CASE NO.: 18-14490
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMANDA LAWSON-ROSS and TRISTIAN BYRNE,

Appellants,

v.

GREAT LAKES HIGHER EDUCATION CORP.,

Appellee.

On Appeal from the United States District Court
for the Northern District of Florida
Gainesville Division
Case No. 1:17-cv-00253-MW-GRJ

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY VETERANS EDUCATION SUCCESS, THE RETIRED ENLISTED ASSOCIATION, AND THE IVY LEAGUE VETERANS COUNCIL IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, amicus Association of Corporate Counsel submits this list, which includes the judges in the trial court and all attorneys, persons, associations of persons, firms, partnerships, or corporations having an interest in the outcome of this matter.

1. Breslow, Brandon, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne
2. Byrne, Tristian
3. Centrone, Gus, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne
4. Conigliaro, Matthew, Appellate counsel to Appellee Great Lakes Higher Education Corp.
5. Flo, Theodore, District Court and appellate counsel to Great Lakes Higher Education Corp.
6. Fulford, Martha, Appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne
7. Great Lakes Educational Loan Services, Inc., corporate subsidiary of Great Lakes Higher Education Corp.
8. Great Lakes Higher Education Corp.

9. Griffin, Mark A., appellate counsel to amicus curiae Veterans Education Success, The Retired Enlisted Association, and The Ivy League Veterans Council

10. Gross, Merrick, District Court counsel to Great Lakes Higher Education Corp.

11. The Ivy League Veterans Council, Amicus Curiae

12. Jones, The Honorable Gary J., United States Magistrate Judge

13. Lawson-Ross, Amanda

14. Nelnet, Inc. (NYSE: NNI), owner of Great Lakes Educational Loan Services, Inc.

15. Paolini, Christopher, District Court counsel to Great Lakes Higher Education Corp.

16. The Retired Enlisted Association, Amicus Curiae

17. Roesch, Benjamin J., appellate counsel to amicus curiae Veterans Education Success, The Retired Enlisted Association, and The Ivy League Veterans Council

18. Veterans Education Success, Amicus Curiae

19. Walker, The Honorable Mark E., United States District Judge

20. Yanes, Katherine Earle, District Court and appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne

21. Zibel, Daniel A., Appellate counsel to Appellants Amanda Lawson-Ross and Tristian Byrne

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, amicus Association of Corporate Counsel makes the following statement as to corporate ownership:

Veterans Education Success is a nonprofit corporation registered under the laws of Maryland. The organization is not publicly held and issues no stock; therefore, no other organization owns ten (10) percent or more of its stock;

The Retired Enlisted Association is a nonprofit corporation registered under the laws of Colorado. The organization is not publicly held and issues no stock; therefore, no other organization owns ten (10) percent or more of its stock;

The Ivy League Veterans Council is a nonprofit corporation registered under the laws of New York. The organization is not publicly held and issues no stock; therefore, no other organization owns ten (10) percent or more of its stock.

/s/Mark A. Griffin
Mark A. Griffin

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Eleventh Circuit Rule 29-1, amicus Veterans Education Success, amicus The Retired Enlisted Association and amicus The Ivy League Council move the Court for leave to file the attached amicus brief in support of Appellants.

Veterans Education Success is a nonprofit corporation with a mission to protect and defend the integrity and promise of federal education programs for veterans and servicemembers, including the Public Service Loan Forgiveness Program ("PSLF"). Veterans Education success engages in advocacy on behalf of veterans and servicemembers before Congress and federal agencies, and assists with providing free legal assistance to veterans.

The Retired Enlisted Association is a nonprofit organization serving those who serve our country. Its stated mission is

> to enhance the quality of life for uniformed services enlisted personnel, their families and survivors –including veterans, active components, reserve components, and all retirees; to stop the erosion of earned benefits through our legislative efforts; to maintain our esprit de corps, dedication and patriotism; and to continue our devotion and allegiance to God and Country.

The Retired Enlisted Association is authorized to file this amicus curiae brief by its governing documents.

The Ivy League Veterans Council is a nonprofit organization founded to study, address and resolve under-representation by U.S. military veterans in the student populations of elite academic institutions. It advocates for recruitment of military veterans, campus integration and academic growth, and post-graduation success of military veterans. The Ivy League Veterans Council is authorized to file this amicus curiae brief by its founding documents.

