

**IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 19-510**

JAMES REAVIS,
Appellant,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY D/B/A
FEDLOAN SERVICING,
Appellee.

On Appeal from the Montana First Judicial District Court,
Lewis and Clark, District Court Cause No.: BDV-2018-833
The Honorable Michael F. McMahon Presiding

**BRIEF OF *AMICI CURIAE* MONTANA LEGAL SERVICES
ASSOCIATION, NATIONAL CONSUMER LAW CENTER, AND
STUDENT BORROWER PROTECTION CENTER IN SUPPORT OF
APPELLANT'S APPEAL**

APPEARANCES:

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INTEREST OF AMICI CURIAE

The interests of *Amici* Montana Legal Services Association, National Consumer Law Center and Student Borrower Protection Center on the consumer rights issues as are involved in this case have been spelled out in their contemporaneously-filed motion for leave to file this Brief.

SUMMARY OF THE ARGUMENT

The Income-Driven Repayment (“IDR”) and Public Service Loan Forgiveness (“PSLF”) Programs are a bipartisan solution to a widespread problem: The rising cost of college and resulting student loan burden is unaffordable for many low-income students and makes it difficult for governments and non-profits to recruit and retain graduates for whom a career in public service is rendered unaffordable. As the House of Representatives Conference Report explained, the promise of the PSLF Program is straightforward: “the Secretary [of Education] shall forgive the remaining loan balance for a borrower who has been employed in a public sector job and has made payments on such loan for a period of ten years.”¹ This case asks the Court to decide whether Montanans are deprived of IDR and PSLF benefits through the unfair and deceptive acts or practices of large, private

¹ College Cost Reduction and Access Act, House of Representatives Conference Report No. 110-317, §401 (Sept. 6, 2007), available at <https://www.congress.gov/110/crpt/hrpt317/CRPT-110hrpt317.pdf> (last accessed December 13, 2019).

sector student loan servicers are entitled to their day in court to fight for what they have earned through years of work and loan payments.

First, this brief explains Congress' intent in enacting the IDR and PSLF Programs and explains their requirements – including the pitfalls that can cost low-income borrowers and public servants like teachers, police officers, and elder care workers years of progress toward the discharge of their student loans.

Second, the brief identifies some of the documented problems caused by PHEAA and other servicers, which have contributed to appallingly low rates of actual debt relief. Indeed, the Department of Education's most recent figures show that only about 1% of applicants have actually received PSLF discharge, and fewer than 20 people have ever received IDR forgiveness.

Third, the brief explains the importance of relief for injured borrowers under Montana law, since the federal Higher Education Act does not provide a private right of action. In these circumstances, the presumption against preemption applies with even greater force, since preemption would deprive Montanans of any legal remedy.

ARGUMENT

I. INCOME-DRIVEN REPAYMENT PLANS AND THE PUBLIC SERVICE LOAN FORGIVENESS PROGRAM ARE BIPARTISAN INVESTMENTS IN AMERICA’S COLLEGE GRADUATES.

A. President Bush and Congressional Leaders Enacted IDR the PSLF Program to Improve Access to Education and Promote Vital Public Service Jobs.

The College Cost Reduction and Access Act of 2007 (the “Act”), PUB. LAW No. 110-84 (Sept. 27, 2007), which created our modern-day IDR Plans² and the PSLF Program, was heralded as a way to ensure low-income students have access to higher education, to ease the burden of student loan debt, and to promote job growth in the economy. Senators Mike Enzi of Wyoming and Ted Kennedy of Massachusetts worked together to create the PSLF Program and other changes to the Higher Education Act at that time, with Sen. Kennedy noting that it has “strong bipartisan support.”³ The PSLF Program was created because the average student

² Congress enacted the Income Contingent Repayment plan in 1993; *see* PUB. LAW No. 103-66 (Aug. 10, 1993), but it was underutilized and generally less affordable than the modern IDR plans.

