

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0510

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JAMES REAVIS,

Plaintiff and Appellant,

v.

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

Defendant and Appellee.

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**BRIEF OF AMICUS CURIAE TIMOTHY C. FOX,  
MONTANA ATTORNEY GENERAL**

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

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## INTEREST OF THE AMICUS CURIAE

Montana Attorney General Timothy C. Fox is the chief legal officer of the State and is authorized to prosecute or defend all causes in the Montana Supreme Court in which the State has an interest. Mont. Const. art. II, § 4; Mont. Code Ann. § 2-15-501(1). The State has a significant interest in the outcome of this appeal concerning whether the Higher Education Act (HEA) preempts Montana’s generally applicable consumer protection laws because consumer protection is mandated by the Montana Constitution and falls within the State’s historic police power. *See Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011) (observing that consumer protection claims “fall in an area that is traditionally within the state’s police powers to protect its own citizens”); *see also*, Mont. Const., art. XIII, § 2 (“The legislature shall provide protection and education for the people against harmful and unfair practices by either foreign or domestic corporations, individuals, or associations.”).

The State also has an interest in the correct application of preemption principles to state laws. The United States Constitution establishes a “system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). As a sovereign, Montana has a strong interest in preserving the appropriate balance between federal and state authority. Notably, the Attorney General filed an amici brief on behalf of Montana and twenty other

states in the United States Supreme Court defending state laws against claims of preemption. *See* Brief of Montana, *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190 (2017).<sup>1</sup>

While the Attorney General takes no position on the underlying merits of this case, he submits this brief in support of Appellant James Reavis and asks this Court to reverse the district court's decision that Reavis's claims were preempted by § 1098g of the HEA, 20 U.S.C. § 1098g.

### **STATEMENT OF THE CASE**

In pursuing advanced degrees, Reavis incurred student loan debt. Doc. 1, ¶¶ 7–8. Pennsylvania Higher Education Assistance Foundation (Fedloan) is a loan servicer that services Reavis's loans. *Id.*, ¶ 3. Reavis sued Fedloan based on, among other things, Fedloan's alleged misrepresentations, unfair or deceptive acts, and false statements made while servicing his loans. *Id.*, ¶¶ 30–62. Reavis asserted common law claims as well as a claim under the Montana Consumer Protection Act. *Id.* The district court dismissed the complaint for failure to state a claim after determining that federal law preempted Reavis's claims. Doc. 22.

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<sup>1</sup> Available at: [https://www.scotusblog.com/wp-content/uploads/2017/02/16-149\\_amicus\\_resp\\_montana.pdf](https://www.scotusblog.com/wp-content/uploads/2017/02/16-149_amicus_resp_montana.pdf).

## STATEMENT OF FACTS RELEVANT TO AMICUS BRIEF

### **A. The Higher Education Act and the Public Service Loan Forgiveness Program.**

Congress enacted the HEA “to keep the college door open to all students of ability, regardless of socioeconomic background.” *Rowe v. Educational Credit Management Corp.*, 559 F.3d 1028, 1030 (9th Cir. 2009) (citation omitted). The HEA facilitates this endeavor by assisting with grants, loans, and other assistance to students and institutions. 20 U.S.C. § 1070. The HEA contains an express-preemption clause, which states that “[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.” 20 U.S.C. § 1098g. The HEA does not contain a provision expressly authorizing the Department of Education (DOE) to make preemption determinations.

The HEA does not contain a private right of action to enforce its terms; the only federal remedy available is to “complain about [loan servicers] to the DOE and to ask the agency to intervene.” *Chae v. SLM Corp.*, 593 F.3d 936, 943 n.6 (9th Cir. 2010) (citation omitted). Whether the DOE is responsive to these complaints is questionable considering its failure to respond to Montana Senator Jon Tester’s concerns about the Public Service Loan Forgiveness Program (PSLF or the Program), the same loan program at issue in this case, after hearing

testimony about DOE’s apparent efforts to block the federal Consumer Financial Protection Bureau from obtaining information about the PSLF and loan servicers.<sup>2</sup>

