19-2116

United States Court of Appeals for the Third Circuit

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff-Appellee,

v.

NAVIENT CORP; NAVIENT SOLUTIONS LLC,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Pennsylvania, NO. 3:17-CV-1814-RDM

BRIEF FOR STATES OF NEW YORK, ALASKA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, VERMONT, VIRGINIA, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEE

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
ESTER MURDUKHAYEVA
Assistant Solicitor General of Counsel

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, New York 10005
(212) 416-6279

Dated: August 29, 2019

(Counsel list continues on signature pages.)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Miscellaneous Authorities **Page(s)**

Federal Sources

Miscellaneous Authorities **Page(s)**

Federal Sources

Other

Miscellaneous Authorities **Page(s)**

Other

Miscellaneous Authorities **Page(s)**

Other

INTEREST OF *AMICI CURIAE*

Amici States of New York, Alaska, California, Colorado, Connecticut, Delaware, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin, and the District of Columbia file this brief in support of plaintiff-appellee Commonwealth of Pennsylvania and in response to the sweeping claims of federal preemption and statutory preclusion asserted by appellants Navient Corporation and Navient Solutions, LLC (together, "Navient"). Amici collectively represent the interests of over 23 million borrowers[1] who owe more than $785 billion[2] in outstanding student loan debt. Nearly all of this debt consists of loans that are guaranteed or owned by the federal government and managed by private loan servicers such as Navient. As several amici States have discovered

---

[1] *See* Mark Kantrowitz, *Statistics Concerning Student Loan and Borrower Characteristics* (July 23, 2019) (internet). (Links are available in the Table of Authorities for authorities available on the internet.)

[2] *See* Consumer Financial Protection Bureau, *50 State Snapshot of Student Debt* (Oct. 2017) (internet).

in their investigations and enforcement actions, many student loan servicers generally—and Navient in particular—have engaged in a broad range of unfair, deceptive, and abusive practices that harm consumers, including steering borrowers to less favorable repayment options and misinforming borrowers about how to maintain their enrollment in borrower-friendly repayment plans. As a result of this conduct, millions of borrowers have been prevented from reducing their crippling debt obligations, making it more difficult for them to start families, buy homes, open businesses, or otherwise contribute to their communities.

Amici States have long been committed to using their historic police powers or other enforcement mechanisms to protect their residents from all forms of unfair and deceptive business practices. And amici have routinely enforced their consumer-protection laws against student loan servicers like Navient, as they have against other companies that defraud or otherwise mistreat consumers in their States. Amici therefore have a significant interest in the outcome of this appeal. If this Court accepts Navient's arguments and ousts States from regulating fraud and deception in the federal student loan industry, millions of borrowers holding nearly $1.5 trillion of debt—approximately 11 percent of all household and consumer debt nationally[3]—will lose state-law protections that previously had applied to them.

It is no answer to say that the federal government remains available to enforce federal laws. The federal government has long recognized that borrowers are best protected by concurrent regulation by federal and state officials. Indeed, there has been a long and effective tradition of the federal government working side-by-side with state law enforcement to promote active oversight in the student loan industry. And contrary to Navient's arguments, no provision of federal law precludes that productive and cooperative enforcement regime.

SUMMARY OF ARGUMENT

The federal student loan system "exists for a single purpose: to serve students and their families." H.R. Rep. No. 110-500, at 240 (2007). All parties involved in administering federal student loans, including servicers like Navient, "must act with honesty and integrity at all times to ensure that the financial aid programs [provided by the federal

[3] Federal Reserve Bank of N.Y., *Quarterly Report on Household Debt and Credit* 3 (Aug. 2019) (internet).

government] serve the best interests of students." S. Rep. No. 110-231, at 27 (2007).

The federal government and the States have long worked together to ensure that loan servicers (and other participants in the federal student loan industry) satisfy these high standards. Navient seeks to disrupt the status quo by asking this Court to displace the long-standing practice of dual oversight by federal and state authorities over matters involving higher education, including student loans. But Congress never intended to remove States from their traditional role in protecting their residents, including borrowers of federal student loans, from misconduct. In arguing otherwise, Navient misconstrues the narrow preemption provision in the Higher Education Act (HEA)—which applies only to affirmative disclosures mandated by state law, not to general prohibitions against unfair and deceptive business practices—and relies on a theory of conflict preemption that ignores congressional intent and the history of cooperation between federal and state authorities.

Navient is likewise wrong to ask this Court to disregard Congress's explicit determination to allow state attorneys general to prosecute violations of the federal Consumer Financial Protection Act (CFPA).

Nothing in the text or purpose of the statute supports Navient's argument that Congress implicitly limited the States' authority to bring such claims in cases where the Consumer Financial Protection Bureau (CFPB) has filed a lawsuit.

