Race: Examining Legal Remedies for Disparate Student Debt Outcomes

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I. Introduction[1]

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The nation is in the midst of an unprecedented student debt crisis. Today, more than 45 million borrowers bear the collective burden of $1.7 trillion of student loan debt, making student debt the second largest consumer financial market after mortgages.[2] But the amount of student debt is not the only component of this crisis. Delinquency and default rates for student loan borrowers rival mortgage default rates of the 2008 financial crisis, creating a rippling fallout across borrowers' financial lives.[3]

The most significant consequences associated with the nation's student loan crisis are not borne equally by all borrowers. In neighborhoods all across the country, Black and Latinx borrowers shoulder this burden most

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2. *See* Student Borrower Prot. Ctr., *Why Borrowers Matter, State by State* (Mar. 23, 2020), Student Borrower Protection Ctr., https://protectborrowers.org/why-borrowers-matter-state-by-state/; Board of Governors of the Fed. Res. Sys., *Consumer Credit—G.19*, https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html (last updated June 5, 2020) (click the hyperlink titled "Consumer Credit—G.19 found in the "Household Finance" section of the page).

3. *See A $1.5 Trillion Crisis: Protecting Student Borrowers and Holding Student Loan Servicers Accountable: Hearing Before the House Fin. Servs. Comm.*, 116th Cong. (2019) (statement of Seth Frotman, Executive Director, Student Borrower Protection Center), https://protectborrowers.org/wp-content/uploads/2019/09/Testimony-of-Seth-Frotman-before-HFSC_September-2019.pdf. See also Complaint, City of Oakland v. Wells Fargo Bank, N.A., No. 3:15-cv-04321 (N.D. Cal. Sept. 21, 2015), https://www.oaklandcityattorney.org/PDFS/Oakland%20v.%20Wells%20Fargo%20endorsed%20complaint%209-21-15.pdf; *Disparate Debts: How Student Loans Drive Racial Inequality Across American Cities*, Student Borrower Protection Ctr. (June 2020), https://protectborrowers.org/wp-content/uploads/2020/06/SBPC-Disparate-Debts.pdf.

acutely—experiencing some of the most severe economic harm associated with student loan debt.[4] For example, Black and Latinx borrowers face disproportionately high rates of delinquency and default on their student loans, creating a cascade of other economic harm, including negative credit reporting, administrative wage garnishment, and Social Security offsets. As a result, where student debt was once praised as "good debt" offering a pathway to the middle class, research shows that student debt actually impedes socioeconomic progress and exacerbates systemic inequalities.[5]

When researchers and policymakers seek to understand the role of the student debt crisis in perpetuating racial and economic inequality nearly every aspect of higher education finance is implicated. These disparities reverberate across debt collection markets, predatory marketing and financing at for-profit institutions, and unfair lending practices that disproportionately penalize Black and Latinx borrowers.

However, regardless of school sector, type of loan, or specifics related to the borrower's course of study, one critical component of the market touches every borrower—student-loan servicing. Servicing refers to the management of a borrower's repayment process by a lender or a third-party company that the lender hires. Loan servicers perform tasks like contacting borrowers ahead of their next payment date, processing borrowers' payments, and reporting borrowers' payment progress to credit bureaus. Importantly, servicers are also responsible for helping borrowers access a range of protections that they are entitled to under the law, or lender-specific protections, to help mitigate the burden of student debt. This responsibility comes into play if, for example, a borrower is struggling to keep up with their loans. The servicer should then help inform the borrower of available income-driven loan repayment options. However, these protections are often illusory to the most vulnerable Americans. Data shows stark disparities in who gets access to student loan payment relief.

4. Kat Welbeck, *Communities of Color in Crisis: Examining Racial Disparities in Student Loan Debt and Borrower Outcomes*, Student Borrower Protection Ctr. (Jan. 8, 2020), https://protectborrowers.org/communities-of-color-in-crisis-examining-racial-disparities-in-student-loan-debt-and-borrower-outcomes/.

5. *Compare* Stephen J. Rose, *Good Debt: Why Student Loans Are Better for You Than You Think*, The Atlantic (Sept. 4, 2012), https://www.theatlantic.com/business/archive/2012/09/good-debt-why-student-loans-are-better-for-you-than-you-think/261918/ [https://perma.cc/VG7P-JVBC], *and* Christopher Shea, *Don't Listen to Those Scary Tales of Student-Loan Woe*, Wash. Post (March 21, 2013), https://www.washingtonpost.com/opinions/dont-listen-to-those-scary-tales-of-student-loan-woe/2013/03/21/0a94b134-90a2-11e2-bdea-e32ad90da239_story.html [https://perma.cc/DN3L-EHPZ], *with Quicksand: Borrowers of Color & the Student Debt Crisis*, UNIDOS US, et al. (Sept. 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-quicksand-student-debt-crisis-jul2019.pdf.

Research suggests, and federal regulators have echoed, that the companies responsible for implementing this relief—student-loan servicers—may be to blame.[6]

This paper will first explore the breadth of research documenting vast disparities across the student loan market. The author will explore how this data supports the argument that student-loan servicing plays a critical role in perpetuating disparate outcomes for borrowers. The paper will then review the range of legal remedies available to regulators, law enforcement officials, and private attorneys seeking to hold servicers accountable and remedy deeply entrenched racial inequities.