³ 153 Cong. Rec. S9534 (July 19, 2007) (statement of Sen. Kennedy), <https://www.congress.gov/crec/2007/07/19/CREC-2007-07-19-pt1-PgS9534.pdf> (last accessed December 13, 2019). *See also* President George W. Bush, White House, Fact Sheet: College Cost Reduction and Access Act of 2007 (September 27, 2007), available at <https://georgewbush-whitehouse.archives.gov/news/releases/2007/09/20070927-1.html> (last accessed December 13, 2019).

loan debt for graduates had “doubled in the last decade,”⁴ making it especially difficult for graduates to devote their careers to fields that often don’t pay much, but for which communities have pressing needs:

We have public education, early childhood education, childcare, and all the public services working with the disabled and the elderly. We know the increasing requirements so many of our parents have, in terms of being able to live independently and to live with dignity. So this bill will encourage those who want to work with the disabled and the elderly, or in public interest legal services as prosecutors of the public defense.⁵

The senators crafted the PSLF Program broadly so that “in all parts of our country, urban areas and rural areas ... if you want to give something back, we are going to make it possible.”⁶

Legislators emphasized the PSLF Program’s its bipartisan nature. Sen. Kennedy explained that “[i]n the area of education which is so important across the board, we have worked very closely together,” and “have been able to rise above the issues of partisanship.”⁷ Sen. Enzi then thanked Sen. Kennedy “for his outstanding job of explaining” the PSLF Program and other aspects of the bill.⁸

⁴ 153 Cong. Rec. at S9535.

⁵ *Id.*

⁶ *Id.* at S9536.

⁷ *Id.* at S9534.

⁸ *Id.* Sen. Harkin of Iowa in turn thanked Sen. Enzi for “working together on this bipartisan bill.” *Id.* at S9540.

The Act was approved on a bipartisan basis in the Senate (79-12) and the House of Representatives (292-97), with Montana's entire Congressional Delegation (Senators Baucus and Tester and Representative Rehberg) all voting in favor.⁹ In doing so, they recognized that discharge of federal student loans is a square deal for those who diligently make monthly payments while working hard for a decade to serve their fellow Montanans.

B. Workers' end of the bargain: Ten years of public service and loan payments.

The "forgiveness" in PSLF is a misnomer: Borrowers *earn* discharge of their loans through a decade of public service and monthly payments. 34 C.F.R. § 685.219(c). But the devil is in the details, and there are several pitfalls that cause borrowers who put in their decade of public service to be ineligible for the promised reward. As Forbes put it, "When it comes to the Public Service Loan Forgiveness program, the requirements can be tricky."¹⁰

⁹ See

https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?cong=110&session=1&vote=00326 (last accessed December 13, 2019);

<http://clerk.house.gov/evs/2007/roll864.xml> (last accessed December 13, 2019).

¹⁰ Zack Friedman, *Student Loan Forgiveness Program Rejects 99% of Applicants*, FORBES (Sept. 24, 2018), available at

<https://www.forbes.com/sites/zackfriedman/2018/09/24/public-service-loan-forgiveness-rejected/#3ebb1f5a1824> (last accessed December 13, 2019).

While working in qualifying employment, borrowers must make the right number of qualifying payments in the right kind of repayment plan on the right kind of loan. 34 C.F.R. § 685.219(c). Servicer abuses have interfered with borrowers' ability to understand and fulfill all of those requirements – here, the right number of qualifying payments.

1. “Qualifying payments” require the right repayment plan

Payments only qualify if the borrower is in the right repayment plan. The Department of Education offers several repayment plans to Direct loan borrowers; however, only two types of plans qualify for forgiveness: (1) the standard ten-year repayment plan; and (2) IDR plans. 34 C.F.R. § 685.219(c)(1)(iv).

