No. ________

In The
Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,

Petitioner,

v.

BRYANA BIBLE, individually
and on behalf of the proposed class,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be overruled.

2. Whether, in affording deference to an agency's interpretation of its own regulation that conflicts with the governing statute, regulations adopted through rulemaking, and decades of prior agency guidance, the Seventh Circuit's decision conflicts with this Courts' decisions in *Auer* and *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings include those listed on the cover.

As a non-stock, non-profit corporation, United Student Aid Funds, Inc. does not have any stock-owning parent corporations. No publicly held company owns 10 percent or more of United Student Aid Funds, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United Student Aid Funds, Inc., respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS AND ORDERS BELOW

The order of the court of appeals denying rehearing *en banc* (App., *infra* 120-25), is reported at 807 F.3d 839 (7th Cir. 2015). The panel opinion (App., *infra* 1-94), is reported at 799 F.3d 633 (7th Cir. 2015). The opinion and order of the district court (App., *infra* 95-119) is unreported and available at 2014 WL 1048807 (S.D. Ind.).

STATEMENT OF JURISDICTION

The court of appeals filed its order denying rehearing *en banc* on October 5, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Higher Education Act, 20 U.S.C. § 1085, *et seq.*, and the Department of Education's regulations, 34 C.F.R. § 682.200, *et seq.*, are set forth at App. 126-82.

STATEMENT

This case is an ideal vehicle for this Court to reconsider an exceedingly important, recurring issue that "go[es] to the heart of administrative law"—how much deference, if any, reviewing courts owe administrative agencies' interpretations of their own regulations. See *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring). In *Auer* v. *Robbins*, 519 U.S. 452 (1997), this Court—"relying on a case decided before the [Administrative Procedure Act]"—established a default rule requiring courts "to 'decide' that the text means what the agency says." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211-12 (2015) (Scalia, J., concurring in the judgment) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 410 (1945)). As Judge Easterbrook observed below, however, several Members of this Court have "expressed deep reservations about deferring to the position an agency adopts through means other than rulemaking." App. 124 (Easterbrook, J., concurring in the denial of rehearing *en banc*); see *Mortgage Bankers*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment) ("I would therefore restore the balance originally struck by the [Administrative Procedure Act] with respect to an agency's interpretation of its own regulations * * * by abandoning *Auer* and applying the Act as written."); *id.* at 1225 (Thomas, J., concurring in the judgment) ("[T]he entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered."); *id.* at 1210-11 (Alito, J., concurring in

part and concurring in the judgment) (noting that "the opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect" and "await[ing] a case in which the validity of *Seminole Rock* may be explored through full briefing and argument").

Although Judge Easterbrook believed that "whether *Auer* supports the Secretary's current position" in this case "is a substantial and potentially important question, * * * an antecedent issue is whether *Auer* is sound." App. 124. In Judge Easterbrook's view, it would not have been a good use of the Seventh Circuit's limited "resources to have all nine judges consider how *Auer* applies * * * when *Auer* may not be long for this world." *Id.* at 125. The validity of *Auer*, of course, is a question only this Court can answer. And this case is an ideal vehicle for doing so, as "this is one of those situations in which the precise nature of deference (if any) to an agency's views may well control the outcome." *Ibid.* The issue is unquestionably important and frequently recurring. See *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring) ("Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis."). *Auer* deference not only raises substantial constitutional questions, but also implicates serious practical concerns. The Court should grant the petition to reconsider (and overrule) *Auer*.

The petition should be granted for the additional, alternative reason that even if *Auer* remains the law, the Seventh Circuit's decision to afford *Auer* deference

in this case conflicts with *Auer* itself, which does not apply where, as here, the agency's interpretation is "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. The decision also conflicts with this Court's decision in *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), that *Auer* deference is inappropriate where, as here, there is no fair warning that an industry could be subject to massive liability based on conduct that was lawful when it occurred (before the agency announced the interpretation at issue). In this case, for example, *Auer* deference "set the stage for a conclusion that conduct, in compliance with agency advice when undertaken * * * is now a federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while the case was on appeal." App. 125; see also *id.* at 93 (noting that *Auer* deference would result in "potentially massive liability on [USA Funds] for conduct that occurred well before that interpretation was announced" (alteration in original)). This Court's review is needed to resolve that conflict, too.