In order to achieve greater racial equity and economic justice, regulators, enforcement officials, and policymakers must rigorously use every available tool to remedy the broad racial disparities of the student debt crisis. In some cases, policymakers may even look to pass new laws and mechanisms to address these disparities.

II. Racial Disparities in the Student Debt Crisis Perpetuate Systemic Inequities

A. The Racial Wealth Gap Drives the Cycle of Disparities in Student Debt Burdens.

Student debt is both a "cause and consequence" of the racial wealth divide.[7] The median white household has approximately 13 times the wealth of the median Black household and 10 times the wealth of the median Latinx household.[8] Accordingly, both Black and Latinx students are less able to draw upon familial wealth to pay for higher education and are

6. Danielle Douglas-Gabriel, *Government Watchdog Investigating Discrimination in Student Loan Servicing*, Wash. Post (Apr. 14, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/14/government-watchdog-investigating-discrimination-in-student-loan-servicing/; *see also* CFPB, Fair Lending Report of the Consumer Financial Protection Bureau (Apr. 2017), https://files.consumerfinance.gov/f/documents/201704_cfpb_Fair_Lending_Report.pdf.

7. Jillian Berman, *All the Ways Student Debt Exacerbates Racial Inequality—'It's Like Landing in Quick Sand'*, Mkt. Watch (July 27, 2019), https://www.marketwatch.com/story/all-the-ways-student-debt-is-exacerbating-racial-inequality-its-like-landing-in-quick-sand-one-black-student-says-2019-07-18.

8. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, Pew Res. Ctr. (Dec. 12, 2014), https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/; *see also*, Heather Long & Andrew Van Dam, *The Black-White Economic Divide Is As Wide As It Was In 1968*, Wash. Post (June 4, 2020), https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/ (finding that "white wealth has soared while black wealth has stagnated" for more than five decades).

more likely to need student loans to finance higher education than their white peers.[9] Over 90 percent of Black students and 72 percent of Latinx students use student loans to pay for college, whereas only 66 percent of white students use loans to pay for college.[10] Majority-Black communities have the highest and fastest growing student loan balances,[11] and Black students take on more student loan debt across all school sectors, including: private colleges, public two-year and four-year colleges, and for-profit institutions.[12]

After taking out larger amounts, Black and Latinx borrowers face systemic inequities that leave them disproportionately struggling to pay this debt. Leaving school with disproportionately higher debt burdens, discrimination in hiring,[13] racial pay gaps,[14] and inequality in promotions[15] makes borrowers of color less able to pay down the debt. One study found that twelve years after leaving school, the median white borrower has paid

9. Aissa Canchola & Seth Frotman, *The Significant Impact of Student Debt on Communities of Color,* CFPB (Sept. 15, 2016), https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color/.

10. *Id.*; *see also* William R. Emmons & Lowell R. Ricketts, *College Inadvertently Increases Racial and Ethnic Disparity in Income and Wealth*, Fed. Res. Bank of St. Louis (Feb. 27, 2017), https://www.stlouisfed.org/publications/in-the-balance/2018/parents-wealth-helps-explain-racial-disparities-in-student-loan-debt (where one analysis found that 58 percent of Black young adults reported that their parents contributed an average of $4,200 over the course of their college career compared to an average of $12,000 given by 72 percent of white families); *see also*, Mark Huelsman, *When It Comes To Student Debt, It's Really a Matter of Wealth*, Wash. Post (May 16, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/05/16/when-it-comes-to-student-debt-its-really-a-matter-of-wealth/?utm_term=.b5e66c62e91b ("White millennials are more likely to report receiving financial support from family, while black and Latino parents are far more likely to need and expect financial support from their children. White families often transfer wealth to children, and families of color frequently must transfer wealth upward to help relatives.").

11. Andrew F. Haughwout, Donghoon Lee, Joelle Scally & Wilbert van der Klaauw, *Just Released: Racial Disparities in Student Loan Outcome*, Fed. Res. Bank of N.Y.: Liberty Street Economics (Nov. 13, 2019), https://libertystreeteconomics.newyorkfed.org/2019/11/just-released-racial-disparities-in-student-loan-outcomes.html.

12. Mark Huelsman, *Debt to Society: The Case for Bold, Equitable Student Loan Cancellation and Reform*, Demos (June 6, 2019), https://www.demos.org/research/debt-to-society.

13. The median college-educated Black and Latinx households earn 80 percent and 70 percent, respectively, of the median income of white families with the same level of educational attainment. *See* Emmons & Ricketts, *supra* note 10.

14. *See id.* (also noting that gender further exacerbates the wage gap for Black and Latinx women).