The standard ten-year repayment plan is straightforward¹¹: The “borrower must repay a loan in full within ten years from the date the loan entered repayment by making fixed monthly payments.” 34 C.F.R. § 685.208(b)(1). Borrowers who spend a full decade in this plan do not benefit from PSLF, because after 120 monthly payments there is no balance left to discharge. PSLF is therefore focused on borrowers for whom a public service job makes standard loan repayments difficult. Federal student loan borrowers have several different options for lower

¹¹ For Direct Consolidation Loan borrowers with loans that entered repayment on or after July 1, 2006, the standard loan repayment period varies depending on the total amount of student loans. 34 C.F.R. § 685.208(c), (j). These payments do not qualify towards forgiveness.

monthly payments (including “graduated” and “extended” plans),¹² but only IDR plans result in qualifying payments for PSLF. Unfortunately, IDR programs remain consistently inaccessible for many borrowers with borrowers struggling to both access IDR and remain in IDR.

a. Borrowers must enroll in IDR Plans to qualify for PSLF

The principle behind IDR plans is also relatively simple: The borrower’s monthly payment is calculated as 10-15% of her “discretionary income,” which is defined as the difference between her annual income and 150% of the poverty guideline for her family size and state of residence.¹³ To illustrate: The federal poverty guideline for a family of four in Montana is \$25,750,¹⁴ and 150% of that amount is \$38,625. Montana’s 2017 median household income was \$53,386,¹⁵ yielding \$14,761 in yearly “discretionary income.” Divided by twelve, the median Montana family of four would have \$1,230 in discretionary income per month.

¹² Under “graduated,” and “extended” repayment plans, monthly payments “start out low and increase every two years” for between 10 and 30 years, are also available. See <https://studentaid.ed.gov/sa/repay-loans/understand/plans/graduated>, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/extended> (last accessed December 13, 2019).

¹³ See <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> (last accessed December 13, 2019).

¹⁴ See <https://aspe.hhs.gov/poverty-guidelines> (last accessed December 13, 2019).

¹⁵ See <https://commerce.mt.gov/News/PressReleases/montanas-median-household-income-growth-fastest-in-the-nation> (last accessed December 13, 2019).

This leads to monthly federal student loan payments of \$123 to \$184, depending on the applicable IDR Plan.

IDR Plans can be a critical tool for many families – not just borrowers seeking PSLF – to manage their student loan repayment. Like the PSLF Program, sustained enrollment in an IDR plan will lead to eventual forgiveness; but unlike the PSLF Program, borrowers must make 20-25 years of qualifying payments to receive discharge.¹⁶

IDR Plans benefit the government, too. One recent analysis found that IDR enrollment reduces delinquency and also counterintuitively *increases* overall amounts repaid: “While IDR mechanically reduces monthly minimum payments by an average of \$171, the effect of reduced minimums on loan balances is dominated by more timely repayment; IDR borrowers pay down \$35 more student debt each month, on average, than those on standard repayment plans.”¹⁷

Because enrolling and staying in the right IDR plan can be complicated, many PSLF and non-PSLF borrowers therefore rely on their loan servicers to make

¹⁶ See <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven/questions#repayment-forgiveness> (last accessed December 13, 2019).

Thus, PSLF cuts a decade off the borrower’s repayment term, and also eliminates the tax consequences of ordinary discharge.

¹⁷ Daniel J. Herbst, *Liquidity and Insurance in Student Loan Contracts: Estimating the Effects of Income-Driven Repayment on Default and Consumption*, p. 4 (Working Paper, March 12, 2019), available at https://drive.google.com/file/d/1A-gq_LIqffY6r2gDTcUK9-Y3ZV8Go6SU/view (last accessed December 13, 2019).

sure they get and stay enrolled in the right repayment plan.¹⁸ Despite the abundant benefits to the financial health of borrowers and the federal government, IDR programs have documented low levels of participation by eligible borrowers.¹⁹ Thus, if a servicer misrepresents the availability, benefits, and drawbacks of these options, borrowers may lose months or years of progress toward discharge under the PSLF Program or their IDR plan – or loan repayment.

