffs' state law claims were preempted by § 1098g. This holding is wrong for at least three reasons. *First*, the district court improperly characterized Plaintiffs' claims as challenging the servicers' failure to satisfy disclosure requirements rather than the servicers'

affirmative misrepresentations; it is the affirmative misrepresentations that have harmed millions of our Nation's public employees. *Second*, Congress did not intend to preempt state prohibitions on affirmative misrepresentations when it enacted § 1098g, which covers only disclosure requirements. *Third*, leaving millions of borrowers with no practical means of recourse to redress harms caused by student loan servicers would thwart congressional intent. By adopting Great Lakes' erroneous view of § 1098g, the district court effectively gave loan servicers *carte blanche* to deceive our Nation's most vulnerable student loan borrowers and propel those borrowers into financial ruin.

ARGUMENT

I. Student Loan Servicers' Affirmative Misrepresentations Dramatically Harm Our Public Employees

The burden of student loan debt weighs heavily upon millions of people across the country. Over 42 million people hold federal student loans.[2] Up to 25% of those loans are delinquent or in default.[3] The severe impact of student loan debt has hit our public employees, including teachers, nurses, and police officers—the backbone of our Nation—especially hard. Those workers who have dedicated themselves to helping others are forced to take out substantial student loans to meet requirements

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[2] Dep't of Educ., Federal Student Aid Portfolio Summary, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls (last visited Dec. 10, 2018).

[3] Consumer Fin. Prot. Bureau, Student Loan Servicing: Analysis of Public Input and Recommendations for Reform 10 (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.

of their job and to maintain and enhance their professional certifications. Yet public service professionals are not highly compensated and struggle to pay back their student debt while meeting their day-to-day financial needs.

AFT's members have experienced this exact situation. "In recent months, educators and other school personnel have walked out to demand a living wage in exchange for the jobs they love. Teachers are working in fast food restaurants or selling plasma to pay their bills."[4] "[I]n no state does a teacher's assistant making the average salary earn enough to provide for the basics for him- or herself and one child."[5] "In 38 states, the average teacher salary in 2018 is lower than it was in 2009 in real terms.... According to the Economic Policy Institute, teacher pay fell by $30 per week from 1996 to 2015, while pay for other college graduates increased by $124."[6]

In a recent AFT survey, 80% of respondents who struggle financially reported that student loan debt was a "major burden or challenging."[7] Many reported being unable to afford basic household needs, including food, rent, medication, and other

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[4] Randi Weingarten, *Public Service Debt Relief Is Broken*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/opinion/public-service-loans-education.html.

[5] AFT, A Decade of Neglect: Public Education Funding in the Aftermath of the Great Recession 4 (2018), https://www.aft.org/sites/default/files/decade-of-neglect-2018.pdf.

[6] *Id.* at 5.

[7] Hart Research Assocs., Effects of Debt on AFT Members Who Struggle Financially 3 (June 2018), https://www.aft.org/sites/default/files/ppt_aft-member-debt_hart2018.pdf.

bills because of their student loan burden.[8] Common ways of coping with falling behind on student loan payments include paying no more than the minimum balance on credit cards, making cuts to food expenses, and forgoing necessary medical treatment.[9]

Other AFT members have been left homeless and hungry—survey respondents reported being evicted from their homes, losing their homes to foreclosure, sleeping in cars, and skipping meals for weeks at a time due to their student loan debt. Some members reported being unable to follow regular hygiene habits and wearing unsanitary clothing in disrepair. Sadly, these are not isolated incidents.

The financial burden of student debt also informs borrowers' major life decisions, such as whether to buy a house or have children. In a survey conducted by the National Association of Realtors and the nonprofit group American Student Assistance, more than 80% of millennials reported that student debt had forced them to shelve their plans to buy a home. Respondents who did not own homes estimated that student debt had forced them to put off buying by as much as seven years.[10] Even when borrowers make the decision to buy a home, they are often unable to get a mortgage due to damaged credit scores. In AFT's survey, members reported that student debt has caused them to decide not to have more children or forgo having

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[8] *Id*.

[9] *Id*. at 3, 12.