1. When a borrower defaults on a student loan by failing to make a monthly payment for nine months, the lender turns the loan over to a guarantor who pays the default claim. 20 U.S.C. § 1085(l); 34 C.F.R. § 682.200(b)(1). The guarantor then has 45 days to provide a written notice and opportunity for the borrower to inspect the records and to request an administrative review. The guarantor must also afford an opportunity for the defaulted borrower to "enter

into a repayment agreement on terms satisfactory to the [guaranty] agency." 34 C.F.R. § 682.410(b)(5)(ii)(D). The borrower must be allowed 60 days from the notice to request an administrative review. *Id.* § 682.410(b)(5)(iv)(B). The guarantor may not assess costs against the borrower or report the default to a consumer reporting agency until the notice and specified opportunities are provided to the borrower. *Id.* § 682.410(b)(5)(ii). Sixty days after the notice, the guaranty agency is required to report the default to all national credit reporting agencies if the defaulted borrower has not agreed to repayment on terms "satisfactory" to the guaranty agency. *Id.* § 682.410(b)(5)(i). The borrower is "required to pay * * * reasonable collection costs" if the borrower defaulted on the loan. 20 U.S.C. § 1091a(b)(1).

Another regulation—34 C.F.R. § 682.405—requires guaranty agencies to create programs giving borrowers an opportunity to "rehabilitate" defaulted loans. If a borrower evidences good faith by making monthly payments for nine out of ten months—even very small payments, based upon the borrower's ability to pay, not the amount actually required to repay the loan—the loan can be purchased from the guarantor by another lender and removed from default status. *Id.* § 682.405(a). In fact, the purpose of the rehabilitation program is "so that the loan may be purchased, if practicable, by an eligible lender and removed from default status." *Id.* § 682.405(a)(1). The pertinent statutory provision of the Higher Education Act regarding loan rehabilitation confirms

that collection costs "may" be charged to defaulted borrowers who enter into such rehabilitation agreements, without exception. 20 U.S.C. § 1078-6(a)(1)(D)(i)(II)(aa).

2. Respondent is a borrower who defaulted on her student loan issued by Citibank as part of the Federal Family Education Loan (FFEL) Program. App. 1. Her student loan is governed by a Federal Stafford Loan Master Promissory Note (the Note), which is subject to the Higher Education Act and applicable regulations promulgated by the Department. See App. 198. Petitioner USA Funds, a non-profit corporation that guarantees loans under the FFEL Program, was the guarantor of respondent's loan. *Ibid.* Under the terms of the Note, respondent would not default on her obligations unless she did not make a payment on her loan for at least 270 days. *Id.* at 191. When she signed the Note, respondent agreed that "[i]f she default[s] on any loans, [she] will pay reasonable collection fees and costs, plus court costs and attorney fees." *Id.* at 11. After her lender found her in default, USA Funds paid the default claim for the loan, and the lender transferred the loan to USA Funds. *Ibid.*

After the loan transfer, General Revenue Corp., a collection agency acting on behalf of USA Funds as creditor, sent respondent a letter providing options for curing her default—including an alternative payment plan or a rehabilitation agreement. *Id.* at 11, 98. The letter stated:

> As part of your eligibility for loan rehabilitation, you will be assessed collection costs at a reduced rate of 18.5% of the outstanding balance *at the time your loan is purchased* by an eligible lender, and the purchasing lender may add these costs to your outstanding loan principal.

Id. at 98-99 (emphasis added). Respondent (represented by counsel) chose to enter into a rehabilitation agreement, in which she agreed to pay $50 a month —significantly less than the amount required to repay her loan—for a period of at least nine months so that her loan could be purchased by another lender, and thereby prevent the default from remaining on her credit record. *Id.* at 12, 99.

General Revenue Corp. sent respondent a "Capitalization Authorization Letter" memorializing the agreed-upon $50-a-month payment. *Id.* at 99. The single-page letter also mentioned collection costs twice: (1) "Once rehabilitation is complete, collection costs that have been added will be reduced to 18.5% of the unpaid principal and accrued interest outstanding at the time of Loan Rehabilitation" (*id.* at 13, 99); (2) "By signing below, I understand and agree that the lender may capitalize collection costs of 18.5% of the outstanding principal and accrued interest upon rehabilitation of my loan(s)." *Id.* at 14, 114. Consistent with the agreement, USA Funds charged respondent collection costs. *Id.* at 99.

