IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2116

COMMONWEALTH OF PENNSYLVANIA

v.

NAVIENT CORP; NAVIENT SOLUTIONS LLC,

Appellants

BRIEF FOR APPELLEE

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA IN NO. 3:17-CV-1814-RDM ENTERED DECEMBER 17, 2018

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STATEMENT OF ISSUES

I. Whether the Commonwealth of Pennsylvania may bring a concurrent enforcement action under the Consumer Financial Protection Act (CFPA) after the Consumer Financial Protection Bureau (CFPB) has already filed suit?

Navient raised this issue in its motion to dismiss the complaint. (Doc. 16, 12/5/2017) The district court denied the motion to dismiss, concluding that the CFPA did not bar the Commonwealth from bringing an enforcement action where the CFPB had already filed a similar lawsuit. (Opinion (Doc. 47) at 27-28; Appx49-50)

II. Whether the Higher Education Act (HEA) preempts the Commonwealth's loan-servicing claims against Navient under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (CPL)?

Navient raised this issue in its motion to dismiss the complaint. (Doc. 16, 12/5/2017) The district court denied the motion to dismiss, concluding that the Commonwealth's claims did not impose disclosure requirements on Navient in violation of the HEA, but were separate and distinct allegations of unfair and deceptive business practices brought pursuant to Pennsylvania's traditional state powers.

(Opinion at 34-40; Appx56-62) It further found that conflict preemption did not apply because uniformity was not an express goal of Congress in enacting the HEA. (*Id.* at 40-42; Appx62-64)

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania, through its Attorney General Josh Shapiro and his Bureau of Consumer Protection, ("Commonwealth" or "Pennsylvania") commenced the present action to protect the public from unlawful student loan origination and servicing practices by Navient Corporation and Navient Solutions, LLC (collectively, "Navient"). Navient, and its corporate predecessors,[1] have been in the business of (1) offering, selling, marketing and promoting student loans to borrowers and (2) servicing and collecting on borrowers' student loans since at least 2004. (Complaint at ¶¶ 2 & 19-21; Appx105) The Commonwealth alleges, *inter alia,* that Navient has harmed numerous student loan borrowers by: (1) marketing risky and expensive subprime student loans that it knew, or should have known, were likely to default; and (2) while servicing federal loans, making a host of misrepresentations while steering

[1] Navient and Navient Solutions, LLC have two corporate predecessors: a parent company (SLM Corporation) and SLM's subsidiary (Sallie Mae, Inc.). (Complaint at ¶ 19; Appx109)

borrowers into costly forbearances, instead of enrolling them into more affordable income-driven repayment plans. (Complaint at ¶¶4 & 180; Appx105-106, 154)

The Commonwealth filed a complaint against Navient in the district court for the Middle District of Pennsylvania on October 5, 2017. (Appx104-167) The Commonwealth alleges that Navient's actions in originating and servicing student loans constitute unfair, deceptive, and abusive practices in violation of both the federal Consumer Financial Protection Act of 2010[2] (CFPA) and Pennsylvania's Unfair Trade Practices and Consumer Protection Law (CPL).[3]

The complaint contains nine counts against Navient: (1) Count I under the CPL for unfairly and deceptively originating risky, expensive loans which had a high likelihood of default, among other unlawful conduct (Appx149-151); (2) Count II under the CPL for steering borrowers suffering long-term financial hardship into costly forbearances (Appx152-153); (3) Count III under the CFPA for steering borrowers suffering long-term financial hardship into costly forbearances (Appx153-155); (4) Count IV under the CPL for loan servicing failures related to recertification of IDR plans (Appx155-157); (5) Count V under the CFPA for loan servicing failures related to recertification of IDR plans

[2] 12 U.S.C. § 5552.

[3] 73 P.S. §§ 201-1 to 201-9.3.

(Appx157-159); (6) Count VI under the CPL for misrepresentations relating to cosigner release (Appx160-161); (7) Count VII under the CFPA for misrepresentations relating to cosigner release; (8) Count VIII under the CPL for repeated payment processing errors (Appx162-163); and (9) Count IX under the CFPA for repeated payment processing errors (Appx163-164).

The Commonwealth seeks, *inter alia*, to permanently enjoin Navient's unlawful conduct under both federal and state law, to obtain restitution on behalf of borrowers who have been harmed by Navient's actions, and to be awarded civil penalties. (Complaint, Prayer for Relief; Appx62-63)

Navient filed a motion to dismiss the complaint for failure to state a claim on December 5, 2017. (Doc. 16) Navient raised a number of arguments in support of its motion, including the two arguments that this Court has granted permission to hear on appeal: Navient's contention that (1) the CFPA precludes the Commonwealth from bringing a parallel enforcement action that is similar to a claim already brought by the Consumer Financial Protection Bureau (CFPB) and (2) the CPL is preempted by Section 1098g of the Higher Education Act (HEA), 20 U.S.C. § 1098g.[4]

[4] Section 1098g provides: "Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 *et seq.*) shall not be subject to any disclosure requirements of any State law."

The district court denied the motion to dismiss in its entirety in a Memorandum Opinion ("Opinion") and Order dated December 17, 2018. (Appx23-93) In rejecting Navient's argument that the CFPA precluded a concurrent lawsuit by Pennsylvania, the district court determined that Section 5552(a)(1) of the CFPA, 12 U.S.C. § 5552(a)(1), is unambiguous in conferring a right on state attorneys general to file suit to enforce the CFPA, and there is nothing in the CFPA which would bar a parallel state action. (Opinion at 22-30; Appx44-52)

Likewise, the district court rejected Navient's preemption argument. It concluded that the Commonwealth's claims survived Navient's attack under both express preemption and conflict preemption principles. It first found that the Commonwealth's claims were not an attempt to impose disclosure requirements on Navient in violation of the HEA, but were instead distinct allegations of unfair and deceptive business practices brought pursuant to Pennsylvania's traditional state police powers. (Opinion at 34-40; Appx56-62) It then found that conflict preemption did not apply because uniformity was not an express goal of Congress in enacting the HEA and, even if it were, this goal is not defeated by allowing the Commonwealth to enforce its consumer protection laws. Moreover, the district court rejected Navient's suggestion that the district court should defer to recent statements made by the Department of Education regarding the interpretation of

Section 1098g as being unpersuasive and not binding. (Opinion at 40-42; Appx62-64)

On January 4, 2019, Navient filed a motion for a certificate of appealability in which it asked, *inter alia,* that the following two issues be certified for interlocutory review by this Court:

> (I) whether the CFPA prohibits "copycat" claims brought by a state when the Consumer Financial Protection Bureau (CFPB) has its own parallel lawsuit against the same defendants regarding the same conduct; and
>
> (II) whether the Higher Education Act (HEA), 20 U.S.C. § 1098g, preempts state law claims brought under the CPL challenging Navient's loan servicing practices;

By a Memorandum Opinion and Order dated March 5, 2019, the district court granted Navient's motion. (Appx3-22) Navient then filed a petition for permission to appeal with this Court. This Court granted the petition as to the these two issues, but denied the petition as to a third issue relating to relief available under the CPL. (Order, 4/30/2019; Appx1-2)

STATEMENT OF FACTS[5]

Navient has been "engaged in trade and commerce by offering, selling, marketing and promoting student loans to borrowers and by servicing and collecting on borrowers' student loans." (Complaint at ¶ 2; Appx105) From 2004 until April 2014, Navient's predecessors were fully engaged in the business of originating, marketing, servicing and collecting student loans. (*Id.* at ¶ 20; Appx109-110) In April 2014, Navient assumed the liabilities of its predecessors and took over their student loan servicing and debt collection business.[6] (*Id. at* ¶ 2l; Appx110)

Federal student loans are funded or guaranteed by the federal government. (*Id.* at ¶ 27; Appx111) They are different from most other loans in that they: (1) are primarily need-based and made regardless of credit history; (2) have interest rates set by the federal government; and (3) provide borrowers with a variety of re-payment options, including alternatives based on income. (*Id.* at ¶ 28; Appx111-112) The servicing of federal student loans is always performed by private

[5] As this is an appeal from the denial of a motion to dismiss, the facts as summarized below are derived from the Commonwealth's Complaint. (Appx104-167)

[6] For purposes of this brief, the term "Navient" encompasses and includes actions by its corporate predecessors: SLM Corporation and Sallie Mae, Inc. (Complaint at ¶ 19; Appx6)

contractors like Navient. (*Id.* at ¶ 33; Appx112) Federal student loan servicers assist borrowers with such things as collecting payments, providing repayment options to borrowers, facilitating the loan's payoff, and collecting on delinquent loans. (*Id.* at ¶ 35; Appx113) Although federal loans provide significant advantages to borrowers, there are serious consequences for borrowers who default. (*Id.* at ¶ 36; Appx113)

I. ORIGINATION OF LOANS

Since at least 2004, Navient's predecessors originated both federal and private student loans throughout the nation.[7] (*Id.* at ¶¶ 45-46; Appx115) Navient held itself out as a trusted resource for student borrowers in originating private student loans, but the borrowers had no reason to know that these loans originated by Navient were highly likely to fail. (*Id.* at ¶ 47; Appx115-16)