The circumstances underlying Reavis’s claims are increasingly a topic of headline news.<sup>3</sup> Student loan debt in 2019 is the highest it has ever been: around 45 million borrowers collectively owe more than \$1.5 trillion. Student debt is now the second highest consumer debt category behind only mortgage debt, and higher than auto loan debt and credit cards.<sup>4</sup> Amidst this backdrop, Congress established the PSLF under the College Cost Reduction and Access Act of 2007. The PSLF’s stated purpose is “to encourage individuals to enter and continue in full-time public service employment,” by permitting Direct Loan borrowers who enter public service careers to have a portion of their student loans forgiven after making 120 on-time payments under a qualifying repayment plan, while working for a qualifying employer. *See* 34 C.F.R. § 685.219(a).<sup>5</sup>

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<sup>2</sup> Letter from Senator Tester to Secretary of Education Betsy DeVos is available at: <https://www.testersenate.gov/files/Letters/2019-10-22%20Education%20DeVos%20Public%20Service%20Loan%20Forgiveness%20-%20Follow-up.pdf>.

<sup>3</sup> *See* <https://www.marketwatch.com/story/this-government-loan-forgiveness-program-has-rejected-99-of-borrowers-so-far-2018-09-20>.

<sup>4</sup> *See* <https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/#5c476f4d133f>.

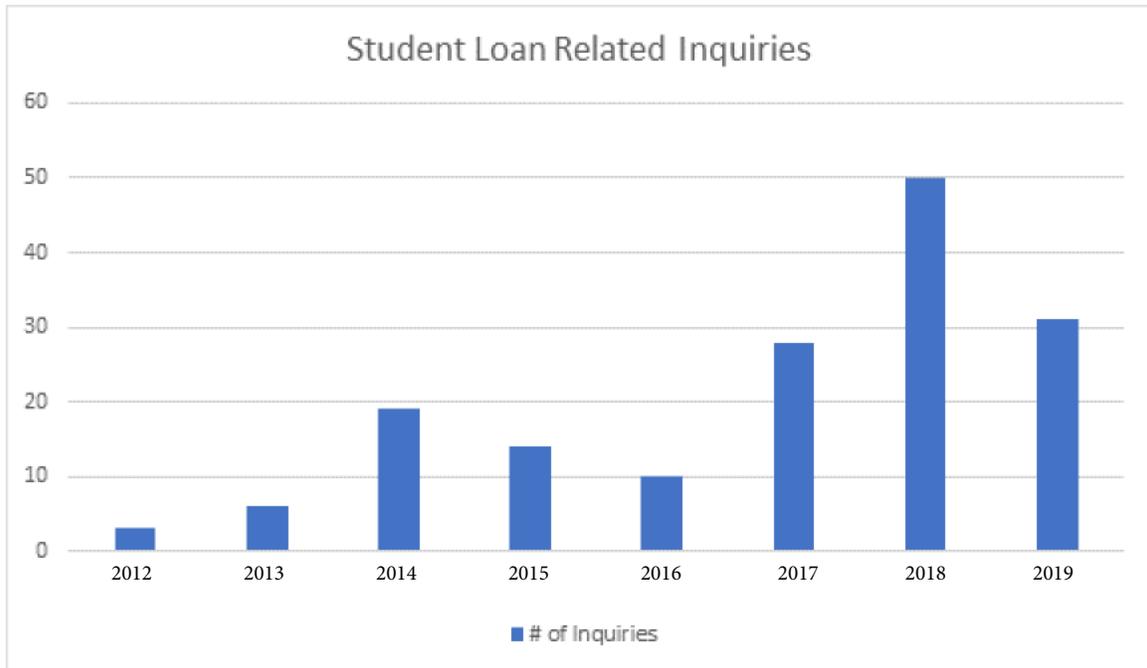
<sup>5</sup> Information about PSLF is available at: <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service>.

As of December 2019, over two years after the first former students, now public-service employees, could have become eligible for forgiveness under PSLF, most indications are that PSLF has been a failure. Recent Government Accountability Office reports have found that roughly 99% of PSLF applications for loan forgiveness promised to and anticipated by borrowers who have dedicated their careers to public service have been denied.<sup>6</sup> Fedloan acknowledged as much in the district court, claiming that “[o]ut of 29,000 applications for loan forgiveness processed by [the DOE], the department has approved only 300—a roughly one percent approval rate so far.” Doc. 5 at 3.