The attached amicus brief is desirable and presents facts and argument relevant to the disposition of this case. First, the brief explains that the PSLF program promotes national security by functioning as an important recruitment and retention tool for the Armed Forces. Second, the brief explains how the Armed Forces, as well as active duty servicemembers, veterans, military families, and survivors are harmed when they, and those who serve them, lose out on PSLF due to misrepresentations by their student loan servicers. Third, the brief delves into traditional state consumer protection laws as the primary means by which servicemembers and veterans can hold servicers accountable and obtain financial relief. Finally, the brief delves into the legislative history of 20 U.S.C. § 1098g and explains that Congress did not intend to preempt traditional state consumer protection laws arising from affirmative misrepresentations made by servicers over the telephone in response to borrower inquiries.

For these reasons stated above, the Court should grant leave to file the attached amicus brief.

Respectfully Submitted,

/s/Mark A. Griffin

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Counsel for Amicus Curiae Veterans Education Success, The Retired Enlisted Association, and The Ivy League Veterans Council in Support of Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2018, I electronically filed the foregoing *Amicus Curie* brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, amicus Veterans Education Success makes the following statement as to corporate ownership:

Veterans Education Success is a nonprofit organization registered under the laws of Maryland. Veterans Education Success is not publicly held and issues no stock; therefore, no other organization owns ten (10) percent or more of its stock.

Amicus The Retired Enlisted Association makes the following statement as to corporate ownership: The Retired Enlisted Association is a nonprofit organization registered under the laws of Colorado. The Retired Enlisted Association is not publicly held and issues no stock; therefore, no other organization owns ten (10) percent or more of its stock.

Amicus The Ivy League Veterans Council makes the following statement as to corporate ownership: The Ivy League Veterans Council is a nonprofit organization registered under the laws of New York. The Ivy League Veterans Council is not publicly held and issues no stock; therefore, no other organization owns ten (10) percent or more of its stock.

/s/Mark A. Griffin
Mark A. Griffin

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INTEREST IF AMICUS CURIE

Veterans Education Success ("VES") is a nonprofit organization with a mission to protect and defend the integrity and promise of federal education programs for veterans and servicemembers, including the Public Service Loan Forgiveness Program ("PSLF"). VES engages in advocacy on behalf of veterans and servicemembers before Congress and federal agencies, and assists with providing free legal assistance to veterans. VES is authorized to file this amicus curiae brief by its governing documents.

The Retired Enlisted Association is a nonprofit organization serving those who serve our country. Its stated mission is

> to enhance the quality of life for uniformed services enlisted personnel, their families and survivors –including veterans, active components, reserve components, and all retirees; to stop the erosion of earned benefits through our legislative efforts; to maintain our esprit de corps, dedication and patriotism; and to continue our devotion and allegiance to God and Country.

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The Ivy League Veterans Council is a nonprofit organization founded to study, address and resolve under-representation by U.S. military veterans in the student populations of elite academic institutions. It advocates for recruitment of military veterans, campus integration and academic growth, and post-graduation success of military veterans. The Ivy League Veterans Council is authorized to file

this amicus curiae brief by its founding documents.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amicus curiae, its members, and its counsel—contributed money that was intended to fund preparing or submitting this brief

QUESTION PRESENTED

Whether Congress intended to preempt any legal remedy for public servants trapped into years of unnecessary student loan payments due to misrepresentations by loan servicers about whether their loans or repayment plans qualified for Public Service Loan Forgiveness. [No.]

ARGUMENT

A. Public Service Loan Forgiveness Promotes National Security by Rewarding Active Duty Servicemembers who Dedicate their Careers to Serving and Protecting our Country.

Congress has long recognized the essential link between higher education and the ability of this nation's Armed Forces to meet the security challenges posed by an ever-changing world. For example, spurred by the Soviet Union's launch of Sputnik, Congress passed the National Defense Education Act of 1958, PUB. LAW NO. 85-864 (Sept. 2, 1958), to supply a cadre of servicemembers with advanced knowledge in math, science and foreign language fields necessary to compete with the Soviet Union. Congress specifically found that "the security of the Nation

requires the fullest development of the mental resources and technical skills of its young men and women," and therefore determined to "provide substantial assistance in various forms to individuals, and to States and their subdivisions, in order to ensure trained manpower of sufficient quality and quantity to meet the national defense needs of the United States." *Id.* at Sec. 101.