b. Borrowers must recertify their income and family size every year to remain in IDR

Because IDR Plans are based on income and family size, borrowers must recertify these items to their servicers each year in order to remain in the program.²⁰ The servicer then recalculates the borrower's monthly payment based on any changes in income or family size. Failure to recertify by the annual deadline means that future monthly payments will be calculated without reference to income

¹⁸ See 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. 13 (Sept. 2018), available at <https://www.gao.gov/assets/700/694506.pdf> (last accessed December 13, 2019) (noting that PHEAA represented that “borrowers were frequently confused by program requirements related to qualifying loans, employment, repayment plans, and payments”).

¹⁹ U.S. Gov't Accountability Office, *Federal Student Loans: Education Could Do More to Help Ensure Borrowers are Aware of Repayment and Forgiveness Options*, Report No. GAO-15-66 (Aug. 2015), available at <https://www.gao.gov/assets/680/672136.pdf> (last accessed December 13, 2019).

²⁰ See <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven#consistent-payments> (last accessed December 13, 2019).

or family size – i.e., increased significantly. In addition, any unpaid interest is capitalized (added to the loan’s principal balance) in some IDR Plans, increasing the costs of the loan.²¹

Servicers play a critical role in the recertification process, and therefore in borrowers’ ability to stay in their IDR plan and ultimately qualify for forgiveness under the IDR or PSLF Programs. Unfortunately, data released by the Department of Education in 2015 confirmed that many borrowers miss the deadline to recertify and thus experience sharp spikes in their monthly payment amounts and interest capitalization. Nearly 57% of borrowers whose IDR recertification was due in a twelve-month period ending in late 2014 did not recertify on time, and many went into forbearance or deferment when their monthly payment suddenly increased.²²

2. Borrowers need an accurate count of their qualifying payments

Even borrowers who have done everything right, like Mr. Reavis, must still rely on PHEAA to accurately track and count their qualifying payments. But when

²¹ See <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven#fail-to-recertify> (last accessed December 13, 2019).

²² These data were released in materials for the Department’s March 2015 negotiated rulemaking process. See U.S. Dep’t of Educ., Negotiated Rulemaking for Higher Education 2015 - PAYE Session 2, Sample Data on IDR Recertification Rates for ED-Held Loans (2015), available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2015/payee2-recertification.pdf> (last accessed December 13, 2019).

PHEAA or other servicers miscalculate, it can be difficult to correct the error(s). For example, the payment history that PHEAA provides to borrowers does not identify the repayment plan, impeding the borrower's ability to determine whether any given payment was a "qualifying payment."²³ News reports indicate that servicer miscounting is a common occurrence.²⁴

As discussed below, the Department of Education has rejected approximately 50% of all PSLF discharge applications for insufficient qualifying payments. The reason isn't that America's college graduates struggle to count over 100. Instead, PHEAA and other servicers have systematically placed them into non-qualifying repayment plans and miscounted (what should be) qualifying payments.

II. PHEAA'S DOCUMENTED SERVICING ERRORS THWART CONGRESS' INTENT WHILE DEPRIVING POLICE OFFICERS, TEACHERS, PROSECUTORS, AND OTHER PUBLIC SERVANTS OF THE BENEFIT OF THEIR PSLF BARGAIN.

Because the PSLF Program requires 120 qualifying monthly payments, the first wave of borrowers began to apply for discharge in the fall of 2017, a decade

²³ Persis Yu, *Student Loan Forgiveness Cannot Work Without a Right to a Payment History* (May 22, 2019), available at <https://protectborrowers.org/qualifying-payments/> (last accessed December 13, 2019).