PSLF is still relatively young, and only borrowers who meet the Program’s requirements could be considered eligible for forgiveness. Likely because of this, Montana’s Office of Consumer Protection has not yet seen complaint numbers against loan servicers rise to the level of those, for example, observed during the nationwide foreclosure crisis a decade ago. However, the graph of student loan related inquiries shows a marked uptick in complaints since 2017, when the first borrowers would have been eligible for PSLF.

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<sup>6</sup> See <https://www.gao.gov/products/GAO-18-547> (2018 GAO report); [https://www.gao.gov/products/GAO-19-595?mobile\\_opt\\_out=1](https://www.gao.gov/products/GAO-19-595?mobile_opt_out=1) (2019 GAO report).



More generally, the National Consumer Law Center has comprehensively surveyed student loan servicer abuses in its most recent Student Loan Law Treatise, finding that the Consumer Financial Protection Bureau, state attorneys general, and private bar actions in recent years reflect a trend of abuses including: providing erroneous information about repayment amounts, providing confusing responses to borrowers' applications to lowered payment plans, failing to respond to borrowers, excessive late fees, affirmatively steering borrowers to less favorable plans, deterring borrowers from beneficial payment options, making misleading statements about late fees, and many others. *See* National Consumer Law Center,

*Student Loan Law* § 5.3, 78–80 (6th ed. 2019).<sup>7</sup> Partly because of these trends, a bipartisan coalition of 31 state attorneys general, including General Fox, joined a 2018 letter opposing HEA legislation that would have broadly prohibited states from overseeing, licensing, or addressing state law violations by loan servicers. *See* Exhibit 1.

**B. Implications of the district court’s order for Montana borrowers.**

The district court’s preemption ruling on Reavis’s Consumer Protection Act claims could adversely affect both the Attorney General’s and the private bar’s abilities to protect Montana consumers through enforcement of the Consumer Protection Act. Because the HEA contains no private right of action, the practical impact of the district court’s decision could permit unfair or deceptive acts, even those in the form of affirmative misrepresentations, so long as they occur during servicing of student loans. Pertinently, if no state-law remedy exists for the unfair or deceptive acts or practices alleged, the State of Montana’s ability to recruit and retain public servants is also jeopardized.

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<sup>7</sup> This information is available on NCLC’s website: <https://library.nclc.org/student-loan-servicers-now-subject-borrowers%E2%80%99-state-law-claims>.

## SUMMARY OF ARGUMENT

When faced with a question of preemption, courts begin with the assumption that federal laws do not displace laws that are within a state’s historic police powers unless that is Congress’s “clear and manifest” intent. Consumer protection laws are just these types of laws, and the Montana Legislature enacted the Consumer Protection Act to regulate in that area. Indeed, the Montana Constitution required the Legislature to do so. Under settled principles of preemption, the court should not have dismissed Reavis’s complaint.

Moreover, although the court issued its order dismissing Reavis’s complaint “with sincere disappointment,” it need not have dismissed it at all. The court’s ruling was based on a misapplication of nonbinding decisions. And, while the HEA contains an express-preemption provision that preempts state laws requiring *additional* disclosures, it was not Congress’s “clear and manifest” purpose to supplant state laws that generally prohibit unfair or deceptive practices and affirmative misrepresentations. Numerous courts have reached this conclusion.

Reavis alleged facts in his complaint that, taken as true, showed that Fedloan engaged in unfair or deceptive actions, including making affirmative representations that were unfair or deceptive. Reavis’s claims based on affirmative misrepresentations should not have been dismissed on preemption grounds. Remand is appropriate so that Reavis’s claims can be heard.

## ARGUMENT

### **I. Section 1098g does not preempt Reavis’s Consumer Protection Act claims.**

#### **A. General preemption principles.**

Under our Nation’s system of dual sovereignty, states retain “substantial” authority as sovereigns, which is limited only by the Supremacy Clause. *Gregory*, 501 U.S. at 457. Under the Supremacy Clause, “state law that conflicts with federal law is without effect” and is preempted. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal quotation and citation omitted). State law can be preempted either because Congress enacted a statute containing an express preemption provision, because a statute impliedly conflicts with federal law, or because federal law occupies the field of regulation. *Montana Immigrant Justice Alliance v. Bullock (MIJA)*, 2016 MT 104, ¶¶ 28–29, 383 Mont. 318, 371 P.3d 430.<sup>8</sup>

Whether analyzing express or implied preemption, courts are guided by “two cornerstones” of preemption jurisprudence. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485

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<sup>8</sup> Field preemption does not apply in cases involving the HEA. *Chae*, 593 F.3d at 941–42; *Nelson v. Great Lakes Educational Loan Services, Inc.*, 928 F.3d 639, 651–52 (7th Cir. 2019).

