IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 19-0510

JAMES REAVIS,

Plaintiff and Appellant,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY d/b/a FEDLOAN SERVICING,

Defendant and Appellee.

BRIEF OF AMICUS CURIAE MONTANA FEDERATION OF PUBLIC EMPLOYEES

On Appeal from the First Judicial District Court, Lewis & Clark County,
The Honorable Michael F. McMahon, Presiding.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the District Court err in concluding the federal Higher Education Act preempts all state legal remedies when the Act itself contains no private right of action and its plain language only preempts state law "disclosure requirements"?

STATEMENT OF THE CASE

The Montana Federation of Public Employees ("MFPE") agrees with the Statement of the Case offered by Plaintiff and Appellant James Reavis ("Reavis").

STATEMENT OF FACTS

MFPE agrees with Reavis' Statement of Facts.

SUMMARY OF AMICUS' ARGUMENT

According to the U.S. Department of Education, 118,000 Montanans collectively owe $3.8 billion in federal student loans—an average of approximately $32,000 each.

For the first time in state history, the District Court ruled that when Montana borrowers are damaged by the affirmative misrepresentations and unfair acts of their federal student loan servicers, they have no legal remedy. Rather, the District Court held that the federal Higher Education Act ("HEA") preempts all state-law causes of action—even though it provides no private right of action itself. The District Court's ruling is contrary to the decisions reached by judges throughout the country. The decision also goes well beyond the Ninth Circuit decision it relies

upon and beyond the preemptive language in the HEA itself ("[l]oans made, insured or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 shall not be subject to any disclosure requirements of any State law.").

The decision conflicts with prior rulings of this Court which look to the constitutional right of Montanans to access the civil justice system and rejecting non-binding federal case law that would otherwise close the courthouse doors to Montanans with valid claims.

The District Court erred as a matter of law and should be reversed.

Amicus Montana Federation of Public Employees ("MFPE") is a union that represents more than 23,000 public employees in Montana as well as hundreds of students presently attending Montana universities. Many of these union members chose to pursue a career in public service at least in part because of the opportunity to obtain federal student loan forgiveness. The allegations made by Reavis in his dismissed complaint are exemplars of stories the union hears from its members too frequently: that after years of public work and dutiful loan payments, they are told that they are not enrolled in the loan forgiveness program or otherwise do not qualify—despite the previous assurances of their loan servicers that they were on track to be out of debt. Experiences similar to those alleged in Reavis' case are reported in the national press, in governmental inspectors' reports and form the

basis of similar lawsuits around the country which have not been thrown out of court.

Amicus MFPE will discuss the history and present state of the federal student loan system, review the preemption decisions from other jurisdictions and set forth the reasons why it is imperative that Montanans' right to access our state's courts be preserved.

If this Court affirms the District Court, it will leave 11% of Montana's population without judicial recourse against private loan servicers for even the most egregious examples of fraud.

DISCUSSION

I. The Backdrop of this Case Involves the Federal Student Loan System, the Role of the Loan Servicing Industry and Its Documented Problems, and the Federal Public Service Loan Forgiveness Program.

To provide this Court context for the issues involved in this case, Amicus offers a brief history of the federal student loan program, the role of loan servicing companies and the federal Public Service Loan Forgiveness Program.

A. The Federal Student Loan System and its Impact on Montanans.

"The HEA was originally passed in 1965 'to strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.'" *Leveski v. ITT Educ. Svcs*., 719 F.3d 818, 819 (7th Cir. 2013), citing Pub. L. No. 89-329, 71 Stat. 1219. Congress

passed the law to "'keep the college door open to all students of ability,' regardless of socioeconomic background." *Rowe v. Educ. Credit Mgmt. Corp*., 559 F.3d 1028, 1030 (9th Cir. 2009), citing *Pelfrey v. Educ. Credit Mgmt. Corp*., 71 F.Supp. 2d 1161, 1162-63 (N.D. Ala. 1999).