²⁴ E.g., Ron Lieber, *Your Student Loan Servicer Will Call You Back in a Year. Sorry.* (N.Y. Times, April 12, 2019), available at <https://www.nytimes.com/2019/04/12/your-money/public-service-loan-forgiveness.html> (last accessed December 13, 2019) (subscription required).

after the program was created. These workers have almost uniformly not received the benefit of their bargain despite a decade of public service.

A. Only about 1% of PSLF Applicants Actually Receive the Promised Discharge.

According to data published by the Department of Education, approximately 28,000 borrowers had submitted applications for discharge under the PSLF program in the first “wave,”²⁵ but only 96 borrowers received discharge.²⁶ Conversely, 99.6% of applications were rejected, and “more than 70 percent of [the rejected applicants] have been denied due to not meeting the program requirements (such as having eligible loans, 120 qualifying payments, or qualifying employment).”²⁷ Thus, a supermajority of the college graduates applying for PSLF discharge – workers for whom PSLF was so important that they applied as soon as they believed they qualified – received bad information about whether their loans were eligible and/or their payments counted.

As more workers have applied for PSLF discharge, approval rates remain stubbornly low. The Department of Education’s data shows that as of March 31,

²⁵ See <https://ifap.ed.gov/eannouncements/091918FSAPostsNewReportstoFSADataCenter.html> (last accessed December 13, 2019).

²⁶ *Id.*

²⁷ *Id.*

2019, more than workers had submitted 86,006 PSLF discharge applications,²⁸ but only 1.1%, were approved for discharge.²⁹ Again, *53% of rejections were due to insufficient qualifying payments*, while an additional 16% of applications were rejected because the loan was not eligible.³⁰ By June 30, 2019 – the last date for which data is available – the Department of Education had approved only 1.2% of the applications it had processed.³¹ Seventy percent (70%) of rejections remained because of either non-eligible loans or insufficient qualifying payments.³²

B. PHEAA’s misrepresentations to borrowers have undoubtedly contributed to Montanans missing out on qualifying payments.

The federal government has repeatedly found that PHEAA’s servicing of federal student loans – both in and out of the PSLF Program – involves numerous failures and misrepresentations.

²⁸ Data available for download at <https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data> (last accessed December 13, 2019).

²⁹ *Id.* Although the Department provided the number of “Unique Borrowers Submitting PSLF Applications,” it inexplicably chose not to publish the number of unique borrowers who received forgiveness as it did in its initial data.

³⁰ *Id.*

³¹ Data available for download at <https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data> (last accessed December 13, 2019).

³² *Id.*

1. The Government Accountability Office found that PHEAA personnel were sometimes unaware of applicable standards and implemented them inconsistently and incorrectly.

A September 2008 report by the U.S. Government Accountability Office found serious problems with the manner in which the Department of Education was administering the PSLF Program, for which PHEAA serviced loans.³³ For example, PHEAA admitted that its “staff are sometimes unaware of relevant guidance and instructions in emails provided by [Department of] Education, which creates a risk that some policy updates will be overlooked and not consistently implemented.”³⁴

PHEAA “developed its own internal processing handbook” for to help staff “process certifications and forgiveness applications.”³⁵ But the Department’s partial review “identified places where the handbook does not accurately reflect PSLF requirements and could result in borrowers’ certification requests being improperly approved or denied.”³⁶

³³ 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), available at <https://www.gao.gov/assets/700/694506.pdf> (last accessed December ___, 2019).

³⁴ *Id.* at 16.

³⁵ *Id.* at 17.

³⁶ *Id.*

Finally, although PHEAA “acknowledge[d] this risk of miscounting payments” and “rel[ies]” on borrowers to catch any payment counting errors” arising from the transfer of data from other servicers, it “does not provide borrowers with sufficient information to catch [its] errors.”³⁷ “This makes it difficult for borrowers to detect erroneous counts that could ultimately affect their eligibility for loan forgiveness.”³⁸ In short, the miscounting alleged by Mr. Reavis in this case is widespread.