ARGUMENT

POINT I

EXEMPTING STUDENT LOAN SERVICERS FROM STATE CONSUMER-PROTECTION LAWS WOULD LEAVE MILLIONS OF AMERICANS VULNERABLE TO ABUSIVE SERVICING PRACTICES

A. Many Student Loan Servicers Engage in Unfair and Deceptive Practices.

Student loans are managed on a day-to-day basis by a student loan servicing company that may be distinct from the actual lender. The servicer is responsible for collecting payments, enrolling borrowers in specific repayment plans, facilitating the loan's payoff, collecting on delinquent loans, and otherwise assisting borrowers as issues arise over the lifetime of a loan. (Appendix (A.) 112-113.)

More than 92 percent of all outstanding student loan debt is owned or guaranteed by the federal government. *See* MeasureOne, Inc. *Private Student Loan Market Trends & Insights* 3 (2018) (internet). Navient, like several other servicers, handles both federal and private student loans. (A. 26, 109-110.) Federal law offers critical protections for federal student loan borrowers that are generally unavailable to borrowers who have private loans, including income-driven repayment options, the ability to receive complete loan discharge in the event of total and permanent disability, and the option to consolidate older federal loans to qualify for newer benefits.[4] *See, e.g.*, 20 U.S.C. §§ 1078-3(b)(5), 1087(a), 1087e(e). The ability of borrowers to meaningfully access these protections is critical to fulfilling Congress's purpose in establishing the federal-loan program: "to keep the college door open to all students of ability, regardless of socioeconomic background." *Rowe v. Educational Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir. 2009) (quotation marks omitted).

The federal government requires servicers to "maintain[] a full understanding of all federal and state laws and regulations" and to "ensur[e] that all aspects of the service continue to remain in compliance

[4] Income-driven repayment plans base a borrower's monthly payment on her income and family size and provide for loan forgiveness after a specified number of qualifying monthly payments.

as changes occur." U.S. Dep't of Educ., Office of Inspector General, ED-OIG/A05Q0008, *Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans* ("*2019 IG Report*") 6 (2019) (internet). Instead, servicers like Navient have engaged in numerous fraudulent, deceptive, and unfair practices.

In February 2019, for example, an audit performed by the federal Department of Education's Inspector General found "noncompliance by all nine [federal student loan] servicers and recurring instances of noncompliance by some servicers," including Navient. *Id.* at 4; *see also id.* at 10-14. These findings included misrepresentations and omissions pertaining to "forbearances, deferments, income-driven repayment, interest rates, due diligence, and consumer protection." *Id.* at 4.

Numerous state investigations have uncovered similar misconduct by Navient and its peers. For example, Illinois found that Navient routinely steered consumers suffering from long-term financial distress into forbearances rather than income-driven repayment plans. *Illinois v. Navient Corp.*, No. 17-CH-00761, First Am. Compl. ¶¶ 312-359 (Cook County Circuit Court, Sept. 11, 2018). Forbearances allow a borrower to temporarily suspend payment on a loan. Forbearances are appropriate only for borrowers experiencing short-term financial difficulty, but are damaging when applied for long periods of time (as Navient was steering consumers to do) because they result in consumers accruing interest that ultimately increases the overall size of their loans. *Id.* ¶¶ 300-301. Illinois also found that Navient regularly misled borrowers who were enrolled in borrower-friendly income-driven repayment plans about the certifications they needed to file annually to ensure that they remained enrolled in such plans, and further discovered that Navient consistently made payment processing errors that resulted in borrowers paying unnecessary late fees and, in some cases, entering into delinquency. *Id.* ¶¶ 360-414.

California, Washington, and Mississippi have also sued Navient for these and other unfair and deceptive practices. California's investigation, for example, found that Navient misled delinquent borrowers about the amount needed to bring their accounts current and therefore induced borrowers into making unnecessarily high payments. *California v. Navient Corp.*, No. CGC-18-567732, First Am. Compl. ¶¶ 81-92 (San Francisco County Super. Ct., Oct. 16, 2018). California also determined that Navient misrepresented disability discharges as defaults to credit-reporting agencies, thereby damaging the credit histories of vulnerable borrowers. *Id.* ¶¶ 93-99. Washington and Mississippi discovered many of the same practices in the course of their investigations of Navient. *See Mississippi v. Navient Corp.*, No. 25CHI:18-cv-982, Compl. (Hinds County Chancery Ct., July 17, 2018); *Washington v. Navient Corp.,* No. 17-2-01115-1-SEA, Compl. (King County Super. Ct., Jan. 18, 2017). The Attorneys General for Colorado, Kansas, Oregon, New Jersey, New York, and the District of Columbia have also issued civil investigative demands to Navient. Navient Corp., Form 10-Q at 83-84 (Aug. 2, 2019).

Other servicers have engaged in similarly fraudulent, deceptive, and unfair business practices. *See* CFPB, *Annual Report of the CFPB Student Loan Ombudsman* ("*2017 CFPB Report*") 9 (Oct. 2017) (internet). New York and Massachusetts have obtained separate settlements with ACS/Conduent Education Services in connection with ACS's practices of steering struggling borrowers into forbearances, misleading borrowers about their eligibility for public-service loan-forgiveness programs, delaying borrowers from consolidating their loans or enrolling in income-driven repayment programs, and misreporting information to credit-reporting bureaus.[5] Massachusetts has also sued the Pennsylvania Higher Education Assistance Agency based on that entity's servicing failures. *See Massachusetts v. Pennsylvania Higher Educ. Assistance Agency*, No. 1784-CV-02682 (Suffolk County Super. Ct., Aug. 23, 2017).