Originally, "[u]nder the HEA, eligible lenders make guaranteed loans on favorable terms to students or parents to help finance student education. The loans are typically guaranteed by guaranty agencies" and ultimately reinsured by the U.S. Department of Education. *Id*. These original loans were designed as Federal Family Education Loan Program ("FFELP") loans. Beginning in 2010, however, Congress stopped the origination of guaranteed loans through private lenders and began a "Direct Loan" program wherein the United States serves as the lender and contracts with private entities to service the loans. 20 U.S.C. § 1071(d); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201 et seq., 124 Stat. 1029, 1074.

Direct Loans and FFELP loans "have the same terms, conditions and benefits[.]" 20 U.S.C. § 1087e(a)(1). The preemption provision at issue in this case applies equally to both types of loans. 20 U.S.C. § 1098g.

Student loan borrowers rarely interact with the actual holder of their debt. Instead, borrowers communicate with their federal loan servicer. A servicer "contract[s] with a lender or guaranty agency to administer … any aspect of the

lender's or guaranty agency's" programs. 34 C.F.R. § 682.200. The functions of a student loan servicer include an array of acts and responsibilities, including receiving and applying payments to a borrower's account, maintaining account records and other "[i]nteractions with a borrower, including activities to help prevent default on obligations arising from post-secondary education loans, conducted to facilitate" repayment. 12 C.F.R. § 1090.106.

The federal student loan program is well utilized by Americans, including Montanans. In the United States today, approximately 43 million people owe more than $1.4 trillion in student loans. U.S. Dept. of Educ., Federal Student Aid Data Center, *Federal Student Loan Portfolio* (June 2019).

In Montana, there are at least 118,000 borrowers who collectively owe $3.8 billion in student loans. U.S. Dept. of Educ., Federal Student Aid Data Center, *Federal Student Loan Portfolio: By Borrower Location* (June 2019). To put that sum of debt into perspective, "[t]he individual income tax is the largest source of [Montana] state tax revenue." *2018 Biennial Report, Individual and Corporate Income Tax*, Montana Department of Revenue, p. 55. In FY18, the most recent year for which data is available, the State of Montana collected $1.29 billion in individual income tax. *Id*. It collected another $167 million in corporate income tax. *Id*. at p.85. It would take almost three years to pay off Montanans' collective

federal student loan burden if the state directed every penny of individual and corporate income tax collections at the debt.

Americans owe more money in student loans than they do on all automobile loans in the country—it is the second largest category of consumer debt after home mortgages. Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit*, 2019, Quarter 3 (November 2019).

B. The Role of Federal Student Loan Servicers.

Although the federal government is the lender for the HEA student loans, they do not directly service those loans. Rather, Congress has directed the U.S. Department of Education ("ED") to enter contracts with private companies to service the portfolio of government issued or held student loans. 20 U.S.C. § 1087f(a),(b)(2) & (4).

Unfortunately, those companies have been failing to perform at a level necessary to ensure that student loan borrowers are treated fairly. See, e.g., Consumer Fin. Prot. Bureau, *Supervisory Highlights: Fall 2014* (Oct. 28, 2014); Report, U.S. Department of Education Office of the Inspector General, *Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans* (Feb. 12, 2019). As discussed below, in recent years, student loan servicing

companies—including the defendant in this case—have been sued by at least seven state attorneys general as well as the Consumer Financial Protection Bureau.

C. The Federal Public Service Loan Forgiveness Program and FedLoan's Documented Problems Administering the Program.

The core of Reavis' dismissed Complaint centers on the allegation that FedLoan botched his qualification for federal student loan forgiveness under the PSLFP. Passed by Congress in 2007, the PSLFP was designed to encourage students to enter public service careers through a program promising student loan forgiveness. See, College Cost Reduction and Access Act of 2007 (CCRAA), Pub. L. No. 110-84 § 401 (Sept. 27, 2007); see also H.Rep. 110-210 at 48 (June 25, 2007)(noting "concern[] with the growing number of individuals who do not choose to enter into lower paying professions" including, "first responders, law enforcement officers, firefighters, nurses, public defenders, prosecutors, early childhood educators, librarians, and other public sector employees" because "of growing debt due to student loans."), codified as amended at 20 U.S.C. § 1087e(m).