3. Respondent sued petitioner—on her own behalf as well as on behalf of a putative nation-wide

class of defaulted borrowers—alleging that by charging collection costs, petitioner breached the terms of the Note and violated RICO. App. 14. Petitioners moved to dismiss under Rule 12(b)(6).

The district court granted the motion and dismissed respondent's claims with prejudice. *Id.* at 14-15. As relevant here, the district court held that because the Note, the Higher Education Act, and the regulations promulgated thereunder allow charging collection costs against borrowers who default on their loans, respondent failed to state a claim either for breach of contract or violation of RICO. *Id.* at 109-19.

4. On appeal, a fractured panel of the Seventh Circuit reversed. App. 4, 57. As an initial matter, the panel on its own initiative asked the Secretary for his views on the permissibility of charging collection costs. *Id.* at 4. The Secretary accepted the invitation and filed an *amicus* brief in support of respondent, asserting that the term "rehabilitation agreement" in 34 C.F.R. § 682.405 must always be deemed a "repayment agreement on terms satisfactory to the [guaranty] agency" for purposes of 34 C.F.R. § 682.410. *Id.* at 202-15.

The panel majority held for respondent and reinstated her breach-of-contract and RICO claims. Each panel member wrote separately. Judge Hamilton, who authored the lead opinion, took the position that the statute and regulations unambiguously prohibit a guaranty agency like petitioner from charging

collection costs to a first-time defaulting borrower who accepts a rehabilitation agreement within 60 days and then successfully completes it. *Id.* at 19-30. Judge Flaum disagreed that the statute and regulations unambiguously prohibit the collection costs, but joined with Judge Hamilton to rule for respondent because, in Judge Flaum's view, the Secretary's interpretation as set forth in his *amicus* brief is entitled to *Auer* deference. *Id.* at 57, 61.

Judge Manion disagreed on both counts.[1] He would have held that (i) the statute and regulations unambiguously *permit* collection costs in these circumstances, but even if they were ambiguous, (ii) *Auer* deference would be inappropriate under this Court's decision in *Christopher*. *Id.* at 66-88, 88-94. In Judge Manion's view, the Department's interpretation incorrectly conflated the loan repayment option under 34 C.F.R. § 682.410 with the loan rehabilitation option under § 682.405. *Id.* at 62, 66-75. The Department's reading made little sense, according to Judge Manion, given not only the plain text of the statute and regulations, but also the agency's own guidance, including the Department's instructions (on its website) telling borrowers that "[y]ou have several options for getting your loan out of default" that

[1] Judge Manion's opinion was designated below as a "partial" dissent because he agreed with the panel majority on an alternative holding of the district court that is not before this Court. App. 62. Accordingly, for simplicity's sake, the petition refers to Judge Manion's opinion as the "dissent."

include "loan repayment[,] loan rehabilitation, and loan consolidation." *Id.* at 84 (citing *Getting out of Default*, Federal Student Aid, https://studentaid.ed.gov/sa/repay-loans/default/get-out, last visited Dec. 30, 2015).

Under the Secretary's new interpretation, however, loan rehabilitation would become "a kind of at-will deferment. A borrower could make no payment on her loans for nine months and then make only token payments for another nine months, all without collection costs, only to have * * * the default erased from her record." *Id.* at 83. There would be no consequence for the borrower, and no financial incentive for the guarantor, who is required by federal law to pay off the loan to the original lender. *Id*. at 126 (citing 20 U.S.C. § 1091a(a)(2)(B)).

Given Judge Manion's conclusion that the statute and regulations unambiguously *permit* collection costs, and Judge Hamilton's conclusion that the statute and regulations unambiguously *prohibit* collection costs, Judge Flaum's conclusion that *Auer* deference applies in all events proved dispositive.

5. The Seventh Circuit denied rehearing. Judge Easterbrook concurred but wrote separately to explain that "whether *Auer* supports the Secretary's current position, when applied to conduct that predates the Secretary's *amicus* brief * * * is a substantial and potentially important question, but an antecedent issue is whether *Auer* is sound." App. 124. He noted that this Court has "expressed deep reservations about deferring to the position an agency

adopts through means other than rulemaking." *Ibid.* (citing *Mortgage Bankers*, 135 S. Ct. at 1199).