The Higher Education Act of 1965 ("HEA") was similarly intended "to provide financial assistance for students in postsecondary and higher education." PUB. LAW No. 89-329 (Nov. 8, 1965). HEA opened doors to higher education for many Americans, and its loan programs became the primary means for many students to finance their educations. Unfortunately, the escalating cost of college – and the resulting burden of student loan debt – fell heaviest on students of modest working- and middle-class backgrounds. Student loan debt often made military or other public service difficult for these graduates, who could not afford to pass up higher private-sector wages necessary to keep up with their monthly student loan payments.

The Public Loan Foregiveness Program, signed into law by President George W. Bush, was a common-sense, bipartisan response to this problem. PUB. LAW 110–84, Sec. 401 (Sept. 27, 2007). PSLF allows graduates to serve their country – foregoing higher wages in the private sector – without sacrificing the rest of the American dream on the altar of their student loan payments. To qualify for PSLF, a

borrower must make 120 monthly payments (1) on a Direct Loan, 20 U.S.C. § 1087e(m)(1); (2) under a qualifying repayment plan, 20 U.S.C. § 1087e(m)(1)(A); while (3) working at a qualifying "public interest job" – which specifically includes military service. 20 U.S.C. § 1087e(m)(3)(B). PSLF harnesses the knowledge and enthusiasm of graduates from this country's world-class universities to benefit the Armed Services and promote the interests of active duty servicemembers.

First, as the Department of Defense has explained, PSLF is "an invaluable recruiting and retention tool from the arsenals of the U.S. Armed Forces," Department of Defense Information Paper, *HR4508, the Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act* (Jan. 10, 2018),[1] and warned that

> [e]limination or restriction of the PSLF Program would adversely affect anyone considering public service who financed his or her own education - both undergraduate and graduate degrees - disproportionately impacting those in specialty fields, such as the Judge Advocate General Corps, for whom graduate degrees are required. With the increasing costs of higher education, recruitment and retention is increasingly difficult. Moreover, as the economy grows, the opportunity for much higher paying positions in the civilian sector makes it increasingly difficult for the Armed Services to compete for quality specialty personnel.

Id.

[1] Available at https://www.insidehighered.com/sites/default/server_files/media/Department-of-Defense-on-PROSPER-Act.pdf (last accessed November 5, 2018).

The U.S. Navy confirmed that the availability of PSLF has "a significant impact on recruiting and retention." Department of Defense Information Paper, p. 2 (Nov. 17, 2017).[2] More than two-thirds of the Navy Judge Advocate General's Corps intend to take advantage of PSLF, and 100% of entry-level Judge Advocates "report they would be more likely to leave active duty if PSLF were eliminated." Department of Defense Information Paper, p. 1 (Nov. 17, 2017). Servicemembers in the Naval Nuclear Propulsion Program, Chaplain Corps, and Health Professions also participate in PSLF. *Id.* at 2.

Second, PSLF serves as a well-deserved and much-needed reward for active duty servicemembers. A recent analysis of data provided by the Government Accountability Office reveals that more than 200,000 servicemembers collectively owe more than $2.9 billion in student debt. Prepared Remarks of Seth Frotman, Assistant Director and Student Loan Ombudsman for the Consumer Financial Protection Bureau, Judge Advocate General's Legal Center and School at Charlottesville, Virginia (October 17, 2017) (citing Government Accountability Office (GAO), *Student Loans: Oversight of Servicemembers' Interest Rate Cap Could Be Strengthened*, GAO-17-4 (Nov. 15, 2016)).[3] Because military service is a

[2] Available at http://studentveterans.org/images/pdf/will/Navy-on-PROSPER-Act.pdf (last accessed December 7, 2018).
[3] Available at https://files.consumerfinance.gov/f/documents/201710_cfpb_Frotman-Remarks-JAG-School.pdf (last accessed November 27, 2018).

public service job, each of these servicemembers is eligible to participate in PSLF.[4] Forgiveness of their federal student loans provides financial freedom for these servicemembers to provide for their families, pursue the American Dream, or even save for their own children's college education.