The PSLFP promised loan forgiveness of any remaining balance after a borrower employed in a public service job has made 120 payments after Oct. 1, 2007, on an eligible Direct Loan. 20 U.S.C. § 1087e(m)(1), (3)(B). Upon completion of these requirements, borrowers are entitled to have outstanding federal student debt cancelled. *Id.*, 34 C.F.R. § 685.219(e). Borrowers with the

pre-2010 FFELP guaranteed loans with a private lender were allowed to consolidate their loans into a Direct Loan to become eligible for the PSLF program. 34 C.F.R. § 685.219(b) & (c)(1)(iii).

Twelve years after the establishment of the PSLFP, barely 1% of those who have applied for PSLFP relief have been deemed eligible. Of the 110,729 borrowers who applied for forgiveness as of June 30, 2019, only 1,216 (1.09%) received loan forgiveness. U.S. Dept. of Educ., Federal Student Aid Data Center, *Public Service Loan Forgiveness Data* (June 2019 report).

The stories of those mistreated are remarkably similar. After years of public service and loan servicer assurances that borrowers are on track for forgiveness, debtors are shocked to learn they are not eligible or sometimes even enrolled in the program. Ron Lieber, *A Student Loan Nightmare: The Teacher in the Wrong Payment Plan*, N.Y. Times (Oct. 27, 2017). Mr. Reavis, the Appellant in this case, presents a similar complaint in his lawsuit which was dismissed. Complaint ¶¶ 11-28.

The defendant in this case, Pennsylvania Higher Education Assistance Agency (d/b/a "FedLoan") has the exclusive contract to administer loans for which forgiveness is being sought under the Public Service Loan Forgiveness program. *Winebarger v. Pennsylvania Higher Educ. Asst. Agency*, ___ F.Supp.3d ___, 2019 U.S. Dist. LEXIS 196821 (C.D. Cal. Aug. 21, 2019). This means if a student loan

borrower elects a career in public service and seeks loan forgiveness the U.S. Department of Education requires their loans be serviced by FedLoan.

There is, therefore, a tremendous lack of market power for borrowers, who do not get to choose which company services their loans. Unlike most American businesses, FedLoan does not need to compete for customers by providing good service, helpful and accurate advice or even by correcting its own errors. Instead, FedLoan gets customers simply because it won the contract to service the loans of borrowers who want forgiveness under the PSLFP. If the vast preemption found by the District Court is affirmed, the loan servicing industry will have no need to correct its own errors—it would never face any real consequences.

FedLoan has documented problems. It "struggled to accurately track borrowers' qualifying monthly payments," according to 2015 and 2016 reviews by ED. Erica L. Green and Stacy Cowley, *Broken Promises and Debt Pile Up as Loan Forgiveness Goes Astray*, N.Y. Times (Nov, 28, 2019). In three successive quarters, at least 23 percent of the accounts examined by the government contained errors. *Id*. More audits in 2017 found Fedloan still had problems accurately accounting for loan payments "and had mistakenly told some borrowers they were on track to receive forgiveness." *Id*.

More recently, a September 2018 report by the Government Accountability Office ("GAO") identified gross deficiencies in ED's supervision of the servicers

who administer the student loan programs. ED's own Office of Inspector General ("OIG") has concluded ED "rarely hold[s] servicers accountable for instances of noncompliance with Federal loan servicing requirements," and as a result, servicers have no "incentive to take actions to mitigate the risk of continued noncompliance that harms students and their families." U.S. Gov't Accountability Office, GAO-18-547, *Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers* (Sept. 2018) at 17. The same GOA report concluded that ED knew there was a high risk that FedLoan would improperly process applications for loan forgiveness, but still took no action to correct these errors. *Id*. at 24.

Loan servicing is an inescapable fact of the federal student loan system. However, borrowers have no say in selecting their student loan servicer. The loan servicing industry is known for self-dealing and making errors. Importantly, "[i]t is undisputed that there is no private right of action under the HEA." *Hyland, et al v. Navient Corporation, et. al.*, 2019 U.S. Dist. LEXIS 113038, 2019 WL 2918238 (S.D.N.Y. July 8, 2019). Therefore, to also hold that all state causes of action are preempted—as the District Court did here—leaves the conduct of a trillion-dollar industry unregulated and Montana borrowers at its mercy. As explained below, such a holding would also run contrary to this Court's long-standing resistance to

creating situations where there is no remedy for recognized wrongs, contrary to Mont. Const. Art. II, §16.