2. The U.S. Department of Education’s Inspector General found “a pattern of noncompliance at PHEAA.”

A 2019 Inspector General established that PHEAA regularly fails to provide sufficient information about repayment plans.³⁹ The Department of Education analyzed 4,440 recorded telephone calls between borrowers experiencing difficulty making their monthly payments and their servicers.⁴⁰ PHEAA had a “failed call rate” of 10.6%, more than double the average for all servicers.⁴¹ PHEAA was also

³⁷ *Id.* at 22.

³⁸ *Id.* at 24.

³⁹ 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*, ED-OIG/A05Q0008 (Feb. 12, 2019), available at <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf> (last accessed December 13, 2019).

⁴⁰ *Id.* at 10-22.

⁴¹ *Id.* at 11.

responsible for 50% of the calls that failed because the servicer representative did not sufficiently inform the borrower about available repayment options.⁴² The Inspector General ultimately found “a pattern of noncompliance at PHEAA.”⁴³

3. These documented servicing problems foreshadow similar problems for all low-income borrowers.

IDR Plans also require borrowers to count qualifying payments in order to achieve discharge. For these borrowers, the problems experienced by PSLF borrowers like Mr. Reavis will be magnified. Instead of keeping track of 120 payments as with PSLF, these borrowers (and their servicers) must keep track of 240 or 300 payments (depending on the plan). 34 C.F.R. §§ 685.209(a)(6), (c)(5)(ii); 34 C.F.R. § 685.221(f). Because payments are based upon the borrower’s income, those who have balances remaining after 20 or 25 years are most likely to have low incomes relative to their student loan debt, and/or large families. As with PSLF, the early results are not encouraging. Borrowers who had enrolled in the 1993 version of IDR, income-contingent repayment, have had the option to switch into modern-day IDR. The first wave of borrowers who switched into the Revised Pay-As-You Earn (“REPAYE”) plan began to qualify for forgiveness in December 2015. But data obtained from the Department of

⁴² *Id.*

⁴³ *Id.* at 13.

Education shows that fewer than 20 people have received forgiveness in any IDR plan.⁴⁴

C. PHEAA's Misrepresentations Harm Individual Montanans and Montana's Economy.

Servicing errors like miscalculating qualifying payments (or steering borrowers into non-qualifying plans) directly harm Montanans like Mr. Reavis.⁴⁵ These workers put in years of public service, and Montana's state and local governments, charities, and their constituents benefited from their efforts. Where these workers are falsely told that their loans are eligible for PSLF discharge or that their monthly payments qualified as progress toward that goal, or when their qualifying payments are miscounted, they are unjustly deprived of a benefit that they earned. Montana law does not countenance such a result. *Cf. Phelps v. Frampton*, 339 Mont. 330, 346, 170 P.3d 474 (2007) (breach of implied covenant of good faith and fair dealing occurs where party is "deprived of a benefit or a justified expectation under the contract").

⁴⁴ U.S. Dep't of Educ. Response to NCLC FOIA Request No. 19-01776-F (November 4, 2019), available at https://www.nclc.org/images/pdf/student_loans/foia-1776-response-from-drt-and-servicing.pdf (last accessed December 13, 2019).

⁴⁵ See Gail Schontzler, *No forgiveness: Student loan borrowers face broken promises*, Bozeman Daily Chronicle (July 21, 2019), available at https://www.bozemandailychronicle.com/news/education/no-forgiveness-student-loan-borrowers-face-broken-promises/article_ea3e3c25-e639-53a5-b3a5-abfa07335052.html (last visited December 13, 2019).