(1996)). Second, courts begin ““with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”” *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). For more than seventy years, the Supreme Court has applied this presumption against preemption. *See Rice*, 331 U.S. at 230. The principle underlying the presumption is the Court’s “respect for the States as ‘independent sovereigns in our federal system.’” *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic, Inc.*, 518 U.S. at 485). The Court applies the presumption both out of concern for federalism and the States’ historical “primacy” in regulating for health and safety. *Medtronic, Inc.*, 518 U.S. at 485.

The Court has applied the presumption when addressing either express or implied preemption as well as the scope of preemption. *Altria Group, Inc.*, 555 U.S. at 77; *Medtronic, Inc.*, 518 U.S. at 485. Thus, while the Court looks to the statutory language of an express preemption clause, it has also noted that, if “a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.” *Altria Group, Inc.*, 555 U.S. at 76. Moreover, when a preemption clause is susceptible of more than one meaning, one that favors preemption and one that disfavors preemption, this Court accepts the

meaning that disfavors preemption. *Id.* at 77 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Recently, in *Puerto Rico v. Franklin California Tax-Free Trust*, the Supreme Court stated that when a federal statute contains an express preemption provision, “we do not invoke any presumption against pre-emption but instead ‘focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce of United States of America v. Whiting*, 563 U.S. 582, 594 (2011)). In the district court, Fedloan cited this language to argue that no presumption against preemption should apply when an express preemption clause is at issue. *See* Doc. 20 at 1–2.

But that reasoning makes sense only when the preemption clause, as a matter of plain meaning, clearly applies in a given context. After all, if—as in *Franklin California Tax-Free Trust*—it is “clear and manifest” from the statute which state laws Congress intended to preempt, then there may be no need for additional interpretation. But when the provision’s language does not clearly resolve the scope of preemption, the presumption has a critical role to play. Notably, the Supreme Court did not overrule its prior decisions applying the presumption against preemption to express preemption cases, and those cases are binding. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reaffirming that, “if a precedent of

this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions”) (citation omitted).

The Court’s presumption against preemption is particularly strong when Congress legislates in a field that the states have historically occupied. *Altria Group Inc.*, 555 U.S. at 77. Consumer protection is just such an area. *See Aguayo*, 653 F.3d at 917. As discussed below, under settled principles, this Court should hold that Reavis’s claims are not preempted and remand so that Reavis may pursue his claims in the district court.

**B. Reavis’s Consumer Protection Act claims are not expressly preempted because his factual pleadings describe affirmative statements that were unfair or deceptive.**

HEA’s express preemption clause provides that “[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.” 20 U.S.C. § 1098g. In determining that the HEA preempted Reavis’s claims, the district court reasoned that Reavis’s claims were preempted because they “arise from or relate to disclosures or non-disclosures made by Fedloan to him.” Doc. 22 at 7. The court relied on the Ninth Circuit’s *Chae* decision, an unpublished federal court decision that followed *Chae*, and the DOE’s “interpretation” on the scope of

HEA's preemption provision. *See* Doc. 22 at 6. The district court's application of preemption principles was incorrect, and this Court should reverse.

In *Chae*, the court addressed student-borrowers' state law challenges to a student loan servicers' method of calculating interest, assessing late fees, and setting repayment start dates. *Chae*, 593 F.3d at 938. The borrowers in *Chae* brought claims under a California consumer protection law, alleging that a loan servicer engaged in fraudulent, unfair, and deceptive practices "by using billing statements and coupon books that trick[ed] borrowers" about how interest was calculated and by setting initial repayment dates that increased the loan's cost and payment lifespan. *Id.* at 942, 940–41. In determining that § 1098g preempted the plaintiffs' state law claims, the court held that the borrowers' misrepresentation claims were really "restyled improper-disclosure claims," and therefore preempted. *Id.* at 943. The court reasoned that the borrowers were essentially seeking to use state law to require alternate disclosures. *Id.* at 942–43.