Until 2007, many school financial aid offices maintained a "preferred lenders" list to give students guidance in choosing between different lenders offering federal and private student loans. (*Id.* at ¶ 49; Appx116) These lenders typically obtained 90% of the total loans taken out by students and parents at a given institution. As a result, Navient attempted to place itself at the top of the

[7] Federal student loans were originated by private lenders through the Federal Family Education Loan Program (FFELP) until they were fully supplanted by the federal Direct Loan Program in 2010. (Complaint at ¶¶ 30-32; Appx112)

preferred lending lists to obtain nearly exclusive access to a school's potential borrowers. (*Id.* at ¶ 52*;* Appx116)

To further this end, Navient marketed custom loan packages to schools which included FFELP loans, private loans for borrowers who qualified for Navient's standard private student loan products (prime loans), and private loans for students who did not qualify for standard private student loans (subprime loans). This benefited schools by maximizing enrollment and benefited Navient overall by giving it a greater volume of the more lucrative (and guaranteed) FFELP market. (*Id.* at ¶¶ 53-55; Appx116-117) Subprime loans typically had high variable interest rates (for example, 15.75% in June 2007) and origination fees as high as 9% of the total loan. (*Id.* at ¶¶ 61-62; Appx118-119) Student borrowers who took out subprime loans were not informed that the loans were part of a subprime lending program which had a high likelihood of default. (*Id.* at ¶ 60; Appx118) Internally, this strategy was described as follows: "Current Strategy is Working:-Use subprime to win school deals and secure FFELP and standard private volume–View economics on an all-in basis." (*Id.* at ¶ 64; Appx119) A January 17, 2007 internal Navient email describes one of its subprime loan programs as "the baited hook to gain [FFELP] volume." (*Id.* at ¶ 67; Appx119)

In order to provide schools with attractive student loan "packages" and thereby secure a greater share of the FFELP and private prime market, Navient

loosened its required credit criteria so subprime borrowers could qualify without knowing the true risk of default. (*Id.* at ¶ 74; Appx121) Between 2000 and 2006 there was a substantial increase in the number of high risk subprime loans made by Navient to students attending schools with a less than 50% graduation rate and to students with FICO scores of less than 640. (*Id.* at ¶¶ 80-81; Appx123) Between 2000 and 2007, between 68% and 87 % of Navient's high risk loans defaulted. A 2009 lawsuit alleged that in 2007, Navient's CEO summarized Defendants' private education loan underwriting standards by stating, "If the borrower can create condensation on a mirror, they need to get a loan this year." (*Id.* at ¶79; Appx122-123) These borrowers were never told before executing these student loans that there was a high likelihood that they would default. (*Id.* at ¶¶ 82-83; Appx123-124)

Navient took steps to shield itself from potential losses arising from defaults of subprime loans. In what is known as a "credit enhancement," schools would agree to not accept the full amount of the loan upfront to insulate Navient from a possible default. Such an agreement was outside the terms agreed to by the student, but made between the school and Navient to enable more students to obtain loans while minimizing Navient's risk. (*Id.* at ¶¶ 88-91; Appx125-126) Similarly, in "recourse agreements," some schools would agree to cover a certain percentage of defaulted loans. (*Id.* at ¶ 92; Appx126)

II. SERVICING OF LOANS

A. Navient Steered Borrowers Who Were Experiencing Long-Term Financial Hardship Into Costly Forbearance Instead Of Pursuing Cheaper Alternatives.

There are two main types of federal student loans: subsidized and unsubsidized. For subsidized loans, the federal government pays the interest while the student attends school. For unsubsidized loans, the loan accrues interest during that time. (Complaint at ¶ 94; Appx127) Generally, students have six months after leaving school to begin repayment. At that time, the borrower is assigned or selects a specific repayment plan, although the borrower may change his or her plan at any time, including when he or she is experiencing financial hardship. (*Id.* at ¶ 95; Appx127)

In 2009, the federal government began to offer income-driven repayment (IDR) plans which place a cap on monthly payments of federal student loans based on the borrower's income and family size. Payments may be reduced to as little as $0 per month in an IDR plan. (*Id.* at ¶¶ 96-97; Appx127) IDR plans offer other benefits including the payment of accrued interest on subsidized loans for the first three consecutive years of enrollment, forgiveness of the remaining loan balance after making 20-25 years of qualifying payments or making 10 years of qualifying payments for borrowers working in jobs covered by the Public Service Loan Forgiveness program. (*Id.* at ¶¶ 99-101; Appx128)

Federal student loan borrowers are also generally eligible for forbearance. Forbearance is a short-term, temporary postponement of payments due to financial hardship or illness. Borrowers may be entitled to multiple forbearances over the course of a loan. (*Id.* at ¶¶ 103-04; Appx129) Borrowers who enter forbearance face significant costs. The borrowers' monthly payments ultimately increase when the forbearance periods end due to the accumulation of unpaid interest, which is added to the principal balances. (*Id.* at ¶¶ 105-06; Appx129)

IDR plans allow borrowers to avoid or reduce the significant costs of forbearance. (*Id.* at ¶107; Appx130) However, Navient has repeatedly encouraged borrowers to contact its representatives for assistance, only to steer borrowers into forbearance rather than more affordable alternatives like IDR plans. (*Id.* at ¶ 108; Appx129) Enrolling a borrower in forbearance can be completed easily in a few minutes without any paperwork. (*Id.* at ¶ 115; Appx132)

Navient has created incentives for its representatives to push borrowers into forbearance without adequately exploring the IDR option–if the IDR option were even discussed at all. (*Id.* at ¶ 110; Appx130) Navient representatives were compensated based on average call time. This creates a disincentive for Navient representatives to engage in time-consuming discussions regarding IDR plans. This was compounded by the fact that enrolling in an IDR plan requires the

submission of paperwork by the borrower which in turn may require additional phone conversations with a Navient representative. (*Id.* at ¶¶ 112-13; Appx131)

There is also an annual recertification process for IDR plans which acts as a further disincentive for Navient representatives to actively promote the advantages of such plans with borrowers. (*Id.* at ¶ 114; Appx131) In sum, counseling borrowers about and enrolling them in IDR plans is costly and time consuming for Navient and its employees.[8] (*Id.* at ¶ 115; Appx132)

As a result of the incentive structure Navient set up for its employees, it enrolled many borrowers into multiple consecutive forbearances, even though they had clearly demonstrated a long-term inability to repay their loans, rather than the short-term financial hardship appropriate for forbearances. (*Id.* at ¶121; Appx134) In fact, between January 1, 2010 and March 31, 2015, Navient enrolled more than 1.5 million borrowers in multiple consecutive forbearances instead of helping them enroll in an IDR plan.[9] (*Id.* at ¶122; Appx134) During the same time period, the

[8] Navient accuses the Commonwealth of "ignor[ing] the reality" that servicers are "paid more for loans in IDR than for loans in forbearance." (Appellants' Br. at 11, n.1) But Navient admits that the change in compensation for loans in forbearance was not implemented until September 2014. (Appellants' Br. at 18)

[9] These 1.5 million Navient borrowers sustained a staggering financial cost of **nearly four billion dollars** in unpaid interest added to the principal of their loans. For many of these borrowers, if they had been enrolled in an IDR plan, the government would have paid the unpaid interest on their subsidized loans for the first three years of enrollment. Even for unsubsidized loans, borrowers would have

number of borrowers that Navient enrolled in forbearance generally exceeded the number of borrowers enrolled in IDR plans. (*Id.* at ¶ 117; Appx132) Navient representatives would sometimes place borrowers in voluntary forbearance even though they would have qualified for $0 per month payments in an IDR plan. In many cases, Navient would unnecessarily place borrowers in forbearance only to have those borrowers later enter an IDR plan. Navient enrolled the majority of IDR plan participants in forbearance for more than three months before ultimately being enrolled in an IDR plan. This resulted in borrowers being negatively impacted by the addition of interest to the loan's principal and losing credit for months that would have been counted towards loan forgiveness. (*Id.* at ¶¶ 118-20; Appx132-133)

B. Navient Had Systemic Servicing Failures Relating to the Recertification of IDR Plans.

A federal student loan borrower must certify his income and family size to qualify for an IDR plan. Enrollment in an IDR plan expires after 12 months unless the borrower recertifies his or her income and family size. (*Id.* at ¶ 131; Appx137) If the 12 month period expires before recertification is completed, (1) the borrower's monthly payments may immediately increase; (2) any unpaid, accrued

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saved on interest because it would not have been capitalized while they were enrolled in an IDR plan. (Complaint at ¶ 124; Appx134)

interest will be added to the loan principal; (3) for subsidized loans, the borrower will lose an interest subsidy for those months he or she is not enrolled in an IDR plan; (4) and for borrowers who enroll in forbearance after the 12 month IDR period expires, their entitlement for loan forgiveness is delayed because they are no longer making qualifying payments that count toward loan forgiveness. (*Id.* at ¶ 132; Appx137-138)