B. Servicers' Misconduct Harms Millions of Borrowers and the States in Which They Reside.

Misconduct by student loan servicers has substantially harmed borrowers and the States in which they reside by, among other things, impeding borrowers' access to income-driven repayment plans and public-service loan-forgiveness programs—thus preventing borrowers from reducing their overall debt and triggering unnecessary and credit-ruining defaults. These consequences exacerbate the already significant burden imposed by rising student loan debt. Nationally, student loan debt has more than doubled over the last ten years. *See* Federal Reserve, Consumer Credit Outstanding (Levels), Historical Data (internet) (last

---

[5] *See* Press Release, Attorney General James and Superintendent Vullo Announce $9 Million Settlement of Federal Student Loan Servicing Claims With ACS Educations Services (Jan. 4, 2019) (internet); Press Release, AG Healey Secures $2.4 Million, Significant Policy Reforms in Major Settlement with Student Loan Servicer (Nov. 11, 2016) (internet).

updated Aug. 7, 2019). For Americans between the ages of 18 and 39, student loan obligations represent between 20 and 40 percent of all debt. *Household Debt and Credit*, *supra*, at 21.

Studies have consistently shown that excessive student loan debt harms borrowers' economic, physical, and mental well-being and inhibits their ability to participate as full and contributing members to their communities. In a 2018 study by the Association of Young Americans and the AARP, 16 percent of borrowers reported that student loan debt prevented or delayed them from obtaining health care, while 25 percent reported that student loan debt prevented or delayed them from financially helping a family member. Angela Cortez, *Student Loan Debt Prevents Saving, Buying a Home* (Nov. 2018) (internet). In the same study, approximately 40 percent of millennials reported that student loan debt has prevented or delayed them from purchasing a home or saving for retirement. *Id.* A 2015 survey similarly found that more than 20 percent of young borrowers have delayed marriage and starting a family because of their student loan debt. American Student Assistance, *Life Delayed* 1 (2015) (internet).

While older Americans bear less student loan debt than their millennial counterparts, the number of older borrowers with student loan debt has quadrupled over the last decade, and the average amount those borrowers owe has nearly doubled. CFPB, *Snapshot of Older Consumers and Student Loan Debt* 4, 6 (Jan. 2017) (internet). Older borrowers are acutely vulnerable to harms caused by servicing failures. Among other things, federal law allows Social Security retirement benefits to be offset to repay federal student loans in default. *See id.* at 12-13. Such offsets are devastating for seniors living on fixed incomes.

By increasing borrowers' overall debt or preventing them from accessing available measures to pay down their loans, servicers like Navient have taken the already heavy burden of student loans and made it worse for millions of borrowers. The States where borrowers reside are likewise harmed by servicers' misconduct. Among other things, States lose valuable property and sales tax revenues due to depressed home purchasing rates and reduced consumer spending. *See, e.g.*, Arapahoe/Douglas Workforce Bd., *The Impact of Student Debt on Colorado's Economy* 13 (Apr. 2019) (internet). Moreover, high student loan debt and its attendant problems strain the already limited resources of state social services programs and health care systems that provide basic services to those who are unable to afford them.

Student loan debt also adversely affects the long-term economic vitality of local communities. More than 60 percent of young borrowers have reported that student loan debt has negatively affected their ability to start a small business. Am. Student Assistance, *supra*, at 1; *see also Impact of Student Debt*, *supra*, at 11. Rural communities are especially likely to suffer economically since individuals with student loan debt are less likely to remain in rural areas, and high-balance borrowers (i.e., those who are more likely to have completed college or a graduate program) are especially likely to leave. *See* PJ Tabit & Josh Winters, Fed. Reserve Bd. Div. of Consumer & Cmty. Affairs, *"Rural Brain Drain": Examining Millennial Migration Patterns and Student Loan Debt*, 1 Consumer & Community Context 7, 9 (Jan. 2019) (internet). This "rural brain drain" deprives rural communities of the benefits of a young and educated workforce. *Id.* at 7.

C. States Are Uniquely Positioned to Protect Their Residents From Unfair and Deceptive Practices by Student Loan Servicers.

States have a "long history" of enforcing "state common-law and statutory remedies against . . . unfair business practices." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams*, 899 F.2d 1315, 1319 (2d Cir. 1990) ("[C]onsumer protection . . . is an area of traditional state regulation."). Amici have regularly exercised their enforcement authority to protect their residents and communities from unfair and deceptive business practices in the student loan industry in particular.