II. Extensive Litigation Concerning Student Loan Servicers is Occurring in Courts Across the Country; the District Court's Decision Departs from the National Trend.

Servicers abusing borrowers across the country has led to a spate of litigation in state and federal courts. The state attorneys general for California, Pennsylvania, Illinois, Washington, Mississippi, Massachusetts and New York have all brought lawsuits against student loan servicers for unfair and deceptive conduct perpetrated against citizens of their respective states. *Washington v. Navient Corp., et al*., Superior Court of King County Cause No. 17-2-01115-1[1]; *Illinois v. Navient Corp., et al*., Circuit Court of Cook County Cause No. 17-CH-761; *Mississippi v. Navient Corp., et al*., Hinds County Court Cause No. CGC-18-567732 (Aug. 15, 2019); *Commonwealth of Mass. v. Pennsylvania Higher Educ. Assistance Agency*, 2018 Mass.Super LEXIS 14, 2018 WL 1137520; *Pennsylvania v. Navient Corp., et al*., 354 F.Supp.3d 529 (M.D. Pa. Dec. 17, 2018); *California v. Navient Corp., et al*., Superior Court of San Francisco County Cause No. CGC-18-567732; *New York v. Pennsylvania Higher Education Assistance Agency*, Cause

[1] M.R.App. 13(5) permits only "the appellant or the appellee" to file an appendix to their brief. For unreported cases cited in this brief, they are included in the *Appellant's Appendix*. These include: Transcript of Proceedings from July 7, 2017 in *Washington v. Navient Corp*., *Order* dated July 10, 2018 in *Illinois v. Navient Corp*., *Order Overruling Defendants' Demurrer to Plaintiff's First Amended Complaint* dated December 20, 2018 in *California v. Navient Corp.,* and *Order of the Court* dated August 15, 2019 in *Mississippi v. Navient Corp*.

No. 1:19-cv-09155. (S.D.N.Y.). The Consumer Financial Protection Bureau has likewise sued a federal loan servicer. *Consumer Fin. Prot. Bureau v. Navient Corp*., 2017 U.S. Dist. LEXIS 123825 (M.D. Pa.). The American Federation of Teachers[2], on behalf of its 1.7 million members, sued U.S. Secretary of Education Betsy DeVos in a putative class-action for alleged mismanagement of the PSLFP and related due process violations. *Weingarten, et al. v. Devos, et al*., Cause No. 1:19-cv-02056 (D.D.C.). Borrowers like Reavis have brought individual cases. *See, e.g*., *Daniel v. Navient Sols., LLC*, 328 F.Supp.3d 1319 (M.D. Fla. June 25, 2018); *Hyland v. Navient Corp.*, 2019 U.S. Dist. LEXIS 113038; 2019 WL 2918238 (S.D.N.Y. July 8, 2019) (dismissing some but not all claims for pleading failures; rejecting express preemption defense).

Unlike the District Court here, jurists around the country have roundly rejected the preemption arguments relied on by FedLoan. In the *Pennsylvania* case, the attorney general there alleged the loan servicer was (1) improperly steering struggling borrowers into forbearances instead of income-driven repayment plans; (2) failed to advise borrowers of the consequences of failing to submit annual income-drive repayment certifications; (3) misrepresenting the requirements to have a student loan cosigner released; and, like Reavis, (4) making errors in processing student loan payments. *Pennsylvania* at 536-539. Despite the

[2] Amicus MPFE is an affiliate of the AFT.

servicer attempting to characterize all claims as "disclosures" which are preempted by 20 U.S.C. § 1098g, the federal court ruled the student loan servicer's interpretation of a disclosure "goes too far: the phrase 'any disclosure requirements of any State law' does not apply to the sort of claims alleged by the Commonwealth here … which are allegations of unfair and deceptive conduct related to forbearance steering and recertification." *Id*. at 549-550. "The HEA and its associated regulations only require that particular disclosures are to be made in the delivery of federal student loans and generally prescribes how those disclosures should be made … It does not preempt the enforcement of a statute of general applicability under a state's traditional police power, here, the Commonwealth's state consumer protection law … which proscribes unfair and deceptive acts of practices in commerce." *Id*.