[10] Natalie Kitroeff, *How Student Debt Can Ruin Home Buying Dreams*, N.Y. TIMES (May 25, 2018), https://www.nytimes.com/2018/05/25/business/how-student-debt-can-ruin-home-buying-dreams.html.

children entirely. Another survey conducted by Future Family, a start-up that offers guidance about fertility, reported that, of the 44% of women with student loan debt, half said that student loans affect their decision about having children.[11] Student debt obligations also leave public service workers unable to save for retirement or for their own children's education—repeating and deepening a permanent cycle of unmanageable student debt.[12]

The financial difficulties caused by student debt also take an emotional toll on borrowers. 97% of respondents to AFT's survey reported that debt caused them increased stress. 80% said it caused them to lose sleep. 73% said it caused strains in their families and households, sometimes leading to divorce.[13] Some respondents even reported suicidal tendencies caused by the weight of loan debt, while others reported turning to drugs and alcohol to cope. Many respondents reported feeling severely depressed and hopeless—struggling every day with no end in sight. The emotional burden has also brought on physical problems, such as high blood pressure, heart attacks, and strokes. Only 9% feel confident they will ever achieve financial security.[14]

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[11] Jessica Dickler, *Student Loan Debt is a Hurdle for Many Would-be Mothers*, CNBC (May 22, 2018), https://www.cnbc.com/2018/05/22/student-loan-debt-is-a-hurdle-for-many-would-be-mothers.html.

[12] Hart Research Assocs., *supra* note 7, at 8.

[13] *Id*. at 12.

[14] *Id*. at 3.

The burdens of student debt do not end there. According to a report issued by AFT, the challenges posed are not only economic but also moral.[15] As a result of the massive student debt burden, public employees are unable to save funds to purchase homes, to start families, or simply to have a night on the town. As a result, "many students face a stark choice: go to college and acquire a mountain of debt that will come due right after graduation, or forgo college altogether."[16] Servicer misconduct is placing the promise of higher education, which has historically been a vehicle for social mobility and is necessary for a public service job, out of reach, increasing economic hardship for the vanishing middle class.[17]

* * *

It was not supposed to be this way. In 2007, Congress created PSLF to reduce the burdens student loans place on those who have forgone careers in the private sector to serve the public and to encourage students to continue to enter public service. College Cost Reduction and Access Act, Pub. L. No. 110-84, § 401, 121 Stat. 784, 800 (2007) (codified as amended at 20 U.S.C. § 1087e(m)); *see* 34 C.F.R. § 685.219. To qualify for PSLF, which is administered by the U.S. Department of Education, a borrower must (i) have federal loans issued pursuant to, or consolidated into, the Direct Loan program; (ii) be employed full-time, as defined by the program,

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[15] AFT Higher Educ., On the Backs of Students and Families: Disinvestment in Higher Education and the Student Loan Debt Crisis 1 (2012), https://www.aft.org/sites/default/files/studentdebt0613.pdf.

[16] *Id.*

[17] *Id.*

by a qualifying public service employer; and (iii) make 120 on-time payments under a qualifying repayment plan while working for a qualifying employer. 20 U.S.C. § 1087e(m)(1); 34 C.F.R. § 685.219(c). Borrowers who apply for PSLF are entitled to have their outstanding federal student debt cancelled once they meet all of the qualifications. 20 U.S.C. § 1087e(m)(1)-(2); 34 C.F.R. § 685.219(e).

Tragically, the PSLF program has not operated as Congress intended. According to a report released by the Department of Education earlier this year, of the 28,000 borrowers who have applied for PSLF, as of June 30, 2018, only 96 borrowers—0.343% of the applicants—have received loan forgiveness.[18] More than 70% of the applications were denied because borrowers did not meet the program requirements, such as having Direct Loans or making 120 qualifying payments.[19]

As Plaintiffs allege, the PSLF program is failing to operate as Congress intended due to misconduct by loan servicers—the private, for-profit corporations with which the Department of Education contracts to administer and manage federal student loan repayments—such as Great Lakes. *See* 20 U.S.C. §§ 1086, 1087f. PSLF depends on loan servicers providing truthful advice to borrowers attempting to navigate the student loan payment process, including the available loan repayment,

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[18] Federal Student Aid, Federal Student Aid Posts New Reports to FSA Data Center (Sept. 19, 2018), https://ifap.ed.gov/eannouncements/091918FSAPostsNewReportstoFSADataCenter.html.