As described *supra* (at 7-10), numerous amici States have investigated student loan servicers like Navient and have issued civil subpoenas to obtain information about practices affecting their residents. Several amici have also sued servicers (and other participants in the student loan industry) under state consumer-protection statutes, which offer comprehensive remedies well-suited to address the harms caused by servicer misconduct, including penalties, compensatory damages, restitution, and injunctive relief, as well as mechanisms for state attorneys general to obtain expedited judicial recourse. *See generally*

Carolyn Carter, Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Laws* (Mar. 2018) (internet).

Many amici States have also developed comprehensive systems for tracking and responding to complaints from consumers, including student loan borrowers. In the last five years, amici have collectively received and responded to thousands of complaints about federal student loan servicers—including many against Navient. For example, in 2015, the Attorney General of Massachusetts established a Student Loan Assistance Unit that has received and responded to nearly 3,500 complaints and requests for assistance from residents.

These vigorous investigatory and enforcement efforts stand in sharp contrast to the more limited oversight that has historically been exercised by the federal government in this area. While the federal Department of Education operates a "feedback system" to process consumer complaints, it is not authorized to bring an enforcement action to resolve such complaints. And although the Department is tasked with monitoring compliance and can offer performance incentives (or noncompliance penalties) to its servicers, these measures do not remedy past violations or restore the rights of injured borrowers.

Indeed, the Department's Inspector General recently concluded that the Department "had not established policies and procedures that provided reasonable assurance that the risk of servicer noncompliance with requirements for servicing federally held student loans was mitigated." *2019 IG Report*, *supra*, at 2. The Inspector General also found that the Department "rarely used available contract accountability provisions to hold servicers accountable for instances of noncompliance" and "did not incorporate a performance metric relevant to servicer compliance . . . into its methodology for assigning loans to servicers." *Id.* In August 2018, the Government Accountability Office had reached the same conclusions. *See* U.S. Gov't Accountability Office, GAO-18-587R, *Federal Student Loans: Further Actions Needed to Implement Recommendations on Oversight of Loan Servicers* 3-6 (2018) (internet).

The comparative advantage of the States over the federal government in policing student loan servicers is no surprise, given the sheer size of the industry and the States' long experience with enforcing consumer-protection laws in general. Recognizing this advantage, the federal government has for decades welcomed the States' unique expertise and worked side-by-side with the States to provide active oversight in the student loan industry. For example, the Department's regulations and servicer contracts expressly require compliance with not only federal laws but also state laws. *See, e.g.*, 34 C.F.R. § 682.401; *2019 IG Report*, *supra*, at 6; *accord* Press Release, U.S. Dep't of Education, Department of Education, Department of Treasury and the Consumer Financial Protection Bureau Issue Joint Principles on Student Loan Servicing (Sept. 29, 2015) (internet).

Starting in at least 2000, the Department routinely disclosed student loan information to state attorneys general and other state and local authorities that were investigating and prosecuting crimes, civil frauds, and other violations in the student loan industry. *See Privacy Act of 1974*, 64 Fed. Reg. 72384, 72399 (Dec. 27, 1999); *Privacy Act of 1974*, 81 Fed. Reg. 12081, 12083 (Mar. 8, 2016). Likewise, the CFPB shared information it received in consumer complaints "in near real-time with a wide range of . . . state government partners, including state attorneys general, [and] banking agencies." *2017 CFPB Report*, *supra*, at 34-36 & n.59. As recently as October 2017, the CFPB noted that "[c]onsumers benefit when the student loan industry is subject to coordinated oversight by regulators at both the federal and state levels." *Id.* at 64.

To be sure, the Department has recently attempted to disavow the federal government's historic practice of cooperation with state authorities in the field of student loan regulation. But because the States "entered the federal system with their sovereignty intact," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), they do not require permission from the federal government to protect their residents' rights and interests. Unless Congress has clearly and unambiguously preempted state consumer-protection law, States retain their inherent sovereign authority to enforce such laws notwithstanding changing federal policy and enforcement priorities. For the reasons explained *infra* (at 19-31), Congress has not displaced state laws governing the unfair and deceptive practices of federal student loan servicers.

POINT II

THE HIGHER EDUCATION ACT (HEA) DOES NOT PREEMPT STATE CONSUMER-PROTECTION LAWS

Federal law may preempt state action only under certain limited circumstances, two of which are relevant to this appeal. *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008). First, Congress may choose to expressly preempt state law. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, Congress's preemptive intent may be "implied" through the "obstruction" prong of conflict preemption. Conflict preemption based on obstruction requires a finding that a particular state law or action is "an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth v. Levine*, 555 U.S. 555, 563-64 (2009) (quotation marks omitted). Conflict preemption is "not to be implied absent an actual conflict." *English v. General Elec. Co.,* 496 U.S. 72, 79 (1990) (quotation marks omitted). Here, the district court correctly held that neither express preemption nor conflict preemption precludes

Pennsylvania's state-law claims involving Navient's loan-servicing practices.[6]