The state court judges in *Washington*, *Mississippi*, *Massachusetts*, *California* and *Illinois* have each agreed the HEA does not preempt the types of claims being brought against loan servicers. Federal judges in *Nelson*, *Pennsylvania* and *Daniel* have likewise done so.

III. The District Court's Decision is Based Upon an Overbroad Reading of *Chae*, the Readily Distinguished *Lawson-Ross* Decision and a Federal 'Interpretation' that Courts have Repeatedly Given No Deference.

While Reavis is addressing the preemption argument in full detail in the *Appellant's Brief*, each of the three bases relied upon by the District Court (i.e.,

those it found "most persuasive") do not support the District Court's holding on preemption.

A. "It was a mistake to read *Chae* so broadly."

Chae held that a category of claims involving "the language in [the student loan servicer's] billing statements and coupon books" were preempted because they involved disclosures mandated by the HEA. *Chae v. SLM,* 593 P.3d 936, 943 (9th Cir. 2010). However, the *Chae* court squarely rejected the express preemption defense regarding the plaintiff's "remaining claims alleging breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, and the use of fraudulent and deceptive practices apart from the billing statements." *Id*. "These claims are not impacted by any of the FFELP's express preemption provisions." *Id*.[3]

Just before the District Court ruled, the Seventh Circuit clarified the issue, correcting a federal district court that "it was a mistake to read *Chae* so broadly." *Nelson v. Great Lakes Education Loan Svcs., Inc*., 928 F.3d 639, 649 (7th Cir. 2019). Because the *Nelson* plaintiff alleged "affirmative misrepresentations" rather than seeking "additional disclosure requirements," the Seventh Circuit

[3] Ultimately, for reasons that do not affect this appeal, the Ninth Circuit found Chae's claims which survived express preemption were nevertheless preempted under conflict preemption principles. The District Court's decision involved only express preemption: "the HEA expressly preempts Reavis' state law claims[.]" *Order on Defendant's Dismissal Motions* at 8 (emphasis added). Reavis discusses the conflict preemption issue in greater detail in the *Appellant's Brief*.

directed the federal district court to "use jury instructions and other tools" to permit the case to proceed without adding new disclosure requirements. *Id*. at 649-650.

Nelson articulates why the District Court here read *Chae* too broadly:

> Section §1098g preempts a state law declaring, for example, that student loan servicers must affirmatively disclose X and Y in a specific format and at a specific time. But Congress did not use language that preempts all state-law consumer protections for student loan borrowers when they are communicating with their student loan servicers.

Nelson at 647.

In support of its determination, *Nelson* reviewed the HEA's preemption provisions other than § 1098g (addressing the preemption of state usury laws, collection costs and wage-garnishment requirements) and concluded Congress did not intend a blanket preemption of state laws generally, but only limited preemption in specifically articulated areas. *Id*.

Next, *Nelson* considered the disclosures required by the HEA at 20 U.S.C. § 1083(e)(2) and found § 1098g was intended only to preempt state efforts to change or modify those types of identified disclosures. However, once an aggrieved borrower makes allegations outside these required disclosures—such as affirmative misrepresentations contained in "voluntary but deceptive statements"—the HEA does not preempt state causes of action. *Id*. at 648.

In so doing, the Seventh Circuit read *Chae* properly—in a limited fashion, as the Ninth Circuit intended.

Chae is not wrong and this Court need not disagree with it or even distinguish it. The District Court simply read it too broadly.

B. *Lawson-Ross* Fails to Follow *Chae* or *Nelson* and is on Appeal.

The *Lawson-Ross* decision the District Court found persuasive is on appeal to the 11th Circuit Court of Appeals as Cause No. 18-14490. According to PACER, briefing in this appeal was completed on Feb. 20, 2019 and oral argument held September 10, 2019. This Court should soon have the benefit of the 11th Circuit's decision. However, the Court can presently recognize the *Lawson-Ross* decision as an outlier that is wrong under both *Chae* and *Nelson*.