In a well-reasoned decision, the Seventh Circuit recently analyzed *Chae* under facts like those presented here. *See Nelson*, 928 F.3d 639. In *Nelson*, the student-borrower brought a claim under an Illinois consumer protection law, alleging that a loan servicer had engaged in fraud and misrepresentation by steering borrowers toward repayment plans that disadvantaged borrowers while benefiting servicers. *Id.* at 642. Like the district court here, the district court in

*Nelson* broadly interpreted *Chae* and ruled that the claims involving affirmative misrepresentations were preempted by § 1098g. *Id.* at 649.

The Seventh Circuit disagreed with this expansive reading. The court observed that *Chae* involved claims about failures to disclose information like loan terms and repayment requirements, and the court noted that it did “not disagree with the Ninth Circuit’s reasoning” that these types of claims would be preempted. *Nelson*, 928 F.3d at 649–50. But while this reasoning applied in the context of a failure to disclose, it did not extend to affirmative misrepresentations. *Id.* at 650 (stating that the “broad language in *Chae* simply does not extend to Nelson’s claims about Great Lakes’ affirmative misrepresentations”). Thus, the court reversed the district court so that the borrower could proceed on her claims of affirmative misrepresentation. *Id.*

In reaching this conclusion, the court noted that, while § 1098g clearly intended to preempt some state laws, the “central question” was “whether and how the phrase ‘disclosure requirements’ in § 1098g applies to state-law remedies for misleading business practices.” *Nelson*, 928 F.3d at 647. The court observed that the law has long distinguished between affirmative misrepresentations and failures to disclose, and the court noted that, while it is “easy to understand” how a failure

to disclose claim could be viewed as implying an additional disclosure requirement, that is not the case for affirmative misrepresentations. *Id.* at 649.<sup>9</sup>

Like the district court in *Nelson*, the court here mistakenly applied an overly broad interpretation of the Ninth Circuit’s non-binding and clearly distinguishable decision in *Chae* to hold that Reavis’s claims were preempted. But as the *Nelson* court illustrated, a careful reading of *Chae* does not support express preemption in this case. Like the claims raised in *Nelson*, Reavis’s claims are not solely that Fedloan failed to disclose details required by Montana law or regulation; rather, Reavis also alleged that he was harmed by Fedloan’s affirmative representations that were unfair or deceptive. *See* Doc. 1, ¶¶ 20, 23–25, 34. For example, Reavis alleged that Fedloan represented to him “that he make a specific payment amount, but then the statements he received show a different amount due.” *Id.*, ¶ 24.

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<sup>9</sup> Even the unpublished federal decision that the district court relied on acknowledged that courts have reached different conclusions on preemption. *See Lawson-Ross v. Great Lakes Higher Education Corp.*, 2018 U.S. Dist. LEXIS 199048, \*6 (N.D. Fla. Sept. 20, 2018) (citing cases). One decision cited by *Lawson-Ross* as favoring preemption was reversed in *Nelson*, while another case holding that § 1098g did not preempt state law employed similar reasoning as *Nelson*. *See Daniel v. Navient Sols., L.L.C.*, 328 F. Supp. 3d 1319, 1323–24 (M.D. Fla. 2018) (finding that preemption cases involving failures to disclose or improper disclosure were “inapplicable” because “Plaintiffs are not claiming that Defendant merely failed to disclose the requirements of the PSLF program, but rather, they are asserting that Defendant made affirmative misrepresentations to them”). Considering the divergence among federal courts along with the presumption against preemption, the district court should have determined that Reavis’s claims were not preempted.

Further, Fedloan “advised” him to switch from an income-based repayment plan to a different plan. *Id.*, ¶ 25.

Given that, when considering a 12(b)(6) motion, allegations are to be “construed in the light most favorable to the plaintiff” and “taken as true,” Reavis’s allegations are best viewed as allegations of affirmative misrepresentations, not as failures to disclose. *Fenwick v. State*, 2016 MT 80, ¶ 13, 383 Mont. 151, 369 P.3d 1011. Under this reading, the district court should have ruled that Reavis’s claims were not preempted. As *Nelson* put it: “statements, when untrue, cannot be treated by courts as mere failures to disclose information. Those are affirmative misrepresentations, not failures to disclose. . . . A borrower who reasonably relied on them to her detriment is not barred by 1098g from bringing state-law consumer protection” claims. *Nelson*, 928 F.3d at 642. Under the plain language of the preemption provision, Reavis’s Consumer Protection Act claims should not be preempted because they do not seek to impose additional disclosures.