A. The HEA's Narrow Express Preemption Provision Does Not Bar Pennsylvania's Loan-Servicing Claims.

Whether "addressing questions of express or implied preemption," courts must start "with the assumption that the historic police powers of the states are not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp.*, 555 U.S. at 77 (quotation and alteration marks omitted). The presumption against preemption "applies with particular force" in cases involving "a field traditionally occupied by the States," such as consumer protection. *Id.* Accordingly, "when the text of a pre-emption clause is susceptible of more

---

[6] Every court to examine preemption in the context of a state enforcement challenge against a student loan servicer has likewise rejected the servicer's preemption arguments. *See Mississippi v. Navient Corp.*, No. G2108-98203, Order (Hinds County Chancery Ct., Aug. 15, 2019); *California v. Navient Corp.*, No. CGC-18-567732, Order Overruling Defs.' Demurrer (San Francisco County Super. Ct., Dec. 20, 2018); *Illinois v. Navient Corp.*, No. 17-CH-00761, Order (Cook County Circuit Court, July 10, 2018); *Massachusetts v. Pennsylvania Higher Educ. Assistance Agency*, No. 1784-CV-02682, Order (Suffolk County Super. Ct., Mar. 1, 2018); *Washington v. Navient Corp.,* No. 17-2-01115-1-SEA, Tr. of Hr'g on Defs.' Mot. for Limited Dismissal (King County Super. Ct., July 7, 2017).

than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Id.* (quotation marks omitted).

Navient's express preemption argument relies on a provision of the federal Higher Education Act (HEA), which states that student loans made, insured, or guaranteed by the federal government "shall not be subject to any disclosure requirements of any State law." 20 U.S.C. § 1098g. On its face, this provision is narrower than many other express preemption provisions because it is limited only to "disclosure requirements" contained in a "State law," rather than (for example) "any State or local law imposing civil or criminal sanctions," 8 U.S.C. § 1324a(h)(2). The key question is thus whether a servicer like Navient is being asked to comply with a particular "State law" that *compels* specific disclosures. *See Oxford English Dictionary*, s.v. *requirement*, 3(a)-(b) (2018) (defining "requirement" as "something called for or demanded," or "a condition which must be complied with"). But Pennsylvania's claims here are not based on any such mandatory disclosure statute; to the contrary, they rely on a state statute prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." 73 Pa. Stat. § 201-3. Navient's attempt to expand "disclosure requirements of any State law" to cover this familiar type of state consumer protection is meritless.

First, Navient ignores the distinction between a "disclosure requirement"—i.e., an affirmative mandate to make a particular statement—and state consumer-protection laws' more general prohibitions against engaging in fraudulent, deceptive, or abusive conduct. To comply with a "disclosure requirement," a business must make the mandated statement. But a business may comply with state consumer-protection laws "by merely refraining from making the false affirmative representation" in the first place. *Nelson v. Great Lakes Educ. Loan Servs.*, 928 F.3d 639, 649 (7th Cir. 2019). The HEA's preemption provision does not apply to state consumer-protection statutes like Pennsylvania's because those statutes "do not require [businesses] to disclose anything"; rather, they "simply require that [businesses] refrain from fraud, deception, and false advertising." *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 114–15 (2008); *cf. Chae v. SLM Corp.*, 593 F.3d 936, 943 (9th Cir. 2010) (applying express preemption to claims challenging the adequacy of disclosures in standardized forms). An express preemption provision that preempts "requirements and prohibitions" applies only to mandatory rules, and not to violations of the "duty not to deceive." *Altria Grp.*, 555 U.S. at 84.

It is immaterial to the preemption analysis that some of Navient's affirmative representations to borrowers are misleading because of omissions rather than express misstatements. "[O]missions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016); *see also Altria Grp.*, 555 U.S. at 82. The defect with such representations is that they are *themselves* misleading due to the absence of material information. And, again, a business can comply with the law by simply refraining from making such misrepresentations, rather than by making any affirmative statements. State-law prohibitions on misrepresentations-by-omission thus also do not qualify as "disclosure requirements" under the HEA's preemption provision.

Second, the legislative history of the HEA's preemption provision supports a narrow construction of the statute's preemptive scope. The preemption provision was enacted in Title VII of the Garn-St. Germain Depository Institutions Act of 1982. As set forth in the accompanying

Senate report, Title VII was intended to exempt federal loans "from the Truth in Lending Act [TILA] and from disclosure requirements of any state law." S. Rep. No. 97-536, at 71 (1982). Congress considered TILA's mandatory disclosures regarding the terms and costs of consumer credit "duplicative and unnecessary" for federal student loans because such loans "are already subject to statutory provisions and regulations that provide comparable disclosures and explicit controls over the issuance of loan proceeds to student consumers." *Id.* at 42. The Act's explicit pairing of the TILA exemption with preemption of state-law disclosure requirements[7] indicates that Congress sought to preempt only disclosure mandates that were similar in kind to the types of mandatory written disclosures that Congress found unnecessary when exempting federal student loans from TILA. *See Student Loan Servicing Alliance v. District of Columbia* (*SLSA*), 351 F. Supp. 3d 26, 54-55 (D.D.C. 2018).