The *Lawson-Ross* plaintiffs alleged their federal student loan servicer systemically made false statements that led them to believe that they were complying with the terms of the PSLFP—even though they didn't have the type of loans that qualified for such forgiveness and needed to first consolidate to Direct Loans to participate in PSLFP. *Lawson-Ross v. Great Lakes Higher Education Corp.*, 2018 U.S. Dist. LEXIS 199048 (S.D. Fla. 2018). The servicer was accused of making affirmative misstatements to borrowers that advanced its pecuniary interest while hurting borrowers. *Id*. Neither *Chae* nor *Nelson* preempt such conduct as it is entirely unrelated to the "disclosures" required by the HEA.

If this Court has any concerns about the *Lawson-Ross* decision, it should wait for the 11th Circuit to rule.

C. The U.S. Department of Education's 'Interpretation' is Not Persuasive and Has Been Rejected by Most Courts.

The third basis of the District Court's decision is an "Interpretation" published by the U.S. Department of Education stating that the HEA preempts all causes of action. 83 Fed. Reg. at 10,619 (March 12, 2018). And although the District Court found the interpretation persuasive, the District Court wholly failed to explain *why* it found it so. This is particularly relevant insofar as there is a growing consensus among courts that the ED Interpretation is poorly reasoned, unpersuasive, conflicts with positions ED took as recently as 2015, and thus unworthy of deference.

Indeed, other than the District Court here and the *Lawson-Ross* decision, which is presently on appeal, the ED interpretation has been resoundingly rejected by courts across the country. See, *Student Loan Servicing Alliance v. District of Columbia*, 351 F.Supp.3d 26 (D.D.C. 2018)(DOE Preemption Notice is "due no deference whatsoever."); *Nelson* at fn2 (Seventh Circuit holds "the Preemption Notice is not persuasive because it is not particularly thorough and it 'represents a stark, unexpected change' in the Department's position."); *Illinois v. Navient* at p.41-42 (describing the DOE Interpretation as something created "post litigation commencement" and holding, "[t]o the extent that the Interpretation suggests that all state consumer protection laws are somehow preempted because they are supposedly predicated on 'disclosures,' the Court does not find the Interpretation

persuasive."); *Hyland* at 19-20 ("The persuasive value of the Interpretation of this lawsuit is limited.").

The courts have found the "Interpretation" unpersuasive for several reasons. First, by its own terms it applies to cases in which States have "enacted regulatory regimes or applied existing State consumer protection statutes that undermine these goals by imposing new regulatory requirements" on loan servicers. 83 Fed. Reg. 10,619. A private tort case does neither of those things—prohibiting unfair and deceptive acts, for example, does not impose new regulatory requirements; businesses are never permitted to deceive its customers under any law. Next, as recently as 2015, ED was routinely taking the opposite position in litigation and disclaiming the idea the HEA offered broad preemption of state laws. See, e.g., *Hyand* at 7. "The persuasive value of an agency's interpretation may be undermined when it is 'novel' or 'inconsistent with its positions in other cases.'" *Id*., citing *In re Bernard L. Madoff Inv. Sec. LLC*, 779 F.3d 74, 83 (2nd Cir. 2015).

The District Court should not have relied upon the ED's "Interpretation" of the HEA as it has been roundly rejected by courts across the country as poorly reasoned and a sharp, unexplained departure from ED's previous position.

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IV. The Montana Supreme Court Has Repeatedly Declined to Defer to Non-Binding Federal Decisions that Deprive Citizens of their Rights Under Mont. Const. Art. II, Section 16.

This case has the potential to bar the courthouse doors to a vast number of Montanans who have federal student debt.

As explained above, this Court need not reject *Chae*, as the District Court simply gave it overbroad application. Nevertheless, this Court should recognize that the federal cases relied upon by the District Court are not binding.

This Court is not bound to walk "lock-step" with federal courts on preemption issues and when confronted with competing lines of persuasive authority, should choose the line that preserves for Montanans their constitutionally guaranteed right to access the court system. Mont. Const. Art. II, § 16 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.").