However, PSLF's usefulness to the Armed Forces as a recruiting and retention tool will be lost if current servicemembers and students considering military service observe senior servicemembers denied the promised loan forgiveness as a result of loan servicer misrepresentations. And the betrayal of our commitment to these servicemembers is compounded if they are also then denied any legal or equitable recourse for that misconduct.

B. Public Service Loan Forgiveness Benefits Veterans, Military Families, and Survivors.

In addition to directly benefitting the Armed Forces and active duty servicemembers, PSLF provides downstream benefits to veterans, military families, and survivors – groups for which our society owe a great debt and to whom we bear a duty to support and care. After serving our country in the military, many veterans

[4] One analysis of data from the U.S. Departments of Education and Defense suggest that as of October 2017, almost 6,800 active duty servicemembers have submitted initial paperwork for the PSLF Program. Ben Werner, *Navy Recruiting Court be Hurt if Popular School Loan Forgiveness Program is Canceled*, USNI News (October 30, 2017). Available at https://news.usni.org/2017/10/30/navy-recruiting-hurt-popular-school-loan-forgiveness-program-canceled (last accessed December 7, 2018).

are called to continue serving their country through government service or employment at non-profit community and veterans service organizations. The U.S. Department of Veterans Affairs, for example, is staffed by many veterans. PSLF encourages veterans to transfer the leadership and other skills they acquired during military service to new careers in public service as Veterans Hospital nurses and administrators, teachers, first responders, law enforcement officials, and other sorely needed professionals – especially those serving their fellow veterans, military families, and survivors.

PSLF also strengthens non-profit organizations like The American Legion and Veterans Education Success that are specifically dedicated to supporting veterans, military families, and survivors. Many employees of these non-profits work long hours for low pay to serve our nation's military, veterans, and their families, and could not do so without PSLF. And because PSLF provides non-profit employees with financial flexibility and a reward for a decade of service, the non-profits are free to spend fewer resources on employee salaries, and more on direct services to those in need.

When these veterans and those serving them are denied PSLF due to loan servicer misrepresentations, the entire support system for our military, veterans, family members, and survivors is harmed.

C. Loan Servicers' Misrepresentations About the PSLF Program Have the Capacity to Harm Servicemembers and Veterans.

1. The consequences of loan servicer misrepresentations are dire.

The stakes of qualifying for PSLF are high for servicemembers and veterans. For example, the U.S. Navy reports that "[t]he average debt reported by Navy Judge Advocates in the entry pay grade of O-2 is increasing annually, and currently averages $167,999." Department of Defense Information Paper, p. 1 (Nov. 17, 2017). Missing out on forgiveness of these large sums is financially devastating.

Servicemembers and veterans working at veteran- and military-focused nonprofits satisfy the "public interest job" criteria, and must therefore ensure that their 120 payments are made on a Direct Loan, and pursuant to a qualifying income-driven repayment plan. One intuitive way for servicemembers and veterans to make sure their payments count toward PSLF is to call their loan servicer and ask. Indeed, loan servicers like Appellee Great Lakes Higher Education Corp. ("Great Lakes") explicitly invite servicemembers, veterans, and other borrowers to call with questions about managing their loans. Doc. 24, ¶ 29.[5]

Servicemembers and veterans suffer real financial harm when a student loan servicer misrepresents the eligibility of his or her loan(s) or payments for PSLF. Because eligibility for PSLF is delayed when the servicemember or veteran has made payments on a non-qualifying Federal Family Education Loan Program loan

[5] *See also* https://mygreatlakes.org/educate/knowledge-center/service-member.html (last accessed November 6, 2018).

(or makes non-qualifying payments under a graduated or extended repayment plan), he or she must make *additional* monthly payments in order to qualify. Every such additional payment represents money – often hundreds of dollars – out of his or her family's monthly budget.

Servicemembers and veterans may also be effectively locked into their current jobs for the additional time required to qualify for PSLF, even if they would rather transition to a job in the private sector, use the leadership skills developed in the Armed Services to be an entrepreneur by starting a new business and create jobs for others, or be a stay-at-home parent. The lack of freedom to change careers is particularly burdensome for active duty servicemembers, for whom remaining enlisted may result in an additional combat tour or other deployment and the attendant dangers, separation from family, and other difficulties.