[19] *Id.*; *see also* GAO Report, Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers (Sept. 5, 2018), https://www.gao.gov/products/GAO-18-547.

consolidation, and forgiveness plans.[20] But the Consumer Financial Protection Bureau ("CFPB") has reported "widespread servicing failures," including "a wide range of sloppy, patchwork practices that can create obstacles to repayment, raise costs, cause distress, and contribute to driving struggling borrowers to default."[21] Misconduct by Great Lakes and other loan servicers has thwarted congressional intent and helped reduce PSLF to a hollow formality.

AFT's surveys of its membership reveal several ways servicers of federal student loans routinely make affirmative misrepresentations to borrowers that prevent borrowers from taking advantage of PSLF, including: (i) falsely informing borrowers that they are ineligible for PSLF; (ii) misrepresenting to borrowers that they are "on track" for PSLF when, in fact, their loans will not qualify for PSLF without consolidation; (iii) misrepresenting to borrowers that they are "on track" for PSLF when, in fact, their repayment plan does not qualify; (iv) falsely informing borrowers that missing one payment will result in disqualification from PSLF; and (v) falsely representing to borrowers that working at multiple part-time jobs will result in disqualification from PSLF.

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[20] Federal Student Aid, Loan Servicers, https://studentaid.ed.gov/sa/repay-loans/understand/servicers (last visited Dec. 10, 2018); Dep't of Educ., U.S. Department of Education Strengthens Federal Student Loan Servicing (Aug. 29, 2014), https://www.ed.gov/news/press-releases/us-department-education-strengthens-federal-student-loan-servicing.

[21] Consumer Fin. Prot. Bureau, CFPB Concerned About Widespread Servicing Failures Reported by Student Loan Borrowers (Sept. 29, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-concerned-about-widespread-servicing-failures-reported-by-student-loan-borrowers/.

Borrowers reported to the CFPB that servicers told them inaccurate information, preventing borrowers from accessing tools to avert default.[22] One respondent to the CFPB reported that the process of consolidating her loans was "riddled with misinformation" and that she "received bad information" from multiple student loan servicer representatives.[23]

The stakes of qualifying for PSLF are extremely high for millions of this Nation's public employees. Like Plaintiffs Lawson-Ross and Byrne, public employees have commenced litigation challenging these failures, against Great Lakes and other servicers.[24] In this suit, Plaintiffs' allegations demonstrate that they are part of the growing group of victims subjected to loan servicers' misrepresentations. Plaintiffs explain that Great Lakes essentially engaged in an active misinformation campaign to deflect borrowers from qualifying for PSLF. Consistent with those surveyed by AFT, Plaintiffs report that Great Lakes "repeatedly giv[es] customers false information regarding the status of their eligibility for the [PSLF] Program…." First Am. Compl. (Doc. 24) ¶¶ 75, 80 (Appellants' App. 49, 50). For example, Great Lakes "repeatedly and explicitly" represented to Lawson-Ross "that she was on track to

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[22] *Id*.

[23] Consumer Fin. Prot. Bureau, *supra* note 3, at 66.

[24] *E.g.*, *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, No. 3:16-cv-183 (S.D. Ill. 2017); *Hyland v. Navient Corp.*, No. 1:18-cv-9031 (S.D.N.Y. 2018); *Daniel v. Navient Solutions LLC*, No. 8:17-cv-2503 (M.D. Fla. 2017); *Davis v. Navient Corp.*, No. 1:17-cv-992 (W.D.N.Y. 2017); *Travis v. Navient Corp.*, No. 2:17-cv-4885 (E.D.N.Y. 2017); *Demyanenko-Todd v. Navient Corp.*, No. 3:17-cv-772 (M.D. Pa. 2017). Nine of AFT's members are named plaintiffs in the *Hyland v. Navient Corp.* action.

benefit under the PSLF, that her loans qualified under that program, and that she would not need to complete any additional forms until her 10 years of public service was completed," even though the majority of Lawson-Ross' loans were ineligible for PSLF. *Id*. ¶¶ 42, 44 (Appellants' App. 43). Similarly, Great Lakes falsely "told Ms. Byrne that all she needed to qualify was to be working full time and to have the human resources department fill out an application and to apply for income-based payments." *Id*. ¶ 50 (Appellants' App. 44). As a result of Great Lakes' affirmative misrepresentations, none of Plaintiffs' payments counted towards PSLF.