The United States Supreme Court has not ruled upon the issue of HEA preemption. The Supremacy Clause of the United States Constitution does not require state courts to follow precedent from the federal appellate courts, even when those courts are interpreting a federal constitutional issue. *State v. Robinson*, 2003 MT 364, ¶ 14, 314 Mont. 427, 67 P.3d 203. "In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is a parallelism but not

paramountcy for both sets of courts are governed by the same reviewing authority of the [United States] Supreme Court." *Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992).

When necessary, this Court has rejected the outcomes reached by federal courts when they are inappropriate for Montana or infringe on the unique protections offered by Montana's 1972 Constitution. *State v. Clayton*, 2002 MT 67, ¶ 22, 309 Mont. 215, 45 P.3d 30 ("we will not 'march lock-step' with federal courts, where the broader protections of the Montana Constitution may be implicated."); *Favel v. Am. Renovation & Constr. Co.*, 2002 MT 266, ¶ 54, 312 Mont. 285, 59 P.3d 412; *Trankel v. State Dept. of Military Affairs*, 282 Mont. 348, 938 P.3d 614 (1997).

In *Favel*, this Court noted the U.S. Supreme Court had declined to decide whether the Davis-Bacon Act provided a private right of action for workers against contractors not paying the prevailing wage; it therefore found preemption inapplicable "and, in keeping with Montana's longstanding policy and constitutional guarantee in Article II, Section 16 granting citizens access to our courts when they are aggrieved," allowed the Plaintiffs' case to proceed. *Id*. at ¶¶ 54, 56.

Prior to *Favel*, this Court declined to follow federal case law (the *Feres* doctrine) which would have barred a negligence claim for a National Guardsman

employed by the U.S. Army and exposed to toxic chemicals by the State of Montana. *Trankel*. In rejecting the *Feres* doctrine, this Court stressed the strong public policy of providing redress for injuries of all character:

> The State contends that the *Feres* doctrine applies to all claims made for injuries which are incidental to military service because the U.S. Supreme Court extended to doctrine to [various enumerated claims] … It is the function of the U.S. Supreme Court to define and limit the scope of rights afforded pursuant to those constitutional causes of action. However, those decisions have little bearing on the scope of rights afforded under state law and guaranteed by our state Constitution.
>
> We reaffirm that pursuant to the second sentence in Article II, Section 16, of the Montana Constitution, any statute or court decision which deprives an employee of his right to full legal redress, as defined by the general tort law of this state against third parties, is absolutely prohibited. That sentence is mandatory and self-executing, and leaves no room for erosion based on what federal courts or the courts of other states would do pursuant to federal laws or the laws of other states.
>
> *Id*., at 619-620, 623.

This Court is in good company in resisting outcomes in which those who have been wronged are left without a legal remedy. "It is, to say the very least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996). Where Congress has failed to provide federal remedies, the U.S. Supreme Court has declined to find the usual state remedies (including the

availability of punitive damages) preempted. *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 251 (1984), *possibly superseded by statute*.

Here, the District Court held that all causes of action alleged by Reavis are preempted. This includes counts alleging negligence, violation of the state Consumer Protection Act and even a count simply seeking declaratory relief. None of these are "disclosures." The District Court should be reversed.

CONCLUSION

More than 100,000 Montanans who have attended college through the use of the federal student loan program may be affected by the Court's decision in this matter. The District Court erred in holding that Reavis' claims against his student loan servicer are preempted. None of the cases relied upon by the District Court mandate such an outcome. This Court does not strip Montanans of their right to access the civil justice system absent a clear and definitive decision by the U.S. Supreme Court. The District Court must be reversed.

DATED this 13th day of December, 2019.

McDONALD LAW OFFICE, PLLC

By: /s/ Jonathan McDonald
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CERTIFICATE OF COMPLIANCE

Pursuant to M.R.App.P. 11(4), I certify this brief is printed with a proportionally spaced Times New Roman typeface of 14 points, is double-spaced except for footnotes and quoted indented material; has margins of 1-inch; and has a word count as calculated by Microsoft Word for Mac of 4,998 words (excluding Tables and Certificates).

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