Other servicemembers and veterans faced with years of additional payments to qualify for PSLF may be forced to leave the military or other public service career in order the pay their (unforgiven) federal student loans while also providing for their families. This is precisely the result that President Bush and Congress sought to avoid by creating PSLF, and the worst-case scenario for recruiting and retention of highly qualified specialists by the Armed Services.

Active duty servicemembers who miss out on PSLF could also be at risk of losing their security clearance and be involuntarily discharged from – that is, kicked

out of – the military if the amount of their debt becomes a security risk in the eyes of the Pentagon. These voluntary and involuntary separations harm both servicemembers and the Armed Forces. As the Pentagon has explained, between 4,640 and 7,580 servicemembers each year "are involuntarily separated where financial distress is a contributing factor," and "[e]ach separation of a Service member is estimated to cost the Department [of Defense] $58,250." Department of Defense, *Limitations on Terms of Consumer Credit Extended to Service Members and Dependents; Final Rule*, 80 Fed. Reg. 43559, 43592 (July 22, 2015). Permitting servicemembers redress against their loan servicers that harm them through misrepresentations about PSLF will help them remain enlisted, deter misrepresentations to other servicemembers, and avoid the significant costs to the Department of Defense associated with separation.

Unfortunately, servicemembers and veterans have almost certainly suffered these life-altering harms.

2. Servicemembers, veterans, and those serving them have almost certainly been exposed to misrepresentations about PSLF by loan servicers.

Although Great Lakes and other servicers encourage servicemembers to call them for assistance, those servicers have struggled to follow through on promises to help. For example, a 2015 report concluded that servicers "may be mismanaging benefits awarded under [another student loan benefit program known as] the

Department of Defense Student Loan Repayment Program, causing confusion and applying payments in ways that increase costs for military borrowers." Hollister Petraeus and Seth Frotman, *Overseas & Underserved: Student Loan Servicing and the Cost to Our Men and Women in Uniform*, p. 15 (CFPB 2015).[6]

Servicers' mismanagement of benefits likely extends to PSLF. For example, officials from the Pennsylvania Higher Education Assistance Agency – the servicer charged with administering PSLF for borrowers who have submitted preliminary paperwork for the program – admit that "their staff are sometimes unaware of important policy clarifications." U.S. Government Accountability Office, *Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers*, GAO-18-547, p. 16 (Sept. 2018).[7] Meanwhile, U.S. Department of Education officials "said they plan to create a comprehensive PSLF servicing manual but have no timeline for doing so." *Id.* at 24.

Finally, actual PSLF forgiveness results to date are dismal. The U.S. Department of Education reported that as of June 30, 2018, more than that 28,000 borrowers had submitted applications for PSLF, but only 96 had actually received

[6] Available at https://files.consumerfinance.gov/f/201507_cfpb_overseas-underserved-student-loan-servicing-and-the-cost-to-our-men-and-women-in-uniform.pdf (last accessed December 7, 2018).
[7] Available at https://www.gao.gov/assets/700/694506.pdf (last accessed December 7, 2018).

forgiveness;[8] in other words, more than 99.6% of PSLF applicants were rejected. That 99.6% (and others who have not yet applied) likely includes servicemembers and veterans who were misled by their servicers about the eligibility of their loans or whether their monthly payments counted toward forgiveness.

The United States made a commitment to its servicemembers and other public servants: give a decade of service, and we will make sure that such service is financially feasible by forgiving the remaining balance of your eligible federal student loans. Where a student loan servicer deprives a servicemember or veteran of this life-changing benefit by misrepresenting eligibility criteria, traditional state consumer protection laws provide servicemembers, veterans, and other public servants with the tools to hold their servicers accountable.

D. Traditional State Consumer Protection Law Prohibits Unfair and Deceptive Acts or Practices Against Servicemembers, Veterans, and other Public Servants.

In 1973, Florida enacted a robust consumer protection law to protect its residents from unfair or deceptive acts or practices. Fl. Stat. § 501.204 ("unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful"). Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") promotes its fundamental police power – the obligation and authority

[8] Data available at https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data (last accessed December 7, 2018).

to protect the health and wellbeing of its residents. *See* Fl. Stat. § 501.202(2) (purpose of FDUTPA is to "protect the consuming public . . . [from] unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce"). Here, Plaintiffs allege that Great Lakes violated the FDUTPA by making misrepresentations about PSLF.