15. *See Key Findings from the Women in the Workplace 2018 Report*, LeanIn.org, https://leanin.org/women-in-the-workplace (last visited July 8, 2020).

down 35 percent of their student debt, while the median Black borrower owes 113 percent of their original balance.[16]

And the effects of student debt are far-reaching—higher levels of indebtedness can have long-lasting effects on borrowers' access to affordable credit, further stripping them of wealth-building opportunities. Recent research has shown that borrowers with larger student debt balances pay more for other consumer financial products.[17] As a result of these disparities, borrowers of color accumulate less savings and wealth, creating a repeating cycle when these borrowers send their own children to college.[18]

B. Racial Disparities in Delinquency and Default are Stark.

The racial disparities present in the student debt crisis extend beyond balances and loan amortization. These vast racial disparities extend to repayment distress as measured by delinquencies and defaults. Student loan defaults carry extraordinary consequences not seen with other consumer financial products.[19] Borrowers in default on their student loans risk wage garnishment without a court order, federal benefits and tax refund offsets, and professional license revocation.[20] Nearly nine million Americans are currently in default on student loans, and another two million are behind on their payments.[21]

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16. Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, Ctr. for American Progress (Oct. 16, 2017), https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/. Similarly, Latinx borrowers lag behind their white counterparts in repayment—twelve years after entering college, the median Latinx borrower still owes 83 percent of their initial balance. *Id.* Twenty years after beginning college, the average Black borrower still owes 95 percent of their original student loan balance, whereas the typical white borrower has repaid nearly 95 percent of their original balance. *See* Laura Sullivan, Tatjana Meschede, Thomas Shapiro & Fernanda Escobar, *Stalling Dreams: How Student Debt is Disrupting Life Chances and Widening the Racial Wealth Gap*, Brandeis U. (2019), https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/stallingdreams-how-student-debt-is-disrupting-lifechances.pdf.

17. *Data Point: The Secret Price of Student Debt*, Student Borrower Protection Ctr. (May 2020), https://protectborrowers.org/wp-content/uploads/2020/05/The-Secret-Price-of-Student-Debt.pdf.

18. Fenaba R. Addo, *Parents' Wealth Helps Explain Racial Disparities in Student Debt*, Fed. Res. Bank of St. Louis (Mar. 29, 2018), https://www.stlouisfed.org/publications/in-the-balance/2018/parents-wealth-helps-explain-racial-disparities-in-student-loan-debt.

19. *See* Neha Dalal & Jessica Thompson, *The Self-Defeating Consequences of Student Loan Default*, Inst. for C. Access and Success (Oct. 2018), https://ticas.org/files/pub_files/ticas_default_issue_brief.pdf#page=2.

20. *Id.*

21. U.S. Dep't of Educ., National Student Loan Data System Portfolio by Loan Status (Mar. 31, 2020), https://studentaid.ed.gov/sa/sites/default/

Black and Latinx borrowers comprise a disproportionate share of those in delinquency and default. Default rates for Black graduates with a bachelor's degree are five times greater than default rates for white graduates with a bachelor's degree.[22] One study found that 49 percent of Black borrowers defaulted on their student loans twelve years after entering college in comparison to 21 percent of white borrowers and 36 percent of Latinx borrowers.[23]

Default and delinquency rates are also closely correlated to the racial makeup of a borrower's community.[24] The Washington Center for Equitable Growth found that "[e]ven after controlling for income, race still has a strong impact on student loan delinquency."[25] Cities across the country have done seminal research that demonstrates the devastating impact these disparities have across communities.[26] For example, in Philadelphia, across

files/fsawg/datacenter/library/PortfoliobyLoanStatus.xls; U.S. Dep't of Educ., National Student Loan Data System Portfolio by Delinquency Status (Mar. 31, 2020), https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/DLPortfoliobyDelinquencyStatus.xls.

22. The default rate for Black graduates with a bachelor's degree is 21 percent in comparison to a default rate of 4 percent for white graduates with a bachelor's degree. The default rate for Black graduates with a bachelor's degree is still higher than the default rate of white borrowers who do not graduate. *See* Judith Scott-Clayton, *The Looming Student Loan Default Crisis Is Worse Than We Thought*, Brookings Inst. (Jan. 11, 2018), https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought.

23. *See* Miller, *supra* note 16.

24. *See* Marshall Stenibaum and Kavya Vaghul, *How the Student Debt Crisis Affects African Americans and Latinos,* Mapping Student Debt (Oct. 2018), https://mappingstudentdebt.org/#/map-2-race (formerly a project of the Washington Center for Equitable Growth).

25. *See id.*

26. *See* Student Borrower Protection Ctr., *Disparate Debts, supra* note 3; *see also* Samuel Storey, *Student Loan Debt Trends in the District of Columbia, 2008–2018*, Fed. Res. Bank of Richmond (Jan. 2020), https://www.richmondfed.org/-/media/richmondfedorg/publications/community_development/special_reports/special_report_dc_student_loan_debt.pdf; Bina Shrimali, Jacob DuMez & Sarika Abbi, *At What Cost? Student Loan Debt in the Bay Area*, S.F. Off. of Fin. Empowerment (Apr. 2019), https://www.frbsf.org/community-development/files/student-loan-debt-in-the-bay-area.pdf; Joelle Scally & Zayne Abdessalam, *Student Loan Borrowing Across NYC Neighborhoods*, Fed. Res. Bank of N.Y. Affairs (Dec. 2017), https://www.newyorkfed.org/medialibrary/media/outreach-and-education/community-development/credit-conditions/student-loan-borrowing-nyc-neighborhoods.pdf; Ulrike Nischan & Zayne Abdessalam, *Student Loan Debt Distress Across NYC Neighborhoods: Identifying Indicators of Vulnerability*, N.Y.C. Dep't of Consumer Affairs (Nov. 2018) https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Research-StudentLoanDebtDistressAcrossNYCNeighborhoods.pdf; Anna Tranfaglia, *Student Loan Debt in Philadelphia*, Fed. Res. Bank of Phila. (May 2020), https://www.philadelphiafed.org/