Between July 2011 and March 2015, more than 60% of Navient's borrowers who enrolled in IDR plans failed to timely renew their enrollment. (*Id.* at ¶ 145; Appx141) From January 1, 2010 to December 31, 2012, Navient's annual renewal notices for IDR plans (sent via U.S. mail) did not provide notice of the actual date by which renewal applications had to be submitted. (Complaint at ¶ 135; Appx138-139) Seventy-five percent of Navient's federal loan borrowers agreed to receive electronic communications. Between mid-2010 and March 2015, these borrowers had to log into an electronic portal using their own ID and password to view these notices. Borrowers would be sent an e-mail with a hyperlink to Navient's website. However, the e-mail did not provide any indication of the purpose of the notice. (*Id.* at ¶¶ 140-41; Appx140)

Instead, Navient provided vague assertions regarding when the IDR period would expire ("approximately 90 days") and that the "renewal process may take at least 30 days" to complete. (*Id.* at ¶ 136; Appx139) These notices made it

impossible for borrowers to determine the actual deadline for submitting a recertification application and failed to advise borrowers of the negative consequences of submitting an untimely application or an application that was deemed to contain incomplete or incorrect information. (*Id.* at ¶¶ 137-38; Appx139) The notices suggested that the processing of such applications would be delayed, but failed to inform borrowers of the negative consequences of having a break in their enrollment in an IDR plan referred to above. (*Id.* at ¶ 138; Appx139)

C. Navient Made Misrepresentations Relating to Cosigner Release.

A cosigner is generally required for a borrower to obtain a private student loan or to obtain a loan with more favorable terms. However, after a borrower begins repayment, he or she can usually apply to release the cosigner after meeting eligibility criteria. (*Id.* at ¶ 149; Appx142-143)

Since January 2010, one of the eligibility criteria has been for the borrower to make a minimum number of consecutive on-time payments. (*Id.* at ¶ 150; Appx143) When a borrower makes multiple payments at one time, Navient applies the payment for the current month and then places the borrower in a "paid ahead" status for subsequent months based on the excess payment. (*Id.* at ¶ 153; Appx143-144) The borrowers is then sent a bill for $0 for the subsequent months covered by the excess payment. (*Id.* at ¶ 154; Appx144) However, until mid-2015, Navient treated these non-payments in response to the bills for $0 as a failure

to make consecutive payments. (*Id.* at ¶ 155; Appx144) Navient would then reset the clock and consider the consecutive on time monthly payments as being zero, thereby increasing the number of consecutive payments necessary to release a cosigner. (*Id.* at ¶ 156-57 & 59; Appx144-145) Nothing on Navient's website, billing statements, or other documents provided to borrowers indicated that this would be the result of not making a payment where the bill stated that nothing was due. (*Id.* at ¶ 158; Appx145)

D. Navient Has Committed Repeated Payment Processing Errors.

Navient has not properly processed student loan payments due to a failure to have adequate processes and procedures to sufficiently address errors in the processing of payments it receives or to prevent recurring errors. (Complaint at ¶ 162; Appx146) Since at least 2011, many borrowers and cosigners (primarily those who pay by check or through an external bill payment system) have complained that Navient has misallocated or misapplied submitted payments. (*Id.* at ¶ 165; Appx147)

Errors made by Navient have resulted in borrowers and cosigners being improperly charged late fees and increased interest charges. It has also resulted in inaccurate negative information being furnished to consumer reporting agencies. (*Id.* at ¶ 169; Appx148) Many borrowers have complained that even after getting Navient to correct an error, the same payment processing errors occurred

repeatedly. (*Id.* at ¶ 170; Appx148) This problem has been compounded by Navient's failure to categorize most borrower inquiries, as well as Navient's failure to identify and address underlying issues to correct recurring problems. (*Id.* at ¶¶ 170-71; Appx148)

SUMMARY OF ARGUMENT

The Commonwealth of Pennsylvania (the "Commonwealth") alleges that Navient Corporation and Navient Solutions, LLC (collectively, "Navient") have harmed numerous student loan borrowers by (1) marketing risky and expensive subprime loans which they knew, or should have known, were likely to default; and (2) while servicing federal loans, making a host of misrepresentations while steering borrowers into costly forbearances, instead of enrolling them into more affordable income-driven repayment plans. The Commonwealth maintains that Navient's conduct in originating and servicing student loans constitutes unfair, deceptive, or abusive acts or practices in violation of the federal Consumer Financial Protection Act (CFPA) and Pennsylvania's Unfair Trade Practices and Consumer Protection Law (CPL).

Navient filed a motion to dismiss the Complaint that was denied by the district court. In this interlocutory appeal, Navient makes two arguments. First, Navient argues that the CFPA precludes the Commonwealth from bringing a concurrent enforcement action that is similar to a claim already brought by the

Consumer Financial Protection Bureau (CFPB). Second, Navient argues that the Commonwealth's claims pursuant to the CPL are preempted by Section 1098g of the Higher Education Act (HEA).

Neither of Navient's arguments have merit. In regard to the Commonwealth's claims under the CFPA, the plain language of the statute permits a concurrent action by a state. While other sections of the CFPA expressly prohibit some concurrent actions by other federal agencies when the CFPB has already brought suit, these sections simply do not apply to the Commonwealth. Moreover, because Congress prohibited some concurrent actions, there can be no doubt that the CFPA's failure to bar states from filing concurrent actions—even when the CFPB has already filed suit—was deliberate.

As to Navient's second argument, Section 1098g of the HEA provides that federal student loans "shall not be subject to any disclosure requirements of any State law." However, Navient incorrectly attempts to extend what is a narrow restriction into a broad one which would effectively preempt any type of state regulation of student loans. For all intents and purposes, Navient is asking this Court to find field preemption based on Section 1098g even though this same position has been generally repudiated by other courts.

If Congress had intended such a sweeping prohibition, it would have expressly stated as much instead of trying to achieve such a result through a

provision which on its face applies only to disclosures. At its core, the Commonwealth's case is about Navient's noncompliance with the CPL, not whether Navient made the specific minimal disclosures as required under the HEA. There is a real distinction between the regulation of highly prescribed forms, which squarely fall within the preemption provision of Section 1098g, and the enforcement of laws of general applicability, such as the CPL, that would not be subject to preemption. Ultimately, the Commonwealth's claims are based on Navient's affirmative misrepresentations to consumers and not Navient's mere failure to disclose items governed by the HEA.

The decision of the district court denying Navient's motion to dismiss should be affirmed.

ARGUMENT

Standard of Review: The district court's decision to grant a motion to dismiss is a question of law for which the review is plenary. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009).

I. THE CFPA PERMITS CONCURRENT STATE CLAIMS.

In denying Navient's motion to dismiss, the district court correctly held that the CFPA permits Pennsylvania to bring concurrent claims. The district court reached this conclusion by following a straightforward application of well-settled doctrine of statutory construction. Navient had asked the district court to read implied restrictions into 12 U.S.C. § 5552(a)(1) despite the fact that Section 5552 "has a plain and unambiguous meaning with regard to the particular dispute in the case." *Marshak v. Treadwell*, 240 F.3d 184, 192 (3d Cir. 2001) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). The district court had no difficulty in rejecting Navient's arguments: "Following Navient's position would require the Court to accept an amalgam of tenuous postulates regarding several provisions of the CFPA and a strained reading of the plain text of the statute." (Opinion at 22; Appx44) In this appeal, Navient resurrects three of the four arguments it made

before the district court, and it adds a Constitutional argument which was not made below.[10] None is persuasive.

A. The Plain Meaning of the CFPA Permits Concurrent Claims.

Navient's Brief overlooks the crucial first step in statutory interpretation: the plain meaning. "When the statutory language has a clear meaning, [a court] need not look further." *Valansi v. Ashcroft*, 278 F.3d 203, 209 (3d Cir. 2002).[11] *See* also Opinion at 22 (Appx44) ("Where 'the statutory meaning is clear, our inquiry is at an end.'") (quoting *Gordon v. Wawa, Inc*., 388 F.3d 78, 81 (3d Cir. 2004) (internal quotation omitted)). The relevant language of Section 5552 is unambiguous: "[T]he attorney general…of any State may bring a civil action…to enforce provisions of this title…and to secure remedies under provisions of this title or remedies otherwise provided under other law." 12 U.S.C. § 5552(a)(1). It authorizes Pennsylvania to enforce the CFPA and in no way limits state claims where the CFPB has concurrent claims pending.

[10] This Constitutional argument (Appellants' Br. at 53-56) should be deemed waived. *See Metro. Edison Co. v. Pennsylvania Pub. Util. Comm'n*, 767 F.3d 335, 352 (3d Cir. 2014) (an issue not raised in the district court is waived unless manifest injustice would result).

[11] Navient has not cited any cases from this circuit that undermine the principles of statutory construction employed by the district court. Although cases from other circuits would not bind this circuit, Navient does not point to any.