Third, related provisions of the HEA demonstrate Congress's narrow view of "disclosure requirements" in the student loan context. For

[7] Title VII contained both § 701(a), which exempted federal student loans from TILA, and § 701(b), which preempted "disclosure requirements" under state law. *See* Pub. L. No. 97-320, 96 Stat. 1469, 1538 (1982).

example, §§ 1078-3 and 1083 set forth various mandatory disclosures that lenders are required to make to borrowers. *See* 20 U.S.C. §§ 1078-3(b)(1)(F), 1083. But "[t]here is nothing in the HEA that standardizes or coordinates how a customer service representative of a third-party loan servicer shall interact with a customer in the day-to-day servicing of his loan." *Hyland v. Navient Corp.*, No. 18-cv-9031, 2019 WL 2918238, at *6 (S.D.N.Y. July 8, 2019) (quotation and alteration marks omitted). Given Congress's stated desire to relieve lenders of compliance with duplicative disclosure requirements, it would make no sense to interpret § 1098g as preempting communications beyond those regulated by the HEA.

Finally, the overarching purpose of the HEA categorically disfavors a statutory interpretation that would shield student loan servicers from state-law prohibitions on unfair and deceptive business practices. The HEA was intended to provide access to higher education for lower- and middle-income families. *See* Twinette L. Johnson, *Going Back to the Drawing Board: Re-entrenching the Higher Education Act to Restore Its Historical Policy of Access*, 45 U. Tol. L. Rev. 545, 557-58 (2014). Congress has since reiterated that federal student aid programs are intended to benefit students and their families, and not to enrich the student loan industry. See *supra* at 3-4. But the HEA does not itself provide a private right of action for injured borrowers. Construing the preemption provision to cover broad swathes of state law, including traditional consumer-protection remedies, would leave borrowers with neither federal nor state remedies against misconduct. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," especially in the context of a statute that is unambiguously designed to support vulnerable populations. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

In determining the HEA's preemptive reach, this Court should give no weight to the Department of Education's recently issued "Notice of Interpretation." *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 (Mar. 12, 2018). As numerous courts have concluded, the Notice "lacks requisite thoroughness and persuasiveness" and "represents a stark, unexplained change in the Department's position." *SLSA*, 351 F. Supp. 3d at 50; *see also Nelson*, 928 F.3d at 651 n.2; *Hyland*, 2019 WL 2918238, at *7.

Among other defects, the Notice fails to explain the Department's prior representation to a New York federal court that "'nothing in the HEA or its legislative history even suggests that the HEA should be read to preempt or displace state or federal laws,'" and impermissibly "draws broad conclusions about the [federal] regulations' preemptive effect without actually interpreting any specific regulations." *SLSA*, 351 F. Supp. 3d at 50-51 (quoting *Sanchez v. ASA Coll., Inc.*, No. 14-cv-5006, Dkt. 64, U.S. Dep't of Educ., Statement of Interest (S.D.N.Y. Jan. 23, 2015)). In addition, the Notice offers no justification, textual or otherwise, for its extraordinarily broad interpretation of the term "disclosure requirements" as including "informal or non-written communications to borrowers as well as reporting to third parties such as credit reporting bureaus." 83 Fed. Reg. at 10,621. "The persuasive value of an agency's interpretation may be undermined when it is 'novel' or 'inconsistent with its positions in other cases.'" *Hyland*, 2019 WL 2918238, at *7 (citation omitted).

B. There Is No Conflict Between the HEA and State Consumer-Protection Laws.

This Court should likewise reject Navient's argument that Pennsylvania's state-law claims impermissibly interfere with the HEA's interest in "establish[ing] clear, uniform standards for federal loan programs that would apply nationwide." Br. for Navient (Br.) at 41 (quotation marks omitted). A state action obstructs federal objectives only if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth*, 555 U.S. at 589 (quotation marks omitted). No such conflict exists here because state consumer-protection laws advance, rather than hinder, the purposes and objectives of the HEA.

As an initial matter, state law cannot obstruct a federal interest in uniformity that does not exist. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995). Nothing in the statute expresses an intent to impose uniform federal standards on the day-to-day servicing of student loans. *See SLSA*, 351 F. Supp. 3d at 70. The HEA does not expressly regulate such conduct, and the Department has issued no regulations governing servicing standards. Indeed, the federal government has acknowledged that "there is no existing comprehensive federal statutory or regulatory framework providing consistent standards for the servicing of all student loans." CFPB, *Student Loan Servicing: Analysis of Public Input and Recommendations for Reform* 11 (Sept. 2015) (internet).

In any event, "[s]tate-law prohibitions on false statements of material fact do not create diverse, nonuniform, and confusing standards," since "state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 529 (1992) (op. of Stevens, J.) (quotation marks omitted). It makes no difference that federal law requires certain disclosures pertaining to student loans, as Navient points out (*see* Br. at 41-42). Conflict preemption requires an actual obstacle, and not the "mere possibility of inconvenience." *Goldstein v. California*, 412 U.S. 546, 555 (1973) (quotation marks omitted). Navient never explains how state-law prohibitions on unfair and deceptive practices actually interfere with the effectiveness of various federal disclosures. Instead, Navient assumes that the mere existence of federal regulations pertaining to disclosures compels a finding of conflict preemption. But "[t]o infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule . . . would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985).