neighborhoods with the highest proportion of non-white residents there are just as many borrowers in default as there are borrowers with amortizing loans; conversely, in Philadelphia neighborhoods with the highest proportion of white residents, only 10 percent of borrowers are in default.[27] Further, in one set of adjacent zip codes, nearly 27 percent of borrowers in Brewerytown and Strawberry Mansion (zip code 19121, 13.6 percent white) were behind on payments, whereas only 8 percent of borrowers in Fairmount, Francisville, and Spring Garden (zip code 19130, 65.8 percent white) were behind on payments.[28] Much of the same follows in New York City, Washington, D.C., and the San Francisco Bay Area, where default rates in majority-minority communities are significantly higher than default rates in predominantly white communities.[29] In some cities, this disparity grows even larger, with default rates in Black neighborhoods rising as high as four times greater than those seen in white neighborhoods.[30]

Most notably across cities, racial disparities in borrower outcomes mirror national data profiles examining disparities in predominantly Black and Latinx communities.[31] Research from the Federal Reserve Bank of New York has found that, across the country, "[t]wo-year college borrowers in majority Black areas default at 1.9 times the rate of those in majority white areas, and those in majority Hispanic areas default 1.7 times as often as residents in majority white areas." The Bank added that, "[t]he ratios of default rates among four-year borrowers are very similar."[32] The persistence of racial disparities in borrower outcomes despite the broad availability of default-mitigation options points to the need for greater scrutiny into the factors driving this divide.

C. Servicing Breakdowns May Lead to Increased Harm and Disparities in Borrower Outcomes.

Racial disparities across the student debt market involve more than failed higher education policy—the student debt crisis is a failure of consumer protection at every level. Differences in borrowers' characteristics

-/media/community-development/publications/special-reports/student-loan-debt-in-philadelphia.pdf?la=en.

27. Anna Tranfaglia, *Student Loan Debt in Philadelphia*, Fed. Res. Bank of Phila. (May 2020), https://www.philadelphiafed.org/-/media/community-development/publications/special-reports/student-loan-debt-in-philadelphia.pdf?la=en.

28. *Id.*

29. *Id.*; *see* Scally & Abdessalam, *supra* note 25; Storey, *supra* note 25; Shrimali, DuMez & Abbi, *supra* note 25.

30. Fed. Res. Bank of N.Y., Reply to Senator Cory Booker's Requested Report Detailing Racial Disparities in Student Loan Debt (Sept. 2019), https://www.scribd.com/document/428472893/Booker-Requested-Report-from-NY-Fed-Detailing-Racial-Disparities-Student-Loan-Debt.

31. *See* Student Borrower Protection Ctr., *Disparate Debts*, *supra* note 3.

32. Haughwout, Lee, Scally & van der Klaauw, *supra* note 11.

such as familial wealth and income only account for about half of the default gap between Black and white borrowers.[33] Notably, that gap is still 11 percent when controlling for additional factors that might affect repayment, such as degree attainment, college GPA, post-college income, and employment.[34] The significant and unaddressed gap suggests another major factor is disparately impacting borrowers of color. Emerging research indicates that student-loan servicers, and notably, servicing failures, significantly contribute to disparate repayment outcomes for borrowers.[35]

Student-loan servicers are often the determining factor in whether a borrower is "getting by or going broke."[36] Given their critical role in helping borrowers avoid the significant economic repercussions of student loan default, servicing practices demand a heightened level of scrutiny from policymakers and enforcement officials at every level. The vast majority of student loan borrowers have the same right under law to default-mitigation programs, such as income-driven repayment (IDR).[37] Servicers are responsible for ensuring borrowers can access these programs and avoid the devastation that accompanies student loan default. However, despite near-universal access to these programs, Black and Latinx borrowers continue to default at alarming rates.

33. *See* Judith Scott-Clayton, *What Accounts for Gaps in Student Loan Default And What Happens After*, Brookings Inst. (June 21, 2018), https://www.brookings.edu/research/what-accounts-for-gaps-in-student-loan-default-and-what-happens-after/.
34. *Id.*
35. Colleen Campbell & Nicholas Hillman, *A Closer Look at the Trillion: Borrowing, Repayment, and Default at Iowa's Community Colleges*, Ass'n of Community C. Tr. (Sept. 2015), https://www.acct.org/files/Publications/2015/ACCT_Borrowing-Repayment-Iowa_CCs_09-28-2015.pdf.
36. *See* CFPB, Response Letter by Seth Frotman, Student Loan Ombudsman of CFPB, to Persis Yu, Director of National Consumer Law Center (May 2, 2017), https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/cfpb-idf-drt-response-letter.pdf.
37. Some data shows that Black borrowers are accessing IDR at higher rates than their white peers, but failing to benefit from this critical protection. According to a Center for American Progress analysis of 2017 Department of Education data, one-third of Black borrowers who held a bachelor's degree and are in repayment use IDR; a proportion higher than other peer groups. Yet, this same analysis suggests that even when Black borrowers enroll in IDR, they may not realize the same long-term economic benefits as their white peers and continue to default at extraordinarily high rates, potentially because of recertification disparities. *See* Miller, *supra* note 15. Other research shows that borrowers of color may be struggling to access IDR in the first place, and therefore do not benefit from the default mitigation protection. *See* Kristin Blagg, *The Demographics of Income-Driven Student Loan Repayment*, Urb. Inst. (Feb. 25, 2018), https://www.urban.org/urban-wire/demographics-income-driven-student-loan-repayment.