E. The Presumption Against Preemption Applies with Particular Force to FDUTPA Claims Arising from Great Lakes' Misrepresentations.

> In all preemption cases, and particularly in those in which Congress has "legislated ... in a field which the States have traditionally occupied," ... [courts] "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Wyeth v. Levine, 555 U.S. 555, 565, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). Consumer protection is a traditional field of state regulation. *E.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, 83 S. Ct. 1210, 1219, 10 L. Ed. 2d 248 (1963) (regulation "designed to prevent the deception of consumers" was within police powers); *Castro v. Collecto, Inc.*, 634 F.3d 779, 784–85 (5th Cir. 2011) (noting that "states have traditionally governed matters regarding … consumer protections"). "'Because consumer protection law is a field traditionally regulated by the states, ***compelling evidence of an intention to preempt*** is required in this area.'" *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011)

(quoting *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) (emphasis added).

The HEA does not provide borrowers with a private right of action. *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1123 (11th Cir. 2004). Preemption of state law in the absence of a federal remedy would deny *any* legal remedy to injured borrowers, contrary to principles as old as our republic. *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803) (quoting Lord Blackstone's commentary that "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded"). Thus, "availability of a state law claim is even *more* important in [this] area," *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir. 2005), and "the presumption against pre-emption is even stronger against pre-emption of state remedies … when no federal remedy exists." *Id.* at 597 (internal quotations omitted).

This Court gives express preemption provisions like 20 U.S.C. § 1098g a "fair but narrow reading." *Spain v. Brown & Williamson Tobacco Corp.*, 363 F. 3d 1183, 1192 (11th Cir. 2004) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 112 S. Ct. 2608; 120 L.Ed.2d 407 (1992)). Thus, "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." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77, 129

S. Ct. 538, 172 L. Ed. 2d 398 (2008) (internal quotation marks omitted). This Court has therefore refused to find express preemption of Florida's Consumer Collection Practices Act under another express preemption provision of the HEA, 20 U.S.C. § 1095a, in part because – like 20 U.S.C. § 1098g – that statute "is absolutely silent regarding civil liability under consumer protection laws for violations of the HEA." *Cliff*, 363 F.3d at 1124-25.

As explained in Appellant's initial brief, the plain language of 20 U.S.C. § 1098g confirms that its preemptive scope does not extend to state law claims based on affirmative misrepresentations. The statute's background and legislative history confirm that Congress did not intend to preempt the law at issue here.

F. Congress Did Not Intend 20 U.S.C. § 1098g to Immunize Servicers from Liability for Their Affirmative Misrepresentations.

1. The legislative history confirms the narrow scope of preemption.

20 U.S.C. § 1098g codifies U.S. Public Law 97-320, sec. 701 (Oct. 15, 1982), a portion of the Garn-St. Germaine Depository Institutions Act of 1982 that provides in relevant part:

> TITLE VII–MISCELLANEOUS
> AMENDMENT TO THE TRUTH IN LENDING ACT
>
> Sec. 701. (a) Section 104 of the Truth in Lending Act (15 U.S.C. 1601) // 15 USC 1603. // is amended by adding at the end thereof the following:
>
> "(6) 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.).".
>
> (b) 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.) // 20 USC 1099. // shall not be subject to any disclosure requirements of any State law.

Section 701 was not initially included in Garn-St. Germaine. Instead, the Senate added Section 701 to address a specific, narrow issue: New pre-loan disclosures promulgated by Board of Governors of the Federal Reserve System under the Truth in Lending Act ("TILA"). Those new TILA regulations were intended to "benefit consumers by providing a more useful basis for credit decisions," and mandated "that disclosures be provided before consummation of the transaction," defined as "the time at which the consumer becomes obligated on a credit transaction . . . ." *Truth in Lending*, 46 Fed. Reg. 20848, 20873 (April 7, 1981). HEA loans fell within the coverage of Regulation Z, *see* 12 C.F.R. § 226.1(b) (1982), which would have dictated items such like the manner in which origination fees were disclosed to student borrowers. 12 C.F.R. § 226.17(i)(4) (1982). The Senate added Section 701 specifically to exempt HEA loans "from the revised Truth in Lending regulations [Regulation Z] that became mandatory on October 1, 1982." S. REP. 97-536 (97th Congress), p. 42. Its reason for doing so is instructive.