Navient's position requires "finding ambiguity in otherwise clear statutory language." (Opinion at 23; Appx45) However, as this Court has clearly stated, "[c]ourts may look behind a statute only when the plain meaning produces a result that is not just unwise but is clearly absurd." *In re Visteon Corp.*, 612 F.3d 219, 220 (3d Cir. 2010). The language of the CFPA simply does not fit within the exception to the "plain meaning" rule referenced above. And that, in itself, should be sufficient for the Court to uphold the decision of the district court regarding the correct interpretation of the CFPA.

If Congress had wished to explicitly prohibit concurrent state claims when it drafted Section 5552, it would have done so. Navient's argument that one must infer a prohibition of concurrent state action under Section 5552(a)(1) is precluded by the fact that other provisions of the CFPA, which do not apply in this context, do prohibit concurrent claims. Under the canon of statutory construction laid down in *Russello v. U.S.*, 464 U.S. 16, 23 (1983), "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotations omitted).

The district court correctly held that applying the *Russello* canon here "is particularly appropriate, especially when the plain text of Section 5552(a)(1) is unambiguous in granting a state a right to bring an enforcement action under the

CFPA as are the other sections of the CFPA that bar concurrent enforcement actions." (Opinion at 29; Appx51) The district court properly points to three other provisions of the CFPA in support of its conclusion. First, 12 U.S.C. § 5514 prohibits the FTC or the CFPB from filing a civil action against a defendant if the other agency has previously filed an action against the same defendant based on the same "provision of law" and "any violation alleged in the complaint." Section 5514(c)(3)(B)(i). (*See* Opinion at 29; Appx51) Second, 12 U.S.C. § 5515 grants the CFPB primary enforcement authority over "very large" depository institutions and provides "backup enforcement" for the other Federal bank regulators to act if the CFPB does not. 12 U.S.C. § 5515(c)(3). (Opinion at 29; Appx51) Third, 12 U.S.C. § 5538 "provides for a state right of action to enforce mortgage rules promulgated by the CFPB, but contains an explicit prohibition on concurrent actions by states when the CFPB has already initiated its own action against a party." 12 U.S.C. § 5538(b)(6). (Opinion at 29; Appx51) In sum, even if the language of Section 5552(a)(1) were ambiguous—and it is not—the Court should presume that Congress's omission of an explicit prohibition against concurrent claims from Section 5552(a)(1) was intentional because Congress explicitly prohibited concurrent claims in three nearby sections of the statute.

Moreover, at least ***thirteen*** other federal consumer protection statutes exemplify Congress' ability to authorize state enforcement and prohibit concurrent state claims when it so intends. In addition to the section of the CFPA cited above, 12 U.S.C. § 5538(b)(6), similar limitations on concurrent claims appear in twelve other consumer protection statutes.[12] At the same time, Congress has passed five consumer protection statutes (in addition to the CFPA) that authorize state enforcement and *do not* prohibit concurrent claims.[13]

1. The CFPA's Pre-Suit Notice Provision Does Not Show that Congress Intended to Prohibit Concurrent Claims.

Navient contends that concurrent state claims render the CFPA's pre-suit notice provision moot because the CFPB "already knows" the alleged facts underlying the state's proceeding. (Appellants' Br. at 47) But Navient misses the point of the notice provision. Since the CFPA is the CFPB's enabling act and source of its organic enforcement authority, the CFPB has a strong interest in how courts and states interpret the CFPA. Pre-suit notice enables the CFPB to decide: (1) whether to raise any concerns with a state before claims are filed; and (2)

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[12] 15 U.S.C. § 6103(d); 15 U.S.C. § 1679h(c)(4); 15 U.S.C. § 1681s(c)(4); 21 U.S.C. § 337(b)(2)(C); 47 U.S.C. § 227(g)(7); 15 U.S.C. § 5712(f); 15 U.S.C. § 6504(d); 15 U.S.C. § 7706(f)(8); 15 U.S.C. § 7804(d); 15 U.S.C. § 2073(b)(5); 42 U.S.C. § 1320d-5(d)(7); 15 U.S.C. § 8405(e).

[13] *See* 12 U.S.C. § 2607(d)(4); 15 U.S.C. § 1640(e); 18 U.S.C. § 248(c)(3); 49 U.S.C. § 32709(d); 49 U.S.C. § 14711.

whether to intervene in the case. Thus, notice is useful even where the CFPB already knows the underlying facts or is litigating. As the district court explained:

> This [notice] provision is not rendered meaningless in the event the CFPB already has its own action underway against the same defendant. A state seeking to bring a concurrent action may have a different litigation strategy than the CFPB, even if it alleges the same or similar claims in its own case. In that case, the notice would provide the CFPB with an opportunity to advise the state, perhaps with lessons learned from its own experience in its concurrent action.

(Opinion at 24; Appx46)

Moreover, the language of the notice provision suggests Congress anticipated concurrent claims. It requires the state to describe in its notice to the CFPB, *inter alia*, "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…" 12 U.S.C. § 5552(b)(1)(C)(iii) (emphasis added). Any "action" is not limited to rulemaking, but includes civil litigation. Rulemaking is specifically referenced because it would not be obviously included as an "action" and not because Congress intended rulemaking to be the sole type of "action" covered by Section 5552(b)(1)(C).

In fact, in addition to civil litigation, an "action" for the purposes of Section 5552(b)(1)(C) could mean one of CFPB's other tools, such as administrative proceedings, supervisory examinations, complaint handling, research, or rulemaking. Navient asserts, without support, that: "as the statute's embedded

reference to 'rulemaking' proceedings helps clarify, the intent of this provision is to protect ongoing regulatory proceedings—not civil litigation." (Appellants' Br. at 48) But the plain meaning of the statute and nearby use of the exact same words demonstrate that rulemaking is *just one example* of an "action," as opposed to an exhaustive list.[14]

In fact, in close proximity to the use of "any action" that Navient claims cannot possibly mean civil litigation, Congress twice used the phrase "any action" in a manner which includes litigation: (1) in the pre-suit notice provision itself, Section 5552(b)(1)(A) ("[b]efore initiating any action in court"), and (2) in 12 U.S.C. § 5531(a)[15] (the CFPB "may take any action authorized under part E"[16]).

[14] If Congress had intended to limit the phrase "action" in Section 5552(b)(1)(C)(iii) to mean "rulemaking," it could have drafted a much simpler provision. Reading "action" to mean only "rulemaking" would render the words "any action, including" mere surplusage. *See U.S. v. Miller*, 527 F.3d 54, 62–63 (3d Cir. 2008) (quoting *Dunn v. Commodity Futures Trading Comm'n.*, 519 U.S. 465, 472 (1997)) ("legislative enactments should not be construed to render their provisions mere surplusage.").

[15] This is one of the statutory provisions upon which the CFPB's lawsuit against Navient relies. *See Consumer Financial Protection Bureau v. Navient Corp. et al.*, No. 3:17-CV-101-RDM, 2017 WL 191446 (M.D. Pa. Jan. 18, 2017) .

[16] Part E of the CFPA includes the CFPB's litigation authority. 12 U.S.C. § 5564.

Navient also asserts, without support, that "there is no conceivable way in which the filing of a [concurrent claim] would interfere with the CFPB's action in any event." (Appellants' Br. at 48) To the contrary, a concurrent claim could potentially interfere with a CFPB lawsuit that is on the verge of settlement. The notice provision could enable the CFPB to request that a state delay or forgo filing its claims to allow for time for settlement talks, and a state may heed this request if, for example, the CFPB settlement obtained the relief the state planned to seek.

2. The CFPA's Intervention Provision Does Not Show that Congress Intended to Prohibit Concurrent Claims.

Navient argues that the intervention provision in Section 5552 demonstrates, that Congress intended to prevent concurrent state claims. But such intervention provisions exist elsewhere in the CFPA,[17] and they exist in: (A) twelve of the thirteen statutes discussed above that *prohibit* concurrent state claims; and (B) two of the five that *permit* such claims.[18] Thus, an intervention provision does not imply a prohibition on concurrent claims.

[17] 12 U.S.C. § 5514(c)(3)(B)(ii).

[18] 12 U.S.C. § 5538(b)(3); 15 U.S.C. § 6103(b); 21 U.S.C. § 337(b)(2); 15 U.S.C. § 5712(b); 15 U.S.C. § 1679h(c)(2)(B); 15 U.S.C. § 1681s(c)(2)(A); 15 U.S.C. § 6504(b); 15 U.S.C. § 7706(f)(5)(A); 15 U.S.C. § 7804(b); 15 U.S.C. § 2073(b)(3); 42 U.S.C. § 1320d-5(d)(4)(A); 15 U.S.C. § 8405(c); 15 U.S.C. § 1640(e)(1); 49 U.S.C. § 14711(c).

Navient argues that permitting CFPB intervention in a concurrent state lawsuit would violate "the longstanding bar against having a single party-plaintiff simultaneously maintain two actions against the same defendant(s)." (Appellants' Br. at 50) But, as the district court points out, the CFPB acknowledged in its rule establishing procedures for the state notification "that its intervention power is discretionary and may be subject to certain limits: . . . 'The Bureau reserves the right to intervene or otherwise participate in any action *where it lawfully may do so.*'" (Opinion at 25; Appx47) (emphasis added by district court).