While recognizing the importance of the question presented, Judge Easterbrook concurred in the denial of rehearing *en banc* because "I do not think that it would be a prudent use of this court's resources to have all nine judges consider how *Auer* applies to rehabilitation agreements, when *Auer* may not be long for this world." *Id.* at 125 (referencing *Mortgage Bankers* and *Christopher*). Further, Judge Easterbrook recognized that "[t]he positions taken by the three members of the panel show that this is one of those situations in which the precise nature of deference (if any) to an agency's views may well control the outcome." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case is an ideal vehicle for this Court to reconsider *Auer* deference—a recurring issue that "go[es] to the heart of administrative law." *Decker*, 133 S. Ct. at 1339 (Roberts, C.J., concurring). As Members of this Court have explained, *Auer* deference to an agency's interpretation of its own regulations "raises two related constitutional concerns. It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches." *Mortgage Bankers*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment). *Auer*

deference undermines the Court's "obligation to provide a judicial check on the other branches" and "subjects regulated parties to precisely the abuses that the Framers sought to prevent." *Id.* at 1213. Rooted in a case "decided before the APA," there is waning justification for affording deference when the agency has not engaged its normal processes for creating binding rules for the public. *Id.* at 1211-12 (Scalia, J., concurring in the judgment) (citing *Seminole Rock*, 325 U.S. at 410). The petition should be granted so that *Auer* (together with *Seminole Rock*) can be reconsidered (and overruled).

At a minimum, *Auer* should be overruled to the extent it allows agencies to claim deference to interpretations announced in *amicus* briefs. That type of "drive-by" regulation ill serves both the regulated community and the public at large, as it creates an appearance, at the very least, of unpredictability and a lack of transparency. As the instant case demonstrates, *Auer* allows an agency (rather than a court) to dictate what a regulation means merely by filing a brief. *Auer*'s expansion of *Seminole Rock* should be reconsidered, particularly in light of the liberties agencies have taken under *Auer* to engage in regulation by litigation rather than the processes contemplated by the APA. See, e.g., *M.R.* v. *Dreyfus*, 697 F.3d 706, 715-16 & n.13 (9th Cir. 2012) (Bea, J., dissenting from denial of rehearing *en banc*) (objecting to the court's decision to afford *Auer* deference to a "statement of interest" filed by the Department of Justice in the district court that "has not gone

through anywhere near the rigorous controls as has a regulation adopted pursuant to the Administrative Procedure Act, or even a Supreme Court *amicus* brief").

Even if *Seminole Rock* and *Auer* remain viable, this Court's review and reversal of the decision below is still warranted because, as Judge Easterbrook noted, how those precedents apply in this case is a "substantial and potentially important question" that independently warrants this Court's review. See App. 124. Indeed, the Seventh Circuit's decision in this case to acquiescence in the Secretary's newly minted position that a "rehabilitation agreement" is a "repayment agreement" conflicts with both *Auer* and *Christopher*. First, *Auer* requires courts to reject agency interpretations that are "plainly erroneous or inconsistent with the regulation," 519 U.S. at 461, and here the Secretary's interpretation is directly at odds with the text of both the statute and regulations. A "rehabilitation" program allows a borrower ultimately to have the negative credit indication removed from her credit report, 34 C.F.R. § 682.405(b)(3)(i); 20 U.S.C. § 1078-6(a)(1)(C), while a "repayment agreement on terms satisfactory to the [guaranty] agency" precludes the guaranty agency from ever reporting the borrower to a consumer reporting agency in the first place. 34 C.F.R. § 682.410(b)(5)(ii)(D). The Secretary's interpretation is thus at odds with the regulation itself—and *Auer* by its own terms does not apply in such circumstances.