II. Congress Did Not Intend To Preempt State Laws Prohibiting Affirmative Misrepresentations Like Those Harming Our Public Employees

Section 1098g provides that student loans made, insured, or guaranteed under the HEA "shall not be subject to any disclosure requirements of any State law." 20 U.S.C. § 1098g. By its plain terms, that section displaces only state laws mandating that loan servicers communicate certain terms to borrowers—not state laws prohibiting loan servicers from making material misstatements when communicating with borrowers.

Plaintiffs in this action allege violations of state prohibitions of affirmative misrepresentations—not claims under state disclosure requirements. The misconduct that dramatically harms our Nation's public employees is not that servicers have failed to tell borrowers important information, but that servicers have actively *lied* to borrowers about PSLF qualification procedures and available repayment plans.

These lies, which have resulted in years of lost qualifying PSLF payments for both Plaintiffs and AFT's members, are the basis for the claims.

The district court erred in holding that 20 U.S.C. § 1098g expressly preempts Plaintiffs' consumer protection claims of breach of fiduciary duty, negligence, unjust enrichment, breach of contract, and violation of the Florida Consumer Collection Practices Act, Fla. Stat. § 559.72. *See Lawson-Ross v. Great Lakes Higher Educ. Corp.*, No. 1:17-cv-253, 2018 WL 5621872, at *2-4 (N.D. Fla. Sept. 20, 2018) (Doc. 44) (Appellants' App. 61-66).[25] In accepting Great Lakes' expansive view of § 1098g, the district court blessed unscrupulous loan servicers' practices of actively lying to borrowers in need. And in holding that Plaintiffs' claims in this action were preempted, the district court mischaracterized state prohibitions of misrepresentations as federal disclosure requirements and misapplied *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010). A proper reading of *Chae* reveals that Plaintiffs' state law consumer protection claims are not preempted because the claims are based on fraudulent and deceptive conduct not regulated by federal law. The district court's opinion must be reversed or millions of public employees—including AFT's members—in deep financial and emotional distress will have no recourse for servicer misconduct.

[25] Although it did not say so explicitly, the district court only conducted an express preemption analysis. It did not conclude that the state laws at issue conflicted with § 1098g or that they were displaced under a field preemption theory.

A. States Have Historically Exercised Their Police Power To Protect Citizens From Affirmative Misrepresentations Made By Unscrupulous Market Participants

Because the Supremacy Clause empowers, but does not require, Congress to preempt state laws, the federal preemption analysis is an exercise of statutory construction to assess whether Congress intended to displace state law. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Preemption analyses therefore hinge on "[t]he purpose of Congress." *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1122 (11th Cir. 2004) (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

The Supreme Court has long required courts to presume Congress did not intend to preempt state laws enacted pursuant to the States' "historic police powers" unless it was the "clear and manifest purpose of Congress" to do so. *Id*. (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Grp.*, 555 U.S. at 77. A federal preemption clause displaces a state law enacted pursuant to the States' historic police powers and within a field traditionally regulated by the States ***only*** if that is the ***sole*** plausible reading of the preemption clause. *Id.* "[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.'" *Id.* (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).[26]

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[26] As Plaintiffs explain in their Opening Brief at 17 n.4, the presumption against preemption of laws enacted pursuant to States' historic police powers has not been

In *Cliff v. Payco General American Credits, Inc.*, this Court joined at least two of its sister circuits in making clear that consumer protection laws—the laws at issue in this appeal—are part of the historic police powers of the States and fall within "a field traditionally regulated by the [S]tates." 363 F.3d at 1125 (holding that another preemption provision of the HEA, 20 U.S.C. § 1095a, did not preempt the Florida Consumer Collection Practices Act); *accord Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41 (2d Cir. 1990) ("[C]onsumer protection law is a field traditionally regulated by the [S]tates …."). In *Cliff*, this Court recognized that the HEA's express preemption provisions in particular are subject to the presumption against preemption when applied to state consumer protection statutes. *See Cliff*, 363 F.3d at 1121-22, 1124-25. Thus, this Court read narrowly an HEA express preemption provision addressing wage garnishment laws, holding that, although state consumer protection laws and expressly preempted state wage garnishment laws address overlapping conduct, the HEA does not preempt the state consumer protection laws because the HEA is "silent regarding civil liability under" such laws. *Id.* at 1125.