Enrolling and maintaining an income-driven repayment plan can provide widespread benefits across borrowers' financial lives, including helping borrowers develop stronger credit profiles, empowering them to repay their principal balance more quickly, and helping them achieve other lifetime financial milestones like homeownership.[38] A government investigation into servicing practices found that borrowers not enrolled in IDR had default rates 28 times higher than borrowers enrolled in IDR.[39]

Although the near-universal availability of IDR should help mitigate the risk of default, racial gaps in IDR enrollment suggest otherwise.[40] Most alarmingly, the Urban Institute found that borrowers of color are almost as likely to not be making any student loan payment as they are to be making IDR payments, raising concerns about how servicers are facilitating IDR enrollment and recertification.[41] In fact, the Consumer Financial Protection Bureau (CFPB) has repeatedly documented how student-loan servicers create obstacles for borrowers seeking to enroll in IDR.[42] Moreover, state and federal law enforcement efforts have exposed how servicers repeatedly steer borrowers away from long-term affordable repayment options, often causing borrowers to accrue thousands of dollars in interest on their loans.[43]

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38. *See* Daniel Herbst, Liquidity and Insurance in Student Loan Contracts: The Effects of Income-Driven Repayment on Default and Consumption (2018), http://conference.iza.org/conference_files/Education_2018/herbst_d26912.pdf.

39. U.S. Gov't Accountability Office, Federal Student Loans, Education Could Do More to Help Ensure Borrowers Are Aware of Repayment and Forgiveness Options, fig. 6 (Aug. 2015), https://www.gao.gov/assets/680/672136.pdf (report to Congressional Requesters) (according to the report, IDR borrowers had default rates of 0.5 percent in comparison to non-IDR borrowers who had a default rate of 14 percent); *see also* CFPB Office of Research, Data Point: Borrower Experiences on Income-Driven Repayment, (Nov. 2019), https://files.consumerfinance.gov/f/documents/cfpb_data-point_borrower-experiences-on-IDR.pdf.

40. *See* Scott-Clayton, *supra* note 32.

41. Kristin Blagg, *The Demographics of Income-Driven Student Loan Repayment*, Urb. Inst.: Urb. Wire (Feb. 23, 2018), https://www.urban.org/urban-wire/demographics-income-driven-student-loan-repayment.

42. *See* Douglas-Gabriel, *supra* note 5 (quoting Patrice Ficklin, director of the CFPB's Office of Fair Lending, as previously stating "we're looking at disparate outcomes . . . and we believe there may be some").

43. *See, e.g.*, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Pa. 2018) (stating "Navient's compensation policies for its customer service representatives have incentivized them to push numerous borrowers to forbearance without adequately exploring income-driven repayment plans with those borrowers, and in some cases, without even mentioning income-driven repayment plans at all."); Complaint at 11, California v. Navient Corp., No. CGC-18-567732 (2018) (stating "Navient's compensation policies for customer service representatives incentivized this misconduct."); Complaint at 13, Massachusetts v. Pa. Higher Educ. Assistance Agency, No. 1784-cv-02682 (2017)

The collective research outlined in the previous sections suggests that student-loan servicing failures are disproportionately harming borrowers of color, especially Black and Latinx borrowers. The vast racial gaps in borrower outcomes raise questions about violations of consumer protection and fair lending laws. Student-loan servicing is one of the most urgent issues of the student debt crisis, and existing fair lending and consumer protection laws also make addressing it one of the most immediate solutions to remedy disparate borrower outcomes.

III. Legal Approaches

While the CFPB had previously indicated that it would prioritize tackling the potential discriminatory fallout of student-loan servicing, they have seemingly abandoned that effort.[44]

However, many of the tools the CFPB previously sought to use remain available for others to take action against student-loan servicers for fair lending violations. The second half of this paper will explore how law enforcement, regulators, and private attorneys can use the Equal Credit Opportunity Act (ECOA) and Unfair, Deceptive, and Abusive Acts and Practices (UDAAP) to tackle disparate outcomes in student-loan servicing. Additionally, the author calls on policymakers to bring greater transparency and tools for enforcement officials and private litigants in the student loan market in a similar manner as the mortgage market—by establishing industry data collection modeled after, and expanding upon, the Home Mortgage Disclosure Act (HMDA) reporting requirements.

A. The Equal Credit Opportunity Act Should be Used to Stamp Out Servicing Practices that Cause Disparate Harm to Protected Classes.