The harm from additional, avoidable years of student loan payments touches all aspects of a worker's life. Student loan borrowers regularly report delaying financial milestones like purchasing a home,⁴⁶ and one study by the Federal Reserve noted that homeownership has declined 9% for 24-to-32-year-olds, and estimates that "a little over 20 percent of the overall decline in homeownership among the young can be attributed to the rise in student loan debt."⁴⁷ Those with significant student debt also often delay having children.⁴⁸

Misrepresentations about the PSLF Program also harm Montana's state and local economies. Anyone who has bought a house or had a child knows that these are significant drivers of consumption, most of which means purchasing goods and

⁴⁶ E.g., Kelley Anne Smith, *Survey: Student loan debt delays major financial milestones for millions*, BANKRATE (Feb. 27, 2019), <https://www.bankrate.com/loans/student-loans/student-loans-survey-february-2019/>; (last accessed December 13, 2019); Annie Nova, *Why buying a home can be almost impossible with massive student loan debt*, CNBC (April 19, 2018), <https://www.cnbc.com/2018/04/19/student-loan-debt-can-make-buying-a-home-almost-impossible.html> (last accessed December 13, 2019).

⁴⁷ Alvaro Mezza et al., *Can Student Loan Debt Explain Low Homeownership Rates for Young Adults?*, p. 5 (Federal Reserve Board, January 2019), available at https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf?mod=article_inline (last accessed December 13, 2019).

⁴⁸ E.g., Jessica Dickler, *Student loan debt is a hurdle for many would-be mothers*, CNBC (May 22, 2019), available at <https://www.cnbc.com/2018/05/22/student-loan-debt-is-a-hurdle-for-many-would-be-mothers.html> (last accessed December 13, 2019); Chris Proctor, *51% of Borrowers with High Student Debt Say Student Loans Derailed Plans for Having Kids*, Student Loan Planner (Sept. 24, 2019), available at <https://www.studentloanplanner.com/student-loans-marriage-divorce/> (last accessed December 13, 2019).

services from local businesses like hardware stores, department stores, and daycare. When these milestones are delayed because a servicer's misrepresentation or miscalculation extends a worker's repayment period, Montana's economy is deprived of these stimuli.

Servicer misrepresentations and miscalculations also present serious long-term problems for Montana's rural areas and small towns. A study by the Federal Reserve found that workers with student loan debt are more likely to leave rural areas for cities.⁴⁹ While the percentage of millennials living in rural areas mirrors the general population, "this percentage quickly shrinks as millennials age, and student loan borrowers are less likely to remain in rural areas than non-borrowers."⁵⁰ "The loss of college educated young people could have important effects on the economic vitality of rural areas and raises questions about what rural policymakers could do to retain a larger share of these individuals."⁵¹ Reducing or eliminating student loan debt is one of the best ways for rural areas and small towns to retain population and a vital economy.

⁴⁹ PJ Tabit and Josh Winters, "*Rural Brain Drain*": *Examining Millennial Migration Patterns and Student Loan Debt* (Federal Reserve Board, January 2019), available at https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf?mod=article_inline (last accessed December 13, 2019).

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 14.

D. The Federal Government Has Left Montanans to Fend for Themselves Using State Law.

The Inspector General’s report discussed above also establishes that the Department of Education has not held servicers accountable. First, the Department’s servicing contracts provide that servicers “will be required to return any fees that they billed to the Department from the time of noncompliance” to applicable statutes and regulations.⁵² But the Department has enforced this provision only 4 times in the last 5 years, leaving PHEAA unaffected.⁵³

Second, the Department’s contracts allow it “to penalize the servicers for noncompliance by reallocating new loan volume to other servicers or transferring all or part of the noncompliant servicer’s current loan volume to another servicer until the noncompliant servicer comes back into compliance.”⁵⁴ But as of September 2017, the Department’s methodology for assigning new loans “did not take into account servicers’ compliance with Federal loan servicing requirements or FSA’s requirements for servicer representatives’ interactions with borrowers,” and therefore “[s]ervicers with more instances of noncompliance experienced no

⁵² 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*, *supra* note 39 at pp. 15-16.

⁵³ *Id.* at 14.