Section 1098g makes clear that Congress did not intend "disclosure *requirements* of any State law" to mean any state law *prohibiting* affirmative misrepresentations. At the very least, the language does not demonstrate Congress's "clear and manifest" intent to preempt prohibitions on affirmative misrepresentations. *See id.* at 1122 (citing *Rice*, 331 U.S. at 230). Rather, in § 1098g, Congress seized on the well-established distinction between laws requiring disclosure and laws prohibiting

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affected by *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016).

affirmative misrepresentations. *See Lindley v. F.D.I.C.*, 733 F.3d 1043, 1055-56 (11th Cir. 2013) ("Congress is presumed to know the content of existing, relevant law ...." (quoting *Griffith v. United States*, 206 F.3d 1389, 1394 (11th Cir. 2000))). The central focus of state consumer protection law, as well as the doctrines of common law fraud and negligent misrepresentation, is to prohibit any person from making a false statement of material fact or affirmative misrepresentations. *See, e.g.*, *Collins v. Countrywide Home Loans, Inc.*, 680 F. Supp. 2d 1287, 1292-93 (M.D. Fla. 2010). State law has also long held that once one undertakes to speak, such speech may not be materially misleading. *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2000 n.3 (2016) ("This rule recurs throughout the common law. In tort law, for example, 'if the defendant does speak, he must disclose enough to prevent his words from being misleading.'" (quoting Prosser & Keeton on Law of Torts § 106 (5th ed. 1984))). These are the types of state laws that Plaintiffs seek to enforce. Plaintiffs rely only on state laws prohibiting affirmative misrepresentations—no law requiring disclosure or otherwise creating a duty to speak is at issue in this action.

Section 1098g preempts "requirements," not "prohibitions." "[W]here Congress knows how to say something but chooses not to, its silence is controlling." *Lindley*, 733 F.3d at 1056. If Congress intended to extend § 1098g to state laws that prohibit, rather than require, certain conduct, it could have done so. *See, e.g.*, 12 U.S.C. § 1831x(c)(1), (2) (distinguishing between disclosure requirements and prohibitions on affirmative misrepresentations); 15 U.S.C. § 1334(b) ("No *requirement or prohibition* based on smoking and health shall be imposed under State law with

respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." (emphasis added)).[27]

Accordingly, § 1098g does not express clear and manifest congressional intent to displace the historic police powers and traditional state regulations prohibiting affirmative misrepresentation claims. Plaintiffs base their claims on the States' longstanding prohibitions of affirmative misrepresentations. Likewise, the harm reported by AFT's members is not caused by the servicers' failure to speak or disclose relevant information; rather, it is based on the servicers' affirmatively false statements. State laws prohibiting such misrepresentations are not preempted.

B. Other Courts Have Recognized The Distinction Between Affirmative Misrepresentations And Omissions In Assessing Preemption Under Section 1098g

Other courts—including the Middle District of Florida—that have confronted similar arguments for preemption under § 1098g have held that state law claims arising from affirmative misrepresentations may go forward.

In *Daniel v. Navient Solutions, LLC*, No. 8:17-cv-2503, 2018 WL 3343237 (M.D. Fla. June 25, 2018), the plaintiffs asserted state tort and contract claims arising from a servicer's false statements regarding a borrower's eligibility for PSLF. The court concluded that the state law claims were not preempted by § 1098g, noting that

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[27] In *Cipollone v. Liggett Group, Inc.*, a plurality of the Supreme Court held that certain state law fraudulent misrepresentations claims were preempted by 15 U.S.C. § 1334(b) only because the statute expressly preempted "*both* requirements and prohibitions." 505 U.S. 504, 527 (1992) (plurality op.) (emphasis added). *Cipollone* further supports Plaintiffs' position for the reasons explained in Plaintiffs' Opening Brief at 28-30.

"Plaintiffs are not claiming that Defendant merely failed to disclose the requirements of the PSLF program, but rather, they are asserting that Defendant made affirmative misrepresentations to them." *Id*. at *2.

The distinction between a loan servicer's affirmative misrepresentations and failures to disclose has been recognized by other courts. In *Genna v. Sallie Mae, Inc*., No. 11-cv-7371, 2012 WL 1339482 (S.D.N.Y. Apr. 17, 2012), the plaintiff asserted state tort and contract claims arising from a telephone conversation in which a servicer representative made false statements regarding a borrower's enrollment in an auto-pay program. The court distinguished between the servicer's written statements made pursuant to explicit federal regulations and statutes, and affirmative misstatements in conversations between a servicer and a borrower regarding the day-to-day servicing of a loan. *Id*. at *8. The court held: "[T]he statements at issue here were neither authorized by the Secretary of Education nor conformed to any explicit dictates of federal law. There is nothing in the HEA that standardizes or coordinates how a customer service representative of a third-party loan servicer like Sallie Mae shall interact with a customer like Genna in the day-to-day servicing of his loan ...." *Id*. Thus, the servicer's false statements giving rise to the claim were not preempted as "disclosure requirements" under § 1098g.