The Department's Notice of Interpretation is likewise wholly unpersuasive with respect to conflict preemption. *See Wyeth*, 555 U.S. at 576. The Notice predicts that various unidentified state laws "could conflict" with various federal statutes and regulations but offers no examination of such conflicts. *See* 83 Fed. Reg. at 10, 622. Conflict preemption analysis is inherently fact-driven and requires review of a specific state statute or regulation, its interplay with the federal regime, and the nature of the regulated service or practice. *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C. Cir. 1984). An agency's broad pronouncement that state laws are preempted as a class regardless of their individual features is entitled to no consideration. *Wyeth*, 555 U.S. at 576-77.

Finally, a finding of conflict preemption would be especially inappropriate against the backdrop of long-standing regulatory cooperation between the federal and state governments in overseeing the student loan industry. See *supra* at 16-18. States are not seeking to undermine Congress's objectives in passing the HEA; to the contrary, States are seeking to ensure that borrowers actually benefit from the protections that Congress has created for them. Where, as here, "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973). In such cases, "courts must be careful not to confuse the congressionally designed interplay between state and federal regulation, for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J. concurring) (quotation marks and citation omitted).

POINT III

THE CONSUMER FINANCIAL PROTECTION ACT AUTHORIZES STATE ATTORNEY GENERAL ENFORCEMENT WHETHER OR NOT THE CONSUMER FINANCIAL PROTECTION BUREAU HAS ALREADY ACTED

The Consumer Financial Protection Act (CFPA) prohibits covered entities from engaging in "any unfair, deceptive, or abusive act or practice" when offering or providing financial products and services. 12 U.S.C. § 5536(a)(1)(B). The CFPA also created the CFPB, a federal agency empowered to promulgate regulations and take enforcement actions to prevent these and other prohibited practices. *Id.* § 5491 et seq. At the same time, the CFPA expressly authorizes state attorneys general and regulators "to enforce provisions of this title or regulations issued under this title." *Id.* § 5552(a)(1). Notwithstanding these provisions, Navient contends (Br. at 45) that the CFPA precludes state attorneys general from bringing claims under the statute when the CFPB has already brought a similar action against the same defendants. The district court correctly rejected this argument. (A. 39-52.)

Contrary to Navient's views (Br. at 46-51), the CFPA's notice and intervention provisions are entirely consistent with concurrent state enforcement actions. First, the CFPA requires a State to notify the CFPB prior to filing a lawsuit under the statute. *See* 12 U.S.C. § 5552(b)(1)(A). This notice must describe, among other things, "whether there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action, including any rulemaking, undertaken by the Bureau." *Id.* § 5552(b)(1)(C)(iii). As the district court correctly noted (A. 46), the CFPA's notice provision expressly contemplates that there may already be a pending CFPB "action" at the time of the State's pre-suit notice. This fact alone forecloses Navient's interpretation.

Navient suggests that the term "action" is limited to "pending regulatory actions," citing to "the statute's embedded reference to 'rulemaking' proceedings." Br. at 48. But the statute uses the word "including" prior to the term "rulemaking," making clear that "rulemaking" is not intended to be an exclusive list of covered "action[s]". *See, e.g., Bloate v. United States*, 559 U.S. 196, 208 (2010). No statutory, dictionary, or common-sense definition of the term "action" would reasonably exclude pending litigation. Moreover, contrary to Navient's suggestion that pre-suit notice would be futile where the CFPB has already filed a lawsuit (Br. at 47), such notice is arguably *most* useful when the CFPB is engaged in pending litigation, because notice gives the agency an opportunity to coordinate with the State to ensure that neither party assumes a litigation position that would undermine the other's action.

Second, the CFPA allows, but does not require, the CFPB to intervene in a State's action under appropriate circumstances. 12 U.S.C. § 5552(b)(2). The district court correctly determined that the statute's permissive intervention provision is consistent with concurrent state enforcement actions. (A. 46-48.) Congress specifically chose not to require the CFPB to intervene in every case brought under the CFPA. The fact that intervention is unavailable in a particular matter because the CFPB is already a party to a related case does not undermine Congress's intent in giving the CFPB discretion to intervene in an action brought by a particular State. The CFPB's participation in its own pending litigation fully protects the agency's rights and interests.

Third, where Congress did seek to limit the States' enforcement authority under the CFPA, it did so expressly. For example, States cannot enforce mortgage regulations promulgated by the CFPB when the federal agency has already initiated an action against a party. *See* 12 U.S.C. § 5538(b)(6). The CFPA also precludes States from enforcing the statute's provisions against national banks and federal savings associations. *See id.* § 5552(a)(2). Likewise, States cannot enforce the CFPA against certain small merchants and retailers offering nonfinancial goods and services. *See id.* § 5517(a)(2)(E). Congress's decision to explicitly limit state enforcement authority in these specific instances is further proof that it did not intend other limitations. *Cf. Hillman v. Maretta*, 569 U.S. 483, 496 (2013).