Navient relies on this Court's decision in *Walton v. Eaton Corp.*, 563 F.2d 66 (3d Cir. 1977). However, *Walton* is distinguishable. In that case, a single plaintiff filed two separate employment lawsuits based on the same underlying facts, in the same court, against the same defendant. *Id.* at 69-70. The *Walton* Court held that filing a second action could not resurrect a previously-waived right to a jury trial. *Id*. at 71-72. In contrast, Pennsylvania and the CFPB are two separate plaintiffs with two different lawsuits. Pennsylvania's lawsuit is intended to protect the public from and remediate violations of both Pennsylvania and federal laws. If the CFPB were to intervene here, it would not be attempting to improperly resurrect a previously-waived procedural right.[19]

[19] Incidentally, Navient argues that the concurrent nature of the Commonwealth's claims explains why the CFPB has not intervened in this case. (Appellants' Br. at 51) But Navient has no way of knowing why the CFPB has not

Indeed, as the district court explained, *Walton* "cuts against Navient's position that there is an irreconcilable conflict between the CFPA's intervention provision and the 'single-party plaintiff' bar because [this Court] indicated that consolidation can be an appropriate solution to avoid violating" this rule. (Opinion at 26-27; Appx48-49) The fact that consolidation may not be suitable for this case does not change the plain meaning of the statute which not only permits consolidation, but more importantly, permits states to file concurrent claims even if the CFPB has already filed its own.

B. Pennsylvania's Concurrent Claims Do Not Waste Judicial Resources or Risk Inconsistent Decisions

Navient argues that Pennsylvania's concurrent claims waste judicial resources and risk inconsistent decisions. The district court rejected Navient's argument that allowing concurrent claims would overburden the courts, reasoning that "[w]hile federal courts are inundated with cases, adjudicating this case is a burden this Court is required to assume, absent a recognized statutory or procedural basis that precludes the Commonwealth from bringing its action." (Opinion at 28; Appx50)

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intervened. More to the point, the CFPB has never intervened in the nearly dozen instances that states have brought claims under CFPA.

Navient argues that Pennsylvania's concurrent claims, "by definition, cannot achieve anything that the CFPB's own lawsuit cannot achieve, no matter how well the state litigates its" claims. (Appellants' Br. at 49) This is wrong for at least three reasons. First, even if the CFPB litigates this case through trial and obtains a judgment, it is possible that Pennsylvania could still achieve outcomes beyond what the CFPB achieves. For example, Pennsylvania could find witnesses and unearth facts that persuade the court to order relief beyond the relief obtained by the CFPB. Second, Pennsylvania and others states have a fundamental right to protect their citizens and prevent harmful conduct from occurring in their states. The interests of the states and the CFPB may not always be completely aligned.

Finally, the CFPB is under pressure to settle or withdraw its lawsuit, and it is of course free to do so. Navient's CEO has publicly and privately lobbied the CFPB to drop its lawsuit.[20] A former Member of Congress[21] has also pressured the

[20] "Navient CEO Met with CFPB as Company Seeks to End Lawsuit," *Politico*, June 28, 2018, available at: https://www.politico.com/newsletters/morning-education/2018/06/28/kennedy-resignation-could-spark-changes-to-affirmative-action-266608 (last visited 8/19/2019).) *See also* letter from Navient CEO to CFPB Acting Director Mick Mulvaney, February 22, 2018, available at: https://int.nyt.com/data/documenthelper/343-navient-letter-to-mick-mulvane/77e9a461440f1d995fbd/optimized/full.pdf (last visited 8/22/2019).

[21] "Let's end financial bureau's interference in student loans," John Kline, *The Hill*, June 15, 2018, available at: https://thehill.com/opinion/finance/392151-lets-end-finance-bureaus-interference-in-student-loans. (last visited 8/10/2019).

CFPB to drop it. This pressure on the CFPB is precisely why Congress gave the states parallel enforcement authority. According to the Senator who authored Section 5552, "While the new bureau will be the main enforcer of its new rules, we have preserved the role for the State [attorneys general] to ensure that the consumers are not put at risk because Federal regulators are asleep at the switch."[22] The states in effect were fully deputized to pursue CFPA claims so that they could protect consumers regardless of the dynamics within the CFPB. The Commonwealth has no authority to direct the CFPB, but its Attorney General has a statutory duty to protect the public interest.

In arguing that concurrent claims waste judicial resources, Navient attempts to rely on an inapposite out-of-circuit district court case, *Navajo Nation v. Wells Fargo & Co*., 344 F. Supp. 3d 1292 (D.N.M. 2018), where the court dismissed CFPA claims filed by a tribal government where the CFPB had already settled similar claims. *Navajo Nation* is easily distinguishable because it was dismissed solely on *res judicata* grounds. *Id.* at 1308. Nothing in *Navajo Nation* suggests an implied prohibition on concurrent claims under the CFPA, nor was the issue ever briefed. Nor were the tribe's claims ever concurrent with the CFPB's: the Navajo

[22] Senator Tom Carper, discussing his amendment that created the near-final version of Section 5552 and passed the Senate by a vote of 80-18. 156 Cong. Rec. S3864, S3871-72 (2010).

Nation filed its complaint more than a year after the CFPB's September 2016 consent order resolving similar claims. *Id.* at 1297-99.

C. The Constitution Does Not Prohibit Concurrent Claims.

Having failed to convince the district court with the other arguments discussed above, Navient now raises two Constitutional arguments that it did not raise below.[23] These "Hail Mary" arguments under the Take Care Clause[24] and Appointments Clause[25] can be easily dismissed because they have no support in the case law and they would result in state attorneys general being unable to enforce federal laws.

To support its argument that permitting concurrent lawsuits would infringe upon the President's ability to "take care the laws are faithfully executed," (Appellants' Br. at 54), Navient relies upon three U.S. Supreme Court decisions: *Myers v. U.S.*, 272 U.S. 52 (1926), *Morrison v. Olson*, 487 U.S. 654 (1988), and *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). These cases outline the President's Constitutional authority to exercise control over executive officers-that is, federal employees who "assist the supreme Magistrate in

[23] Although the Commonwealth believes these arguments are waived (*see* p. 22 n.10, *supra.*), it is providing a response to Navient's argument on the merits.

[24] U.S. Const. art. II, § 3.

[25] U.S. Const. art. II, § 2.

discharging the duties of his trust." *Free Enter.*, 561 U.S. at 483 (quotation omitted). However, none of these cases concern the President's ability to control state officials, including an attorney general.

Navient's Appointments Clause argument is similarly strained. Navient cites *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018) for the proposition that "[a]n individual is considered an 'Officer of the United States' and thus is subject to the constitutional limits set forth in the Appointments Clause if he or she (i) holds a 'continuing office established by law' and (ii) exercises 'significant discretion' in the enforcement of federal law." (Appellants' Br. at 54-55) (quoting *Lucia*, 138 S. Ct. at 2053). However, this characterization misses the threshold question in *Lucia*. The central issue in *Lucia* was whether certain administrative law judges (ALJs) qualify as "Officers of the United States" as opposed to mere employees of the United States. *Lucia*, 138 S. Ct. at 2049. Implicit in this distinction is the understanding that the ALJs were federal government officials. Nothing in *Lucia* suggests that a state attorney general—employed and empowered by his or her state—could be considered an officer of the United States.

Finally, nothing in Navient's Constitutional arguments is limited to litigation over concurrent claims. Taken to their logical conclusion, Navient's arguments lead to the untenable position that state attorneys general may not enforce *any* federal laws. As discussed above, Congress explicitly authorized state attorneys

general to enforce the CFPA, and it has frequently enacted provisions expressly allowing for state enforcement of federal law, particularly in the area of consumer protection. *See, e.g.*, 15 U.S.C. § 1194; 15 U.S.C. § 1264; 15 U.S.C. § 1477; 15 U.S.C. § 1679h(c); 15 U.S.C. § 5712; 15 U.S.C. § 6103; *see also* Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 Cardozo L. Rev. 53, 56-57 (2011) (listing "twenty-four federal laws that explicitly grant enforcement power to…state attorneys general."). Under Defendants' novel theory, all of these statutes would be unconstitutional.

II. THE COMMONWEALTH'S CONSUMER PROTECTION POLICE POWERS ARE NOT PREEMPTED BY THE HEA.

A. There is a Judicial Presumption Against Preemption.

There are three types of preemption: express, field, and conflict. None applies here. Express preemption applies where Congress explicitly preempts state law in the statutory language. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). But the presence of an express preemption provision does not end the inquiry. *Farina v. Nokia*, 625 F.3d 97, 117-18 (3d Cir. 2010) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996)). Courts still must examine congressional intent as to the scope of the preemption provision. *Farina*, 625 F.3d at 118. Although courts look primarily to the text of the statute to discern

congressional intent, they also look to the context of the regulatory scheme as a whole, including its purposes and the way in which Congress intended it to affect the public and the law. *Id*. Moreover, because, as noted below, there exists a presumption against preemption, "when 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)).