The key decision cited by the district court in this case, *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010), held that state law claims for fraudulent and deceptive practices are *not* expressly preempted. The section of *Chae* on which the district court relied—providing that written statements regulated by federal disclosure law are preempted—is inapposite because the oral misrepresentations made to Plaintiffs

in this case are not regulated by federal law. *Chae* involved a challenge to documents, including federally-mandated billing statements and coupon books, which the plaintiffs argued violated state law by misleading borrowers about how interest was calculated. *Id*. at 942. The Ninth Circuit determined that the plaintiffs' state law unfair competition claims were preempted because the written billing statements at issue were regulated by a "federal statutory and regulatory scheme." *Id*. at 943. For example, one of the federal regulations on which the plaintiffs in *Chae* based their suit set forth terms for written forms, requiring "clear, concise, and simple language to facilitate understanding of loan terms." *Id*. Given this legal framework, the court found that the plaintiffs' claims were "improper-disclosure claims"—meaning, a challenge to the way in which the servicer disclosed loan terms. *Id*. at 942. Notably, however, the court held that the plaintiffs' claims for "breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, and *the use of fraudulent and deceptive practices apart from the billing statements*" were *not expressly preempted* because such claims were "not impacted by any of the [federal regulation]'s express preemption provisions." *Id*. at 943 (emphasis added). It is therefore entirely consistent with *Chae* to hold that claims asserting "fraudulent and deceptive practices," such as affirmative misrepresentations, are not improper-disclosure claims regulated by § 1098g.

The Department of Education's March 12, 2018 interpretive guidance respecting § 1098g should be given little weight, if any, for the reasons explained in Plaintiffs' Opening Brief at 35-46. In addition, the Department of Education relied on *Chae* without considering this important carve-out of the Ninth Circuit's decision.

See Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619-20 (Mar. 12, 2018). The district court's reliance on this interpretative guidance to set aside *Genna*—which rejected preemption in a nearly identical scenario—was misplaced. Doc. 44 at 7-8 (Appellants' App. 64-65).

Moreover, in *Gutierrez v. Wells Fargo Bank*, 704 F.3d 712 (9th Cir. 2012), the Ninth Circuit reinforced the distinction it recognized in the preemption context in *Chae* between affirmative misrepresentations and failures to disclose. *Gutierrez* involved state claims arising from (1) a bank's failure to inform its customers of its bookkeeping methods, and (2) a bank representative's misleading statements about its bookkeeping methods, both of which the defendant argued were preempted by federal law. *See id.* at 716. The Court held that the claim for failure to inform customers of bookkeeping methods was preempted by the National Bank Act as "disclosure requirements." *Id*. at 726. Otherwise, state law would impose liability on the bank for its failure to sufficiently adhere to federal disclosure requirements regarding posting methods. Importantly, the Court also held that the bank's affirmative misrepresentations to a customer about bookkeeping were ***not preempted*** because state law does not "impose disclosure requirements[,] but merely prohibits statements that are likely to mislead the public." *Id*. The court noted that to expand preemption on the basis that the misleading statements "touche[d] on" checking accounts (an area that banks regulated) would lack any limiting principle and "would swallow all laws." *Id*. at 727.

Thus, courts have drawn clear lines between disclosure requirements and prohibitions of misrepresentations. Adopting an interpretation of "disclosure requirements" that includes affirmative misrepresentations, as the district court did in this case, is not only unsupported by precedent, but defies common sense.[28]

III. Preventing States From Policing Servicer Misconduct Thwarts Congressional Intent

Congress intended PSLF to provide public employees with debt relief after years of payments. As remarked by a member of Congress in support of the bill creating PSLF, the program was designed to help those desiring to be "teachers, police officers, nurses, social workers and public defenders" to do so without fear of being "straddled with debt."[29] Tragically, reports from AFT's members, including those very teachers and nurses, indicate that they are imprisoned by debt due to servicer deception. Congress clearly did not create PSLF to let private loan servicing companies profit by lying with reckless abandon and virtually no oversight at the expense of qualified borrowers securing debt relief. Yet that is exactly the perverse