Fourth, there is no merit to Navient's complaint that concurrent state enforcement actions "waste judicial resources and create inconsistency." Br. at 52-53. Every statute that authorizes multiple parties to seek relief necessarily contemplates parallel litigation that may result in conflicting decisions. Simply put, a defendant that injures many different parties risks many different lawsuits. A variety of mechanisms are available to ameliorate concerns about judicial resources, including consolidation, coordinated discovery and briefing schedules, and abeyances pending dispositive motions. In any event, concerns about litigation burdens are not by themselves sufficient to strip parties of their statutory right to seek relief for violations of the law when, as here, Congress has seen fit to confer that right upon them.

Finally, Navient suggests (Br. at 53-56) that "serious constitutional concerns" would arise if fifty state attorneys general were able "to enforce federal law independent of the President" or other federal authority. In Navient's view, a federal official must have the "power to control the myriad litigation decisions" that a given party seeking to enforce federal law might make. *Id.* at 54. If Navient were correct, innumerable federal statutes—including those that allow for enforcement by state attorneys general and those that create private rights of action—would violate the Constitution. But no court has ever embraced the bizarre contention that the Constitution forbids Congress from conferring enforcement authority on anybody other than a federal officer or agency.

CONCLUSION

This Court should affirm the district court's decision.

Dated: New York, New York
August 29, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Amici Curiae

By: *<u>/s/ Ester Murdukhayeva</u>*
ESTER MURDUKHAYEVA
Assistant Solicitor General

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
ESTER MURDUKHAYEVA
Assistant Solicitor General
of Counsel

28 Liberty Street
New York, NY 10005
(212) 416-6279

(*Counsel listing continues on next page.*)

KEVIN G. CLARKSON
Attorney General
State of Alaska
1031 W. 4th Avenue #200
Anchorage, AK 99501

XAVIER BECERRA
Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244

PHIL WEISER
Attorney General
State of Colorado
1300 Broadway, 10th Fl.
Denver, CO 80203

WILLIAM TONG
Attorney General
State of Connecticut
55 Elm St.
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801

CLARE E. CONNORS
Attorney General
State of Hawaiʻi
425 Queen St.
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720

KWAME RAOUL
Attorney General
State of Illinois
100 W. Randolph St., 12th Fl.
Chicago, IL 60601

CURTIS T. HILL, JR.
Attorney General
State of Indiana
200 W. Washington St., Room 219
Indianapolis, IN 46204

TOM MILLER
Attorney General
State of Iowa
1305 E. Walnut St.
Des Moines, IA 50319

ANDY BESHEAR
Attorney General
Commonwealth of Kentucky
700 Capitol Ave., Ste 118
Frankfort, KY 40601

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 St. Paul Pl.
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Pl.
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

JIM HOOD
Attorney General
State of Mississippi
P.O. Box 220
Jackson, MS 39205

DOUGLAS J. PETERSON
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

AARON D. FORD
Attorney General
State of Nevada
100 North Carson St.
Carson City, NV 89701

GURBIR S. GREWAL
Attorney General
State of New Jersey
25 Market St.
Trenton, NJ 08625

HECTOR H. BALDERAS
Attorney General
State of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

JOSHUA H. STEIN
Attorney General
State of North Carolina
P.O. Box 629
Raleigh, NC 27602

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. NE
Salem, OR 97301

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main St.
Providence, RI 02903

JASON RAVNSBORG
Attorney General
State of South Dakota
1302 E. Highway 14, Ste 1
Pierre, SD 57501

HERBERT H. SLATERY III
Attorney General
State of Tennessee
P.O. Box 20207
Nashville, TN 37202

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 N. Ninth St.
Richmond, VA 23219

ROBERT FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

JOSH KAUL
Attorney General
State of Wisconsin
17 W. Main St.
Madison, WI 53703

KARL A. RACINE
Attorney General
District of Columbia
441 4th St., NW
Washington, DC 20001

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the accompanying Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system on August 29, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 29, 2019
New York, NY

/s/ Ester Murdukhayeva

COMBINED CERTIFICATIONS

Ester Murdukhayeva certifies under penalty of perjury under 28 U.S.C. § 1746 that:

1. I am a member of the bar of this Court.

2. This brief complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) of the Federal Rules of Appellate Procedure and contains 6,484 words.

3. All parties of record are Filing Users and, as required by 3d Cir. L.A.R. 113.4, this brief has been served electronically by the Notice of Docket Activity.

4. The text of the electronic file of this brief is identical to the text of the paper copies of this brief.

5. This document was prepared on a system using CrowdStrike Falcon Sensor anti-virus software and no viruses were identified in the document.

Dated: August 29, 2019

/s/ Ester Murdukhayeva