Field preemption occurs where Congress does not expressly preempt state law, but where a court nonetheless finds that "'federal law leaves no room for state regulation and that Congress had a clear and manifest intent to supersede state law' in that field." *Sikkelee v. Precision Airmotive Corp*., 822 F.3d 680, 688 (3d Cir. 2016) (quoting *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 127 (3d Cir. 2010)). Furthermore, "[w]here Congress expresses an intent to occupy an entire field, States are foreclosed from adopting any regulation in that area, regardless of whether that action is consistent with federal standards." *Sikkelee,* 822 F.3d at 688 (citing *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1595 (2015)).

Conflict preemption applies "when a state law conflicts with federal law such that compliance with both state and federal regulations is impossible, or when a challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law.'" *Sikkelee,* 822 F.3d at 688

(quoting *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011)) (internal citations omitted).

As the district court indicated, the intent of Congress is the "ultimate touchstone" in determining whether a law is subject to federal preemption. (Opinion at 30; Appx52) (citing *Farina*, 625 F.3d at 115) That intent is determined by looking to the "structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which congress intended the statute and its surrounding regulatory scheme to affect business, consumers and the law." (Opinion at 41; Appx53) (quoting *Lohr*, 518 U.S. at 485-86) (internal citations omitted). The analysis does not end there; in addition, courts have long presumed that Congress does not cavalierly preempt state-law causes of action and have applied a presumption against preemption. *Farina*, 625 F.3d at 116 (citing *Lohr*, 518 U.S. at 485). *See also Wyeth*, 555 U.S. at 565 n.3 (2009); *Student Loan Servicing Alliance v. District of Columbia*, 351 F. Supp. 3d 26, 46 (D.D.C. 2018) (reviewing Section 1098g of the HEA and affirming that the presumption against preemption guides courts in all preemption cases).

The presumption is appropriately applied here—as consumer protection is a field that states have traditionally occupied. *See, e.g., Cal. v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (noting the long history of state common-law and statutory

remedies against unfair business practices); *Fla. Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (observing statute to "prevent the deception of consumers" within scope of state's police powers); *In re Nortel Networks, Inc.*, 669 F.3d 128, 137-38 (3d Cir. 2011) (noting, in considering the police power exception to an automatic bankruptcy stay under 11 U.S.C. § 362(b)(4), that consumer protection is part of governmental police powers); *In re Burns*, No. 5-BK-07-50140 RNO, 2008 WL 3246244, at *3-4 (Bankr. M.D. Pa. Aug. 7, 2008).

If this Court were to hold that the HEA preempts state-law consumer protection claims, consumers would be left with no protection against unfair or deceptive acts or practices (UDAP) by servicers because the HEA contains no such general UDAP prohibition. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Servicers would be free to mislead consumers provided that they met the HEA's technical disclosure requirements. Even if Navient violates the HEA, no consumer protection agency at the federal or state level is empowered to enforce it.[26] Navient points to a provision of the HEA that permits ED to impose civil penalties or even

[26] Navient asserts that the Commonwealth does not allege a violation of the HEA. (Appellants' Br. at 11) Since the Commonwealth is not authorized to enforce the HEA, the Commonwealth has not determined whether Navient violated it.

suspend a "lender," but Navient has not offered a single example of ED using this power against a federal loan servicer, nor has the Commonwealth identified any in a search of public filings.

B. Express Preemption of Counts II and IV is Not Warranted.

As noted, Navient's express preemption argument relies on Section 1098g, which states that "[l]oans made, insured, or guaranteed pursuant to…the [HEA] shall not be subject to any disclosure requirements of any State law." 20 U.S.C. § 1098g. Specifically, Navient argues that the reference to "disclosure requirements" preempts Pennsylvania's CPL allegations. Navient would summarily end the discussion regarding the application of express preemption wholly based upon the language of Section 1098g without further analysis while ignoring the presumption against preemption. (Appellants' Br. at 30)

Of course, it is not that simple. At a certain level, any communication by Navient to its customers can be viewed as a type of "disclosure." However, such an interpretation is both overly broad and overly simplistic. It is contrary to the intent of Congress and would result in the disclosure requirements of Section 1098g supplanting all "means of judicial recourse for those injured by illegal conduct" by federal loan servicers. *Silkwood*, 464 U.S. at 251.

Despite Navient's contentions regarding the clarity of Section 1098g, when conducting an express preemption analysis of HEA, federal and state courts

considering the scope of this provision have found just the opposite—recently and repeatedly determining that it does not fully cloak loan servicers from liability under state law claims alleging fraudulent and deceptive conduct.[27] *Nelson v. Great Lakes Educ. Loan Services, Inc.*, 928 F.3d 639, 648 (7th Cir. 2019) (stating that Congress "most certainly did not enact language imposing broad preemption on any state laws, or even any state consumer-protection or tort laws, that might apply to student loans and their servicing"); *Hyland v. Navient Corp.*, No. 18-CV-9031(DLC), 2019 WL 2918238, at *6 (S.D.N.Y. July 8, 2019) (stating the language of Section 1098g does not express the "clear and manifest purpose of Congress" to preempt claims that included steering) (citations omitted); *Olsen v. Nelnet, Inc.*, No. 4:18-CV-3081, 2019 WL 2189486, at *8-9 (D. Neb. May 21, 2019) (rejecting an express preemption argument made in response to a negligent misrepresentation count and agreeing with the district court's decision here); *Chery v. Conduent Educ. Services, LLC*, No. 1:18-CV-75, 2019 WL 1427140, at *7 (N.D.N.Y. March 3, 2019) (observing state consumer protection law claims

[27] Navient relies heavily on the Ninth Circuit's 2010 decision in *Chae v. SLM Corp.*, 593 F.3d 936 (9th Cir. 2010) to support its position. However, the holding in *Chae* was quite limited and does not undermine the Commonwealth's position. While the *Chae* Court found that the plaintiffs' attempt to assert claims under California law regarding billing statements and coupon books was preempted by Section 1098g of the HEA, the plaintiffs were not barred from pursuing claims regarding other fraudulent and deceptive practices. *Id.* at 943.

against servicer related to its concealment of delays in processing paperwork were not preempted by HEA; where servicer "failed to establish that this allegedly deceptive practice was either 'authorized by the Secretary of Education' or 'conformed to any explicit dictates of federal law'"); *Daniel v. Navient Solutions, LLC*, 328 F. Supp. 3d 1319, 1324 (M.D. Fla. 2018) (rejecting express preemption argument where claims were not merely failure to disclose claims but also included allegations of affirmative misrepresentations); *Genna v. Sallie Mae, Inc*., No. 11 Civ. 7371(LBS), 2012 WL 1339482, at *8 (S.D.N.Y. Apr. 17, 2012) (rejecting similar express preemption arguments and stating "[T]here 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 outside of the circumstance of pre-litigation informal collection activity. Sallie Mae has not shown that § 1098g, or anything else in the HEA, expressly preempts Genna's claims"); *People v. Navient Corp.*, No. 17 CH 761, at 12-13 (Ill. Cir. Ct. July 10, 2018) (finding that the Illinois Attorney General's claims "…are not 'restyled disclosures' because the core of the State's allegations is that Navient schemed to steer borrowers into forbearances, not just that Navient failed to disclose the availability of IDR plans"). *but see Lawson-Ross v. Great Lakes Higher Educ. Corp.*, No. 17-CV-253, 2018 WL 5621872, at *3 (N.D. Fla. Sept. 20, 2018) (relying heavily on an interpretation

issued by ED to find express preemption of the plaintiff's claims, the same ED interpretation rejected as unpersuasive by the district court in this case)(appeal pending in the 11th Circuit, oral argument scheduled for September 9, 2019). *Cf. Student Loan Servicing Alliance*, 351 F. Supp. 3d at 48-50 (rejecting ED's reliance on its own informal statement regarding the scope of Section 1098g).[28]

Against the weight of the aforementioned case law rejecting—as the district court did—the blanket preemption of fraudulent and deceptive conduct, Navient's primary criticism of the district court's decision is that it "made no effort to engage with the text of 20 U.S.C. § 1098g." (Appellants' Br. at 29) In fact, the district

[28] Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619 (Mar. 12, 2018) ("Interpretation"). The district court properly determined it was not required to adopt ED's "post-litigation commencement" Interpretation, which the district court described as an "informal statement" and found unpersuasive. (Memorandum Opinion at 41-42; Appx63-64) A number of courts have followed suit. *Student Loan Servicing Alliance*, 351 F. Supp. 3d at 48-50 (holding that the Interpretation is entitled only to *Skidmore* deference, disagreeing with the *Lawson-Ross* determination that it was persuasive and noting "no deference is owed to an agency's conclusion that state law is preempted.") *See also, Nelson*, 928 F.3d at 651 n.2 (refusing to give special deference to the Interpretation, noting agreement with *Student Loan Servicing Alliance* and its determination that statement lacked persuasiveness because it "represents a stark, unexplained change" in ED's position); *Hyland*, 2019 WL 2918238, at *7 (rejecting Navient's argument for *Auer* deference, applying *Skidmore* deference, and, in accordance with *Student Loan Servicing Alliance* and *Nelson*, finding the Interpretation unpersuasive).

court started with the text of Section 1098g and expressly rejected Navient's broad reading of the phrase "any disclosure requirements of any State law" as going too far. (Opinion at 35; Appx57) Consistent with the aforementioned case law, the district court was correct to reject Navient's expansive reading of the statute. The plain language of the statute does not provide clarity with respect to the meaning of the word "disclosure." *Student Loan Servicing Alliance*, 351 F. Supp. 3d at 53. As noted in *Student Loan Servicing Alliance*:

> If read consistently with its plain meaning without context, Section 1098g might well prohibit state regulation of all foreseeable types of communication. Without a more explicit indication from Congress that it meant to preempt states from mandating or prohibiting all types of communications within the context of federal student loans, however, the Court declines to read the term "disclosure" so broadly. In light of the presumption against preemption and the fact that express preemption arises only when "the federal statute itself announces its displacement of state law, when the text of a[n express] pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"

Id. (internal citations omitted). *See also Nelson*, 928 F.3d at 647 (stating the language of Section 1098g itself provides no specific guidance about the scope of "disclosure requirements.").