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[28] This issue is also raised squarely in *Nelson v. Great Lakes Educational Loan Services, Inc.*, No. 18-1531, which is currently pending in the U.S. Court of Appeals for the Seventh Circuit. At the October 23, 2018 argument, the panel repeatedly discussed the well-accepted distinction between tort actions premised on affirmative misrepresentations and those premised on omissions. *See* http://media.ca7.uscourts.gov/sound/2018/rs.18-1531.18-1531_10_23_2018.mp3 4:01-5:30; 13:47-18:00; *see also* 18:53-20:00 (discussing the fundamental problems with the Department of Education's interpretation of *Chae*).

[29] 153 Cong. Rec. S11249 (Sept. 7, 2007).

result that would flow from the district court's holding that § 1098g prevents States from protecting their citizens from loan servicers' affirmative misconduct.

Borrowers would be left largely helpless under the district court's ruling. The HEA provides no private right of action; only the Secretary of Education is empowered to enforce the statute. *Cliff*, 363 F.3d at 1123. "[W]hen no federal remedy exists," the case against preemption of state laws "is even stronger." *Coll. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 597 (4th Cir. 2005). An expansive interpretation of "disclosure requirements" in § 1098g would "swallow all laws," *Gutierrez*, 704 F.3d at 727, and effectively foreclose any remedy while shielding servicers from liability.

The two remaining methods for purportedly rectifying harm—lodging complaints with the federal government or the servicer directly—have proven generally unsatisfactory. AFT's members have reported that complaints filed with the Department of Education or CFPB are closed with minimal inquiry, sometimes solely relying on the servicer's unverified response to close the case. Other AFT members have reported receiving no response at all from the federal government. That is unsurprising. Between September 2016 and April 2017, the CFPB reported that over 12,900 complaints were filed concerning federal student loan servicers.[30] It is not

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[30] Annual Report of the CFPB Student Loan Ombudsman 2, 6 (Oct. 2017), https://files.consumerfinance.gov/f/documents/cfpb_annual-report_student-loan-ombudsman_2017.pdf. Of *all* the complaints the CFPB receives about student loans, 64% are about problems borrowers experience when dealing with their student loan servicer. CFPB Monthly Complaint Report 12 (Apr. 2017), https://files.consumerfinance.gov/f/documents/201704_cfpb_Monthly-Complaint-Report.pdf.

practical to leave the entire burden of investigating and providing redress for the harms caused by student loan servicers to the CFPB while precluding borrowers harmed by servicer misconduct from achieving their own recourse.[31] Moreover, complaining directly to the servicer is an ineffective substitute for direct enforcement of legal rights. Servicer misconduct has continued. The immense harm suffered by thousands of public employees, despite these alternative complaint mechanisms, demonstrates the need for state law remedies.

Affirming the district court here would grant student loan servicers *carte blanche* to do whatever they want regardless of consequences to the borrowers—allowing servicers to benefit from an expansive reading of a preemption clause in a federal statute that does not contain a private right of action—and leave millions of teachers, nurses, first responders, public defenders, and other public employees, who have dedicated their lives to serving the public, with no practical means of recourse. This cannot be the result intended by Congress. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) ("It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'" (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984))).

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[31] Moreover, recent news reports have reported a "precipitous drop in the total number of administrative and judicial enforcement actions" by the CFPB over the past year. Robert O'Harrow, Jr., Shawn Boburg, & Renae Merle, *How Trump Appointees Curbed a Consumer Protection Agency Loathed By the GOP*, WASH. POST (Dec. 4, 2018), https://www.washingtonpost.com/investigations/how-trump-appointees-curbed-a-consumer-protection-agency-loathed-by-the-gop/2018/12/04/3cb6cd56-de20-11e8-aa33-53bad9a881e8_story.html?utm_term=.bb2efb262d91 (internal quotation marks omitted).

CONCLUSION

For these reasons, AFT respectfully requests that this Court reverse the district court's dismissal of Plaintiffs' state law claims.

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Respectfully submitted,

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Dated: December 10, 2018

/s/ Yelena Konanova
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I certify that on December 10, 2018, a true and correct copy of the foregoing was filed using the Court's Electronic Filing System, which will send a Notice of Docket Activity to counsel of records for all parties.

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