Moreover, because consumer protection is an area historically occupied by the states, the court should have been guided by the presumption against preemption. *See Altria Group, Inc.*, 555 U.S. at 77. This Court has held that the Consumer Protection Act “should be liberally construed with a view to effect its object and to promote justice.” *Baird v. Norwest Bank*, 255 Mont. 317, 327, 843 P.2d 327, 333 (1992). This Court has also recognized the harm that can be wrought

by unfair or deceptive practices in the context of loan servicing and that the Consumer Protection Act provides consumers with one potential claim for relief. *See Morrow v. Bank of America*, 2014 MT 117, ¶ 67, 375 Mont. 38, 324 P.3d 1167. In light of Montana’s strong constitutional and statutory interests in consumer protection, the presumption principles discussed, the decisions addressing preemption in this context, and the distinguishability of Reavis’s alleged facts from those pled in *Chae*, this Court should reverse and hold that, because Reavis alleged affirmative misrepresentations, his Consumer Protection Act claim is not expressly preempted.

**C. Reavis’s Consumer Protection Act claims are not conflict preempted because the importance of nationwide uniformity does not trump Montana’s interest in safeguarding its citizens from loan servicers’ affirmative misrepresentations.**

Reavis’s claims are also not preempted under conflict preemption. Although the district court did not expressly analyze conflict preemption, the Attorney General anticipates that it will be raised on appeal and thus addresses the issue.

State law can be subject to conflict preemption when it is a “physical impossibility” to comply with both federal and state law, or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *MIJA*, ¶ 29 (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)). Under conflict preemption, courts exercise caution when

determining whether a federal law preempts an area of law that has traditionally been governed by states, such as consumer protection laws. *Chae*, 593 F.3d at 944. Further, the presumption against preemption applies with full force: courts must start with the assumption that federal law does not preempt a state’s “historic police powers” unless that was Congress’s “clear and manifest” purpose. *Altria Group, Inc.*, 555 U.S. at 77.

Here, there is no question that loan servicers can physically comply with both the HEA and Montana’s consumer protection laws. The only question is whether the consumer protection laws pose an obstacle to the HEA’s purposes. Again, the two primary decisions that have addressed this issue are *Nelson* and *Chae*. Based on their analysis and the presumption against preemption, this Court should hold that the HEA does not preempt Reavis’s Consumer Protection Act claims under conflict preemption.

In holding that conflict preemption did not apply to affirmative misrepresentation claims, the *Nelson* court reasoned that the HEA’s inclusion of several express preemption provisions was an expression of Congress’s intent regarding preemption:

Recall that there are several express preemption provisions in the HEA: 20 U.S.C. § 1078(d) (usury laws), 1091a(a)(2) (statutes of limitations), 1091a(b) (collections costs and infancy defenses), 1095a(a) (garnishment requirements), as well as § 1098(g) (disclosure requirements). The number of those provisions and their specificity

show that Congress considered preemption issues and made its decisions. Courts should enforce those provisions, but we should not add to them on the theory that more sweeping preemption seems like a better policy.

*Nelson*, 928 F.3d at 650. Rather than conflicting, the court determined that, “[p]roperly understood, state law and federal law can exist in harmony here.” *Id.*

The *Nelson* court also addressed *Chae*, which had determined that a federal loan program was intended to operate uniformly nationwide and that state law claims would pose an obstacle. *See Chae*, 593 F.3d at 950. *Nelson* explained that *Chae* involved different kinds of claims, such as the methods for setting late fees, loan repayment start dates, and calculating interest. *Nelson*, 928 F.3d at 651. The court acknowledged that the “value of uniformity would be more compelling” for these administrative tasks, but that value did not extend to preempting laws prohibiting loan servicers from making affirmative misrepresentations: “We assume the need for nationwide consistency on those sorts of administrative mechanics is substantial. That need does not extend to the claims *Nelson* asserts based on affirmative misrepresentations . . . .” *Id.* The *Nelson* court’s reasoning applies here because Reavis has alleged that Fedloan made unfair or deceptive

affirmative statements to him during his effort to qualify for PSLF. *See* Doc. 1, ¶¶ 20, 23–25, 34.<sup>10</sup>

The purpose of HEA is “to keep the college door open to all students of ability, regardless of socioeconomic background.” *Rowe*, 559 F.3d at 1030; 20 U.S.C. § 1070. The Consumer Protection Act poses no obstacles to this purpose. Moreover, access to higher education should not come at the cost of being forced to accept affirmative misrepresentations from loan servicers. If anything, rather than conflicting, Montana’s prohibition on unfair or deceptive acts and practices complement the HEA’s underlying purpose, especially when the HEA provides no private right of action.