The Equal Credit Opportunity Act, a federal fair lending law, bars discrimination in credit transactions on the basis of race, color, religion, na-

("PHEAA has wrongfully held borrowers' money that it was not entitled to collect."); Complaint at 18, Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0013 (Aug. 22, 2016) (Respondent . . . maximized late fees incurred by many consumers . . .); *Attorney General James And Superintendent Vullo Announce $9 Million Settlement Of Federal Student Loan Servicing Claims With Acs Education Services*, Office of N.Y. Att'y Gen. (Jan. 4, 2019), https://ag.ny.gov/press-release/attorney-general-james-and-superintendent-vullo-announce-9-million-settlement-federal; *see also Consumer Financial Protection Bureau Finds Consumers Complain Of Needless Hurdles In Applying For Lower Student Loan Payments*, CFPB (Aug. 18, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-finds-consumers-complain-needless-hurdles-applying-lower-student-loan-payments/.

44. *See* CFPB, *Fair Lending Report*, *supra* note 5 ("Mortgage and Student Loan Servicing. We will evaluate whether some borrowers who are behind on their mortgage or student loan payments may have more difficulty working out a new solution with the servicer because of their race, ethnicity, sex, or age.").

tional origin, sex, marital status, or age.[45] Prohibitions on discrimination extend to actions from lenders that cause a disparate impact even if it is not overtly framed as a discriminatory practice.[46] Importantly, ECOA covers all aspects of a consumer credit transaction, including applications for credit, originations, and loan term and repayment modifications.[47] In mortgage servicing, for example, ECOA prohibits servicers from offering less favorable terms on a home loan modification to borrowers of color in comparison to similarly situated white homeowners.[48]

Prohibitions on discrimination under ECOA also extend to student-loan servicing.[49] Enrollment and renewal of IDR plans for federal student loan borrowers are considered credit determinations under ECOA; in effect, IDR application decisions are analogous to mortgage loan modification applications.[50] Given the data that shows Black and Latinx borrowers are more likely to experience student loan delinquency and default while also less likely to be enrolled or persist in IDR raises serious questions about these borrowers' access to affordable repayment plans.[51] This gap in access to or persistence in IDR—a student loan modification—should raise flags about

45. 15 U.S.C. § 1691(a)(1).
46. 12 C.F.R. §§ 1002.4(a), 1002.6(a); *see, e.g.*, Dubravka Ritter, *Do We Still Need the Equal Credit Opportunity Act*, Payment Cards Center, Fed. Reserve Bank of Phila. (Sept. 2012), https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2012/D-2012-equal-credit-opportunity-act.pdf ("Such policies or practices can be neutral, yet discriminatory in their effect. For example, if lenders prohibit mortgage loans for an amount of less than $50,000, the policy may disproportionately exclude minority borrowers, whose incomes and home values may be lower on average.").
47. CFPB, CFPB Consumer Laws and Regulations: ECOA (June 2013), https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf. ("Because the ECOA and Regulation B prohibit discrimination in any aspect of a credit transaction, a creditor violates the statute and regulation when discriminating against borrowers on a prohibited basis in approving or denying loan modifications. Moreover, as the definition of credit includes the right granted by a creditor to an applicant to defer payment of a debt, a loan modification is itself an extension of credit and subject to ECOA and Regulation B. Examples of loan modifications that are extensions of credit include, but are not limited to, the right to defer payment of a debt by capitalizing accrued.").
48. *Id.*
49. *See Fair Lending Report, supra* note 5; *see also* CFPB, Student Loan Servicing (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.
50. *Id.*
51. Ben Miller, *The Continued Student Loan Crisis for Black Borrowers*, Ctr. for American Progress (Dec. 2, 2019), https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continued-student-loan-crisis-black-borrowers/.

servicers' role in ensuring equitable access to default mitigation. The disparities outlined in the first half of this paper should spur regulators and law enforcement officials to closely scrutinize servicing practices from a fair lending perspective.

In the absence of rigorous CFPB supervision and enforcement of student-loan servicing, particularly with regard to ECOA compliance, state banking regulators and enforcement officials have an increasingly critical role to play in protecting borrowers. Section 1042 of the Dodd Frank Act allows state regulators and law enforcement officials to enforce federal consumer protection laws.[52] State attorneys general could use their Section 1042 authority to bring ECOA claims when student-loan servicers operating within their states engage in practices that disproportionately harm borrowers who are members of a protected class. Private attorneys could also bring private claims on behalf of aggrieved consumers under provisions of ECOA. Additionally, one could even envision the passage of municipal ordinances that give cities the ability to enforce ECOA with similar authority.[53]

B. UDAAP Laws Can Be Used to Remedy Practices that Contribute to Debt Disparities.

In addition to fair lending laws that specifically bar discrimination against protected classes, consumer protection laws, such as prohibitions against unfair, deceptive, and abusive acts and practices (collectively, UDAAP) can be used to stamp out improper practices that harm the most vulnerable borrowers in the student debt crisis. Both the Federal Trade Commission (FTC) and the CFPB have the authority to investigate and enforce prohibitions on unfair and deceptive acts and practices, while the CFPB has additional authority to pursue abusive acts and practices.[54]