The district court's analysis went on to further explain the context for its decision by noting that HEA regulations "only require particular disclosures . . . to be made in the delivery of federal student loans and generally prescribes how those

disclosures should be made." (Opinion at 35; Appx57) Notably, the district court applied the presumption against preemption by drawing an important distinction between (1) instances, such as the portion of *Chae* dealing with billing statements, coupon books and standardized loan applications, where HEA explicitly governs certain specific conduct and thus preempts state law, and (2) the enforcement of laws of general applicability, such as the consumer protection law, that would not be subject to preemption. (Opinion at 35-38; Appx57-60); *Chae v. SLM Corp*., 593 F.3d 936 (9th Cir. 2010).

Nevertheless, Navient sees no doubt in the language of Section 1098g describing it as "unqualifiedly" preempting state law disclosure requirements and noting it "seeks to immunize inherently federal programs from state regulation" as Title IV student loans are "creatures of federal law that are subject to a comprehensive federal regulatory scheme." (Appellants' Br. at 31) In essence Navient seeks field preemption. Again, this argument has been repeatedly rejected. *See Chae*, 593 F.3d at 941-42 (summarily dismissing field preemption as not applicable to the HEA); *Nelson,* 928 F.3d at 652 (agreeing with *Chae* that field preemption does not apply to the HEA); *Genna,* 2012 WL 1339482, at *7 (same); *Keams v. Tempe Tech. Inst., Inc.*, 39 F.3d 222, 226 (9th Cir. 1994) (observing "[t]he [HEA] has not been read, in other contexts, as occupying the field and leaving no room for state law to operate"); *Bible v. United Student Aid Funds, Inc.*,

799 F.3d 633, 653 (7th Cir. 2015) (stating that the presence of a regulatory scheme does not imply that field preemption exists); *Hyland*, 2019 WL 2918238, at *8 ("[c]ourts have consistently held that field preemption does not apply to the HEA").

Finally, despite *Chae's* determination that "fraudulent and deceptive practices apart from billing statements" were not expressly preempted under Section 1098g, *Chae*, 593 F.3d at 943, Navient argues that the district court's reading of that part of *Chae* was flawed. (Appellants' Br. at 34-35) Again, Navient relies on an expansive reading of Section 1098g, ignoring the presumption against preemption. In fact, the presumption does "square" with the district court's observations by allowing for preemption in limited instances involving claims related to highly prescribed forms and rejecting preemption when affirmative misconduct is alleged—such as in the instant matter. (Opinion at 37; Appx59) Further, Navient revisits that portion of *Chae* that found certain misrepresentation claims were "'merely the converse' of a state-law requirement that alternate disclosures be made." *Chae*, 593 F.3d at 943. However, as the district court correctly observed, the Commonwealth's claims which allege affirmative misconduct are separate and distinct from those preempted in *Chae*. (Opinion at 37; Appx59)

Of course Navient emphasizes the recent *Nelson* decision that, while acknowledging the language of Section 1098g does not expressly preempt state consumer protection law, draws a line between affirmative misrepresentation claims and failure to disclose claims. *See Nelson*, 928 F.3d at 649-50. A careful reading of Nelson, however, indicates that state consumer protection laws are not so easily categorized. After discussing the differences between affirmative misrepresentations and failures to disclose in the context of the law of fraud (Count II of *Nelson*) and negligent misrepresentation (Count III of *Nelson*), the *Nelson* Court states:

> We recognize that it would be possible to apply state consumer protection laws to impose additional disclosure requirements on loan servicers of federally insured student loans. Such applications would be preempted under § 1098g, as the Ninth Circuit made clear in *Chae*. But that result is not necessary or inherent in Nelson's claims, at least to the extent she alleges affirmative misrepresentations. We cannot say on the pleadings that all of Nelson's claims are preempted by § 1098g. On remand, the district court may need to use jury instructions and other tools to allow Nelson to proceed on her claims of affirmative misrepresentations while ensuring that the case does not become a vehicle for state law to impose new disclosure requirements.

Nelson, 928 F.3d at 650. (internal citations omitted). Thus, the *Nelson* Court indicated that all claims could move forward as long as they did not impose new disclosure requirements. *Id.*

Further, it should be noted that Navient's "disclosure" argument is, at the end of the day, based upon a feared remedy as opposed to the claim itself. The allegations do not presuppose a remedy that would necessarily require disclosures, nor does the Complaint urge the court to impose new disclosures. It merely seeks compliance with state and federal law. Purely by way of example, a remedy could prohibit Navient from having internal policies restricting its representatives' call times. This remedy would not impose any preempted disclosure requirements. To dismiss this case merely based on speculation over remedies at the motion to dismiss stage would be premature.

As the district court recognized, the Commonwealth's claims here allege "affirmative misconduct." (Opinion at 37; Appx59) The Commonwealth's core allegations with respect to Counts II and IV are that Navient improperly steered consumers into costly forbearances and made misrepresentations to consumers regarding the recertification of their IDR plans. This included misrepresenting to consumers that Navient would inform them of the date by which they needed to renew and misrepresenting the consequences of failing to renew. To the extent the Commonwealth does fault Navient in the Complaint for failing to disclose or notify borrowers of certain information, it does so only because Navient's failure to disclose certain information perpetuated the affirmative misconduct in which Navient voluntarily chose to engage.

With respect to Count II, the Commonwealth alleges that Navient steered consumers into forbearance by advising consumers that forbearance was their best or only option when, in fact, these consumers may have been eligible for an IDR plan. To the extent the Commonwealth faults Navient for failing to disclose the availability of IDR plans in this context, it does so only because Navient's failure to disclose this information perpetuated the false representation that forbearance was the best or only option for these consumers. Thus, on this point, *Nelson*'s suggestion that affirmative misrepresentations and failures to disclose are mutually exclusive is mistaken; concealment or failures to disclose can be part of an overall scheme of an affirmative misrepresentation.[29]

Further, to the extent a judicial analysis would divorce allegations of affirmative misconduct from allegations of inadequate disclosures and omissions in the overall steering and recertification schemes, the Commonwealth's Complaint is nonetheless replete with allegations of affirmative misconduct. For example, the Commonwealth alleged the following affirmative misconduct (including misrepresentations) relating to Counts II and IV:

[29] "Misrepresentation" is defined as "an intentionally or sometimes negligently false representation made verbally, by conduct, or ***sometimes by nondisclosure or concealment*** and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally." Merriam-Webster Dictionary, available at https://www.merriam-webster.com/legal/misrepresentation (last visited Aug. 22, 2019) (emphasis added).

1. Navient's website misrepresented to borrowers that Navient's representatives would help them "make the right decision for [their] situation" and "find an option that … minimizes [their] total interest cost." (Complaint at ¶ 108; Appx130)

2. Navient misrepresented to a consumer "that her only option for loan assistance was a forbearance, despite the fact that she qualified for an IDR plan." (*Id.* at ¶ 126; Appx135)

3. Navient gave false information about public service loan forgiveness to one borrower, causing the borrower to lose out on seven years of payments that could have been applied to this forgiveness program but were not. (*Id.* at ¶ 127; Appx136)

4. Navient repeatedly enrolled a consumer in forbearance for eleven years, allowing nearly $27,000 in interest to accrue, despite his eligibility for an IDR plan. (*Id.* at ¶ 129; Appx136-137)

5. Navient told a consumer enrolled in IDR who was having trouble making payments that "forbearance was his only option" when, in fact, "continuing his IDR plan would have been a better option for him in the long term." (*Id.* at ¶ 130; Appx137)

6. In a notice to borrowers, Navient misrepresented that Navient would notify the borrowers when their IDR plan was up for renewal and, at

that time, Navient would provide the borrower with a date to submit a new application. (*Id.* at ¶ 133; Appx138) Yet the notices Navient sent did not include this date. (*Id.* at ¶ 135; Appx138-39)

7. In a notice to borrowers, Navient misrepresented that the only consequence of providing incorrect or incomplete information during the IDR renewal process would be a delay in renewal when, in fact, proving incorrect or incomplete information resulted in financial harm to borrowers. (*Id.* at ¶ 138-39; Appx140)

8. Navient told a consumer that Navient would send him an annual renewal reminder when, in fact, Navient did not. (*Id.* at ¶ 148; Appx142)

These above-referenced allegations seek to hold Navient accountable for its affirmative misconduct. To the extent these allegations fault Navient for *also* failing to disclose relevant information to borrowers *in the course of making the affirmative misrepresentations*, the Commonwealth does so only because the failures to disclose perpetuated the false impressions Navient gave borrowers. Absent Navient's voluntary choice to engage in this deceptive misconduct, the Commonwealth would not be faulting Navient for failing to provide consumers with more information about IDR plans or recertification. Accordingly, holding Navient accountable for this affirmative misconduct would *not* impose additional

"disclosure requirements" on servicers such as Navient, as servicers can simply avoid such claims by remaining silent or telling the truth.