The Senate explained that HEA 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. Therefore, the Truth in Lending provisions and Regulation Z are duplicative and unnecessary." S. REP. 97-536, at 42 (emphasis added). It apparently thought the same about state disclosures, because the Senate Report explained the amendment in a single sentence: "This section exempts from the Truth in Lending Act and from disclosure requirements of any state law loans that are made, insured or guaranteed under any program authorized by" the HEA. *Id.* at 64. Section 701 was therefore intended "to eliminate duplicative paperwork for students," schools, guarantee agencies, and lenders "while still providing all disclosures and protections to students that are currently required under the Act." *Id.* at 42.

Nothing in this legislative history suggests that by seeking to eliminate duplicative and unnecessary pre-disbursement paperwork, Congress intended 20 U.S.C. § 1098g to preempt traditional state consumer protection law prohibiting affirmative misrepresentations to borrowers, much less those about loan forgiveness programs made over the telephone by servicers years after disbursement of the loan. On the contrary, the Senate's stated intention fatally undermines the U.S. Department of Education's conclusory and unsupported assertion that 20 U.S.C. § 1098g applies to telephonic communications between servicers and borrowers, which failed to even acknowledge the relevant legislative history. *Fed. Preemption and State Reg. of the Dept. of Educ.'s Fed. Student Loan Programs and Fed. Student*

Loan Servicers, 83 Fed. Reg. 10619, 10621 (March 12, 2018).

20 U.S.C. § 1098g cannot be read to preempt traditional state law remedies when servicers misrepresent material facts in response to borrower inquiries, or when they create independent duties toward borrowers, only to breach them.

2. Congress did not intend 20 U.S.C. § 1098g to immunize student loan servicers when they make, and break, promises to assist borrowers.

Great Lakes, like other student loan servicers, explicitly encouraged servicemembers, veterans, and other public servants to call it for assistance managing loan repayment. That "active conduct created a duty to act in accordance with [its] own statements." *Consumer Fin. Prot. Bur. V. Navient Corp.*, 2017 WL 3380530, at *20 & fn. 9 (M.D. Pa. Aug. 4, 2017) (hereinafter, "*CFPB*"). There is no evidence that Congress intended 20 U.S.C. § 1098g to immunize the company from liability when it creates, then breaches, a duty to servicemembers.

The Eleventh Circuit and other federal courts regularly reject preemption of state law claims for deceptive conduct where a company takes affirmative steps to create, and then breach, a duty. *Spain*, 363 F. 3d at 1198-99, 2001-02 (finding no preemption for state law claims for breach of warranty and conspiracy to fraudulently misrepresent); *Cipollone*, 505 U.S. at 525-26 (express warranty's requirements are imposed "by the warrantor" and a "common law remedy for a contractual commitment voluntarily undertaken" were not be preempted); *Epps v.*

JP Morgan Chase Bank, N.A., 675 F. 3d 315, 326 (4th Cir. 2012) ("[W]hen a party to a contract voluntarily assumes an obligation to proceed under certain state laws, traditional preemption doctrine does not apply to shield a party from liability for breach of that agreement.").

Student loan servicers cannot promise to assist servicemembers and other borrowers, take on a duty to act in accordance with those promises, *CFPB*, 2017 WL 3380530, * 20 & fn.9, and then hide behind 20 U.S.C. § 1098g to escape liability when they fail to live up to their word.

CONCLUSION

Traditional state consumer protection law provides a remedy where a loan servicer's affirmative misrepresentations deprive servicemembers and veterans of the PSLF benefits that Congress intended to bestow upon them as an incentive and reward for public service. The text and legislative history of 20 U.S.C. 1098g confirm that Congress did not intend to preempt this traditional state law and deprive those who serve our country of legal remedies for these wrongs. Amici therefore respectfully request that the Court reverse the judgment of the District Court and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 5,845 words excluding the parts of the brief exempted by FRAP 32(f). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2018, I electronically filed the foregoing *Amicus Curie* brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will serve a copy on all counsel of record.

I further certify that on December 10, 2018, seven copies were furnished to the Court via Federal Express, and that the copies are exact copies of the ECF submission.

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