Indeed, UDAAP has been used extensively to address student-loan servicing violations. For example, student-loan servicers often encourage borrowers to contact them for information on repayment options. Servicers' affirmative misrepresentations about borrowers' repayment options has been repeatedly deemed a violation of federal[55] UDAAP laws.[56] In fact,

52. 12 U.S.C. § 5552.
53. For example, cities have the ability to enforce Fair Housing Act Claims. *See Enforcement of Fair Housing Laws*, Loc. Housing Solutions, https://www.localhousingsolutions.org/act/housing-policy-library/enforcement-of-fair-housing-laws-overview/enforcement-of-fair-housing-laws/ (last visited July 8, 2020).
54. Dodd-Frank Act § 1031(a)(1).
55. *See* Consumer Fin. Prot. Bureau v. Navient Corp. et al., Case No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017).
56. *Memorandum on Loan Servicing, Enforcement Risk, & the Coronavirus Pandemic*, Student Borrower Protection Ctr. (Apr. 14, 2020), https://protectborrowers.org/wp-content/uploads/2020/04/Servicing-in-the-Time-of-Coronavirus_2020.pdf. Moreover, the imposition of "late fees, interest capitalization,

servicers have committed a range of UDAAPs specific to giving borrowers accurate information about IDR. For example, at least one servicer has been found to illegally and systematically reject IDR applications that were merely incomplete, rather than asking the borrowers to provide the additional information needed to complete the application.[57] One of the largest student-loan servicers, Navient, was sued by the CFPB for UDAAP violations when it steered borrowers away from IDR and failed to inform borrowers about IDR renewals, among other issues.[58] Disproportionately high rates of delinquency and default among Black and Latinx borrowers suggest that by halting servicing practices that are unfair, deceptive, or abusive, federal UDAAP enforcement will have the second-order effect of addressing these disparities as well.[59]

But federal law enforcement officials are not the only ones with the ability to hold industry to account under UDAAP. Each state also has its own ban on unfair and deceptive acts and practices—often referred to as "Little FTC Acts"—while also having the authority to enforce federal UDAAP pursuant to Section 1042 of the Dodd Frank Act.[60] State and federal law enforcement officials can readily use UDAAP to pursue bad actors that engage in harmful servicing practices. Because Black and Latinx borrowers experience student loan default at higher rates, rigorous UDAAP enforce-

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adverse credit reporting and other punitive measures" can be actionable under UDAAP laws where other contractual and federal requirements have been violated.

57. CFPB, *Supervisory Highlights: Issue 13, Fall 2016* (Oct. 2016), https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.

58. Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Pa. 2018).

59. In the auto lending market, the Federal Trade Commission recently halted discrimination by a chain of auto dealers using an unfairness theory for the first time. In the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda, Commission File No. 1623238 (May 27, 2020). In a statement released at the time of this action, Commissioner Rohit Chopra described the potential application of unfairness to address disparate impact discrimination specifically. Statement of Commissioner Rohit Chopra, In the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda Commission File No. 1623238 (May 27, 2020). ("Congress has enacted laws to ban discrimination in contexts like housing, employment, and credit, but many practices are not only discriminatory, but are also unfair. Here, for example, the alleged conduct . . . violates the FTC Act's prohibition on unfair practices. Using disparate impact analysis and other tools, the Commission can use its unfairness authority to attack harmful discrimination in other sectors of the economy.").

60. Maryland is the first state to have adopted an "abusive" acts and practices standard, though others may follow. Allen H. Denson & Latif Zaman, *States' Divergent Approaches to Unfair, Deceptive, and Abusive Acts and Practices Reveal Consumer Protection Priorities*, ABA (Aug. 22, 2019), https://www.americanbar.org/groups/business_law/publications/blt/2019/09/abusive-acts/.

ment could also help stem some discriminatory outcomes. Additionally, to the extent these state laws include a private right of action, they remain an avenue for private attorneys to similarly hold industry to account.

Indeed, state UDAAP laws have also been used extensively to address student-loan servicing abuses. For example, student-loan servicers often encourage borrowers to contact them to obtain information about repayment options. Servicers' affirmative misinformation to borrowers has been repeatedly deemed a violation of state[61] or federal[62] UDAAP laws.[63] Disproportionately high rates of delinquency and default among Black and Latinx borrowers begs the question of whether servicers are disparately failing to provide information about payment relief to borrowers of color.

States have recognized the racial disparities in borrower outcomes and are increasingly looking to the federal UDAAP's abusive standard as a direct way to address harmful servicing practices by incorporating these standards into Student Loan Borrower Bills of Rights.[64] To the extent these laws also include private rights of action, the private bar should look to the wide range of servicing practices already found by federal regulators to be unfair, deceptive, or, where applicable, abusive with an eye towards harm to vulnerable consumers.

C. The Home Mortgage Disclosure Act Provides the Model for a New Student Loan Data Collection Tool.

As policymakers look to address systemic discrimination in the student loan market, the Home Mortgage Disclosure Act (HMDA) provides an instructive example of the value of borrower demographic data.[65] Congress should require student lenders and servicers to collect, compile, and publish data on student loan lending and student-loan servicing, including information on the race, ethnicity, and gender of borrowers.[66]

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61. *See* Nelson v. Great Lakes Educ. Loan Services, Inc., 928 F.3d 639 (7th Cir. 2019).