⁵⁴ *Id.*

reduction in the amount of new loans that FSA assigned to them.”⁵⁵ Moreover, because PHEAA is the exclusive servicer for many borrowers in the PSLF Program, it is effectively immune to performance incentives in administering that it. There is no reason to believe the federal government intends to step up enforcement against PHEAA,⁵⁶ or impose any no performance- or competition-based solution to the misconduct alleged by Mr. Reavis.

Nor does federal law provide a remedy for Montanans injured when PHEAA or another federal student loan servicer makes misrepresentations about the PSLF Program or other aspects of loan repayment. *See Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1123 (11th Cir. 2004) (Higher Education Act does not provide private right of action). In the absence of a federal cause of action, Montanans must rely on traditional state law to get justice.

⁵⁵ *Id.* at 16.

⁵⁶ For example, in April 2019, PHEAA hired the Department of Education’s Deputy Chief Operating Officer for Federal Student Aid to serve as its Director of Federal Relations. *See* <https://www.pheaa.org/about/executive-team/> (last accessed December 13, 2019). The revolving door kept turning, and four months later a top PHEAA compliance officer left to become the Consumer Financial Protection Bureau’s private student loan ombudsman. *See* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-appoints-private-education-loan-ombudsman/> (last accessed December 13, 2019); Bob Fernandez, *Federal consumer agency hires exec in complaint-ridden Pa. firm as watchdog*, THE PHILADELPHIA INQUIRER (August 20, 2019), available at <https://www.inquirer.com/business/pheaa-fedloan-consumer-protection-student-loans-complaints-20190820.html> (last accessed December 13, 2019).

III. THE AVAILABILITY OF A STATE LAW CLAIM IS CRITICAL WHERE, AS HERE, FEDERAL LAW PROVIDES NO LEGAL RECOURSE.

This Court's preemption analysis takes as its starting point a strong presumption against preemption:

Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action. In all preemption cases, . . . we 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.

Sleath v. West Mont Home Health Services, 304 Mont. 1, 6 ¶ 23, 16 P.3d 1042 (2000). This presumption against preemption “can only be overcome by evidence of a ‘clear and manifest’ intent of Congress to preempt state law.” *Sleath*, 304 Mont. at 17, ¶ 61 (internal quotation marks omitted).

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 the republic. *E.g.*, *Marbury v. Madison*, 5 U.S. 137, 163 (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”). The principle that every wrong should have a remedy is also enshrined in Montana's Constitution and statutes. *See* MONTANA 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.”); M.C.A. § 27-1-202 (“Every

person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.”).

Courts regularly hold that the presumption against preemption applies most strongly where, as here, federal law does not provide a private right of action. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (noting “Congress’ failure to provide any federal remedy for persons injured by such conduct,” and finding no preemption because “[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct”); *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988) (“The presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists.”); *Franklin Livestock, Inc. v. Boehringer Ingelheim Vetmedica, Inc.*, 113 F. Supp. 3d 834, 838 (E.D.N.C. 2015). This specifically includes the Higher Education Act. *See College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 598 (4th Cir. 2005) (“availability of a state law claim is even *more* important in [this] area”).

PHEAA cannot overcome this preemption here, where Mr. Reavis’ central claim arises from the allegation that PHEAA miscalculated the number of his qualifying payments. Complaint, ¶ 34. Miscalculation is not a “disclosure,” and is therefore preempted by 20 U.S.C. § 1098g.

CONCLUSION

When federal student loan servicers make misrepresentations or miscalculate qualifying payments for the bipartisan IDR and PSLF Programs, Montanans and Montana's economy suffer. Congress did not intend the narrow preemption of state *disclosure* requirements in 20 U.S.C. § 1098g to prevent injured Montanans from seeking a remedy where PHEAA's *miscalculations* and *affirmative misrepresentations* effectively deprived them of the benefit of their PSLF bargain.

Date: December __, 2019

SIGNATURE BLOCK