In its brief, Navient incorrectly argues that it was required by federal law to make certain affirmative misrepresentations to consumers on its website. (Appellants' Br. at 38-39) Specifically, the Commonwealth alleges that Navient made the following statements on its website regarding its ability to help borrowers:

- "If you're experiencing problems making your loans [sic] payments, please contact us. Our representatives can help you by identifying options and solutions, so you can make the right decision for your situation."

- "We can help you find an option that fits your budget, simplifies payment, and minimizes your total interest cost."

(Complaint at ¶ 108; Appx130)

The *Nelson* Court identified similar affirmative misrepresentations allegedly made by another servicer on its website and reasoned that these types of affirmative misrepresentations were not preempted by Section 1098g because the servicer made these statements voluntarily when it could have just remained silent or told the truth. *See Nelson*, 928 F.3d at 649-50. Recognizing the similarities of the statements the *Nelson* servicer made on its website, *see id*. at 641-42 ("[o]ur trained experts work on your behalf" and "[y]ou don't have to pay for student loan services or advice" because "[o]ur expert representatives…understand all of your

options") and the above-referenced statements alleged in the Commonwealth's Complaint, Navient wrongly argues that the first affirmative misrepresentation listed above (i.e., that Navient can help borrowers "make the right decision") merely "parrots" what federal law requires. (Appellants' Br. at 39) Notably, Navient does *not* claim that the second affirmative misrepresentation listed above and alleged in the Complaint (i.e., that Navient can help borrowers "minimize [their] total interest cost") is required by federal law.

In any event, neither of the federal provisions cited by Navient in its brief require Navient to misrepresent to borrowers that it will help them "make the right decision for [their] situation" or help them "minimize[] [their] total interest cost." Section 1083 of HEA merely requires that lenders include on a "bill or statement … the lender's or loan servicer's address and toll-free phone number for payment and billing error purposes" and "a link to the appropriate page of [ED's] website to obtain a more detailed description of the repayment plans…" 20 U.S.C. § 1083(e)(1)(H) & (I). This provision says nothing about what statements Navient must make on its *website* (as opposed to its bills or statements). Moreover, Navient's statements clearly went far beyond providing addresses, telephone numbers, and links to affirmatively representing that Navient would help borrowers make the "right" decisions and "minimize" their interest payments. For these reasons, Sections 1083(e)(1)(H) and (I) could not possibly serve as a "safe

harbor" for the above-referenced affirmative misrepresentations Navient made on its website.

In sum, the district court correctly applied the presumption against preemption, as the language of Section 1098g cannot be read so broadly as to preempt the Commonwealth's attempt to hold Navient accountable for its affirmative (and voluntary) decision to make misrepresentations to borrowers. Because allowing the Commonwealth's claims to proceed would not impose any new "disclosure requirements" on Navient, the district court's ruling that the Commonwealth's claims are not expressly preempted by Section 1098g should be affirmed.

C. Conflict Preemption of Counts II and IV is Not Warranted.

Navient's entire argument in support of conflict preemption is founded on *Chae's* determination that nationwide uniformity was a goal of the HEA. *See Chae,* 598 F.3d at 944-47. As the lower court correctly noted, following Navient's line of reasoning would require the Court to find that the HEA imposes an expansive and unsupported level of preemption that would reach the level of field preemption. (Opinion at 42; Appx64). Again, Navient's position has been repeatedly and roundly rejected.

In *College Loan Corp.*, a case which *Chae* declined to follow, the court stated that the existence of comprehensive federal regulations that fail to occupy

the regulatory field do not, by their mere existence, preempt non-conflicting state law. *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir. 2005) ("[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.") (quoting *Hillsborough County, Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 717 (1985)). *See also Bible*, 799 F.3d at 652 (rejecting argument that allowing state law claim would frustrate Congress's goal of "uniformity" because it would require many state and federal courts to interpret HEA regulations in potentially inconsistent ways); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1126-31 (11th Cir. 2004) (indicating broad purposes of HEA were not obstructed by having to comply with a provision of state debt collection law); *Daniel*, 328 F. Supp. 3d at 1324 (stating "uniformity" was "not one of Congress's expressed goals in enacting the HEA"); *Brooks v. Sallie Mae, Inc.*, No. FSTCV096002530S, 2011 WL 6989888, at *9 (Conn. Super. Ct. Dec. 20, 2011) ("[i]f Congress intended that uniformity be a goal of the HEA, and FFELP in particular, then it easily could have stated that objective in §1071(a)(1)").

Most recently, *Nelson* distinguished *Chae*'s broad language on conflict preemption in the context of allegations that servicers made affirmative misrepresentations to borrowers (such as the claims at issue here) as opposed to the

claims at issue in *Chae*, which focused on the method of setting late fees, repayment start dates, and interest calculations. The *Nelson* Court noted that *Chae*'s broad language "focused on different sorts of claims, where the value of uniformity would be more compelling than it is here." *Nelson*, 928 F.3d at 651.

Navient's conflict preemption argument, based upon *Chae*'s determination that HEA demonstrates Congress intended a sweeping goal of regulatory "uniformity," is belied by the existence of provisions of HEA that expressly preempt state law. *See, e.g.*, 20 U.S.C. §§ 1078(d) (usury laws); 1091(a)(2) (statutes of limitation and debt collection costs); 1095a (wage garnishment). These express preemption provisions demonstrate that Congress intentionally did not preempt state law generally, or in respects other than those it addressed. *See Nelson*, 928 F.3d at 650 ("[t]he number of [express preemption] provisions and their specificity show that Congress considered preemption issues and made its decisions. Courts … should not add to them on the theory that more sweeping preemption seems like a better policy."); *Cipollone*, 505 U.S. at 517 ("[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation") (internal quotations and citations

omitted). *See also English. v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (noting the Supreme Court has "observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict'"). Applying this analysis, *Nelson* concluded that "state law and federal law can exist in harmony" under HEA. *Nelson*, 928 F.3d at 651.

Consistent with this conclusion, because consumer protection laws are statutes of general applicability they should not be subject to preemption under HEA *See Poskin v. TD Banknorth, N.A.*, 687 F. Supp. 2d 530, 555-57 (W.D. Pa. 2009) (holding claim under the CPL is not preempted under the National Bank Act (NBA) because the CPL is a law of general applicability and not targeted directly at banking and lending); *Mwantembe v. TD Bank, N.A.*, 669 F. Supp. 2d 545, 553 (E.D. Pa. 2009) (indicating CPL claims related to gift-card marketing were not subject to conflict preemption by the NBA and related regulations; "[t]he duty to refrain from deceptive and misleading conduct is imposed on all businesses. State laws of general application, which merely require all businesses, including banks, to abide by contracts and refrain from making misrepresentations to customers, do not impair a bank's ability to exercise its gift-card issuing powers").

Finally, with only one (readily distinguishable) case on which to base its conflict preemption argument, Navient resorts to a desperate attempt to defend its arguments by inviting this Court to question the Commonwealth's motive in

bringing this lawsuit, arguing that the "lawsuit is designed to displace the highly reticulated federal requirements set forth in ED's regulations." (Appellants' Br. at 42) In support of this statement, Navient cites a multistate letter criticizing ED's withdrawal of *proposed* servicing guidance and a press release urging Congress to reject certain *proposed* changes to HEA. (Appellants' Br. at 43) These public statements are simply irrelevant to the conflict preemption analysis, which requires Navient to show that the application of Pennsylvania's consumer protection law to Navient's conduct would create an *obstacle* to the *current* operation of federal student loan programs. But the statements cited by Navient reflect only the Commonwealth's support for laws that would strengthen protections for borrowers from the deceptive conduct of lenders and servicers. Nothing in the Commonwealth's public statements suggest this lawsuit somehow creates an *obstacle* to existing federal law.

CONCLUSION

For these reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Howard G. Hopkirk, Senior Deputy Attorney General, hereby certify as follows:

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

2. That the text of the electronic version of this brief is identical to the text of the paper copies.

3. That a virus detection program was run on the file and no virus was detected.

4. That this brief contains 12,872 words within the meaning of Fed. R. App. Proc. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Howard G. Hopkirk

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CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General, do hereby certify that on August 22, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I also mailed seven copies of the foregoing brief by first class mail to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

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Date: August 22, 2019