62. *See* Consumer Fin. Prot. Bureau v. Navient Corp. et al., Case No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017).

63. *Memorandum on Loan Servicing, Enforcement Risk, & the Coronavirus Pandemic,* Student Borrower Protection Ctr. (Apr. 14, 2020), https://protectborrowers.org/wp-content/uploads/2020/04/Servicing-in-the-Time-of-Coronavirus_2020.pdf. Moreover, the imposition of "late fees, interest capitalization, adverse credit reporting and other punitive measures" can be actionable under UDAAP laws where other contractual and federal requirements have been violated.

64. *See, e.g.*, S.B. 77, 2020 Sess. Gen. Assemb., 2020 Reconvened Sess. (Va. 2020); S.B. 381, 2020 Sess. Gen. Assemb., Reg. Sess. (Conn. 2020); *see also* Brian Shearer, *Federalism to the Rescue: State Regulators Can and Should Examine for Violations of Federal Consumer Protection Law*, Student Borrower Protection Ctr. (May 2020), https://protectborrowers.org/wp-content/uploads/2020/05/State-Powers-Report.pdf.

65. 12 U.S.C. §§ 2801-10 (2006).

66. Federal student loans are originated by the federal government, not private

HMDA was enacted to help address the legacy of redlining through mandatory, nationwide reporting on loan origination, pricing, and credit decisioning by the mortgage lending industry.[67] This reporting includes detailed information about borrower demographics, including race, that is anonymized and made available to the public. Through this mandatory data reporting, the public, including policymakers, regulators, and law enforcement officials, gain critical visibility and insight into mortgage industry practices that may be driving disparate outcomes in lending or pricing.[68] For the last several decades, HMDA has proven to be a vital tool in protecting homeowners of color from discrimination. Student loan borrowers deserve the same.

No similar reporting regime exists in the student loan market, despite growing evidence of extreme racial disparities in borrower outcomes. Congress should mandate similar reporting requirements focused both on the origination and servicing of private and federal student loans, including servicer decisioning around eligibility for and enrollment in alternative repayment options. Just as HMDA has served as a critical tool to address longstanding inequities in the housing space, an equivalent law is needed in the student loan market to address egregious disparities. Moreover, requiring such data to be published would allow for increased accountability across the student loan market.

IV. Conclusion

Education has always been a pillar of the American Dream. Our country has long pushed the idea that an education—no matter the cost—is a path to a better life. But as with so many other aspects of the American Dream, the reality of educational costs has not been the same for white students and non-white students. America has a long history of discrimination in

lenders. As a result, the compulsory data collection would require a Congressional mandate.

67. *See* Richard D. Marsico, *Looking Back and Looking Ahead as the Home Mortgage Disclosure Act Turns Thirty Five: The Role of Public Disclosure of Lending Data in a time of Financial Crisis*, 29 Rev. Bank and Fin. Law 205 (2009), https://www.bu.edu/rbfl/files/2013/09/Marsico.pdf (discussing history of HMDA as it relates to redlining).

68. *See, e.g.*, Roman L. Weil, Daniel G. Lentz & Elizabeth A. Evans, Litigation Services Handbook: The Role of the Financial Expert (6th Ed. 2016), Section 35A.5 (discussing HMDA as a source of data used in fair lending litigation); George J. Benston, *The History and Value of HMDA Data for Studies of Invidious Discrimination, in* Fair Lending Analysis: A Compendium of Essays on the Use of Statistics (Washington, DC: American Bankers Association, 1995) (discussing policy analysis of HMDA data); *Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement*: *Hearing before the House Fin. Servs. Comm., Subcomm. on Oversight and Investigations*, 110th Cong. (2007) (statement of Hilary O. Shelton, Director, NAACP Washington Bureau), https://www.govinfo.gov/content/pkg/CHRG-110hhrg38394/html/CHRG-110hhrg38394.htm (discussing municipal use of HMDA data).

higher education. Discrimination and disparities caused by student loan companies at the heart of the student loan market only serve to reinforce systemic disenfranchisement.

Student loan debt places an enormous burden on communities across the county, but has disproportionately harmful effects on Black and Latinx borrowers. These acute harms facing Black and Latinx borrowers directly affect their overall economic outcomes and create a legacy of inequity—from higher reliance on debt to pay for higher education to alarming rates of delinquency and default. In other words, the disproportionately negative outcomes in Black and Latinx families is both driven by and reinforces overall negative economic outcomes in those same communities.

Tackling debt disparities through the broken system of student-loan servicing is critical to curtail disparities in delinquency and default. While this may not eradicate all gaps, federal and state enforcement of ECOA and UDAAP laws are fundamental to stamping out practices that have a discriminatory effect on certain subsets of borrowers. Additionally, the creation of new legal tools, such as a mandatory reporting mechanism, will provide greater transparency into the market, showing which borrowers are experiencing the greatest harms associated with student debt.

Time and again, a lack of race-consciousness has impeded efforts to alleviate the burden of student debt that exacerbate the burden for borrowers of color, thereby compounding racial disparities. Policymakers, regulators, law enforcement officials, and private attorneys have an obligation to establish and utilize every tool at their disposal to dismantle this fundamentally broken system.