**D. The Department of Education’s informal guidance regarding preemption is entitled to no special deference.**

In 2018, the DOE issued an agency notice expressing its view that federal loan servicing must be governed exclusively by federal law. *See* Federal Preemption and State Regulation of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619 (Mar. 12, 2018). In holding that federal law preempted Reavis’s state law claims, the district

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<sup>10</sup> To the extent *Chae* would lead to a different outcome, it is not a binding decision, and this Court should follow the more applicable *Nelson* decision. Doing so would respect the role that the State has in our federal system, honor the presumption against preemption, and afford the people of Montana the constitutional and statutory protections they have historically enjoyed.

court found the DOE's Interpretation persuasive. Doc. 22 at 6. This Court should accord the Interpretation no special deference because the DOE lacks authority to make preemption determinations and because its interpretation represents an unexplained change in the DOE's position.

As an initial matter, the Attorney General recognizes that an agency regulation with the force of law can preempt state law. *See Wyeth*, 555 U.S. at 576. However, the only authority that an agency has is the authority Congress delegates, and when an agency goes beyond the power that Congress has conferred, the agency's actions are invalid. *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (when agencies act improperly or without jurisdiction, their actions are "ultra vires"). This limit on agency authority extends to the preemption context because "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *New York v. FERC*, 535 U.S. 1, 18 (2002) (quoting *Louisiana Public Service Commn. v. FCC*, 476 U.S. 355, 374 (1986)). Thus, the "question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*" *City of Arlington*, 569 U.S. at 297 (emphasis in original).

Here, no federal statute authorizes the DOE to preempt state laws. Moreover, the DOE did not enact a formal regulation following a

notice-and-comment period, and thus, its Interpretation does not have the force of law. Instead, as courts have recognized, the DOE’s Interpretation qualifies as “informal guidance, nothing more.” *Student Loan Servicing Alliance v. Dist. Of Columbia*, 351 F. Supp. 3d 26, 49 (D.D.C. 2018). Thus, the only deference the Interpretation could be due is *Skidmore*<sup>11</sup> deference, and that level of deference is appropriate only if the Interpretation were “thorough, consistent, and persuasive.” *Id.* at 50. Most courts have found that the Interpretation does not merit even *Skidmore* deference.

For example, in *Student Loan Servicing Alliance*, the District of Columbia district court explained that the DOE’s Interpretation failed the *Skidmore* test “most notably because the agency’s view represents a stark, unexplained change” in the DOE’s position. *Id.* at 50. The court pointed to several instances where the federal government had expressly rejected the idea that the HEA preempted state law, including a statement of interest where the government declared that “[n]othing in the HEA or its legislative history even suggests that the HEA should be read to preempt or displace state or federal laws.” *Id.* (Citation omitted). The court also noted that the DOE had taken inconsistent positions on preemption before different courts, and the court observed that the DOE’s Interpretation “does nothing to alleviate or explain those contradictions.” *Id.* at 51.

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<sup>11</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Seventh Circuit agreed, holding that “the Preemption Notice is not persuasive because it is not particularly thorough and it ‘represents a stark, unexplained change’ in the Department’s position.” *Nelson*, 928 F.3d at 651 n.2 (quoting *Student Loan Servicing Alliance*, 351 F. Supp. 3d at 50); accord *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 552–53 (M.D. Pa. 2018) (“To 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.”) Other than the district court, the *Lawson-Ross* court is the only court to find the Interpretation persuasive; however, *Lawson-Ross* did not discuss the fact that the Interpretation marked an unexplained change in policy, nor the ever-changing and inconsistent views that the DOE had presented in different litigation.

Given the conclusory nature of the Interpretation and the “stark, unexplained change” in position, this Court should decline to give any special deference to the DOE’s informal guidance.

**CONCLUSION**

For the reasons set forth above, this Court should reverse and remand for further proceedings.

Respectfully submitted this 20th day of December, 2019.

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,988 words, excluding certificate of service and certificate of compliance.

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