Second, the Secretary's interpretation is in conflict with *Christopher*, which restrains courts from affording *Auer* deference in the absence of "fair warning" that the regulated entities could face "massive liability" for conduct that occurred before the agency announced its position. See 132 S. Ct. at 2167-68. As Judge Easterbrook explained below, *Auer* deference "set the stage for a conclusion that conduct, in compliance with agency advice when undertaken * * * is now a federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while the case was on appeal." App. 125; see also *id.* at 93 (noting the "potentially massive liability * * * for conduct that occurred well before that interpretation was announced"). This is exactly the sort of unfair surprise and industry disruption that *Christopher* forbids. The petition should be granted to resolve that conflict, too.

I. *Auer* Should Be Overruled Because It Raises Serious Constitutional Concerns.

As Members of this Court have recognized, there is a wide gulf between deferring to agency interpretations of *statutes*—over which Congress has presumably delegated interpretive authority—and deferring to agency interpretations of *regulations* promulgated by the agency itself. See *Talk Am., Inc.* v. *Mich. Bell Tele. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as

well.”). And yet, under *Auer*, “[r]eviewing courts accord even greater deference to agency interpretations of agency rules than they do to agency interpretations of ambiguous statutory terms.” *Capital Network Sys., Inc.* v. *FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994) (citing *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)); *Elgin Nursing & Rehab. Ctr.* v. *HHS*, 718 F.3d 488, 493 (5th Cir. 2013) (“Agencies receive even greater deference under *Seminole Rock* and *Auer* than they would under *Chevron* * * * * ” (citing *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984))). That makes little sense and is in tension with this Court’s recognition in *United States* v. *Mead Corp.* that interpretive rules “enjoy no *Chevron* status as a class.” 533 U.S. 218, 232 (2001). It also raises serious constitutional concerns.

As Justice Scalia observed in *Decker*, *Auer* deference is inimical to separation of powers, because “‘[w]hen the legislative and executive powers are united in the same person * * * there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.’” 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (quoting Montesquieu, SPIRIT OF THE LAWS bk. XI, ch. 6, pp. 151-52 (O. Piest ed., T. Nugent transl. 1949)). The Framers thus took great care—and for good reason—to ensure that the separation of powers was fundamental to the very structure of the Constitution (and to the government it established). *Mortgage Bankers*, 135 S. Ct. at 1217-20 (Thomas, J., concurring in the judgment).

Auer deference is an affront to that constitutional structure. While judges are to independently apply "recognized tools of interpretation to determine the best meaning of a regulation, [*Auer*] demands that courts accord 'controlling weight' to the agency interpretation of a regulation." *Id.* at 1219. This prevents judges from exercising a power given to them by the Constitution and, instead, "amounts to a transfer of the judge's exercise of interpretive judgment to the agency." *Ibid.* Without the structural protections of the judicial branch, the executive branch is "not properly constituted to exercise the judicial power under the Constitution [and] the transfer of interpretive judgment raises serious separation-of-powers concerns." *Id.* at 1220.

Auer deference also diminishes a critical check the Founders intended the judiciary to perform over the power of the executive branch—"enforcement of the rule of law through the exercise of judicial power." *Id.* at 1221 ("As we have long recognized, '[t]he Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.'" (alteration in original) (citing *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012))). The "abandonment" of judicial authority required by *Auer* "permits precisely the accumulation of governmental powers that the Framers warned against." *Ibid.* (citing THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961)).

The framers of the APA, too, understood that while the Act's "definitions and limitations must, to

be sure, be interpreted and applied by agencies affected by them in the first instance * * * the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis." See S. Rep. No. 79-752 (1945), reprinted in ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 79TH CONGRESS, 1944-46 at 217 (1946). And judicial review must align with the underlying principle, recognized by this Court in *Mead*, that there should be either more rigorous process on the front end of an agency action (such as notice and comment) or else less deference on the back end (such as *Skidmore* instead of *Auer*). See *Mead*, 533 U.S. at 232-34 (holding that agency rulings did not merit *Chevron* deference because they did not represent a delegation of authority to make such rulings "with the force of law" and the rulings did not go through notice-and-comment rulemaking that would evidence an interpretation carrying the force of law); see also *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). Otherwise, agencies acquire the power to create binding norms without either procedural safeguards ("paying now") or meaningful judicial review ("paying later")—thereby rendering *Mead* a dead letter. See Matthew C. Stephenson & Miri

Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1463-64 (2011).[2]

The APA distinguishes between legislative rules (which have the force of law and require notice-and-comment rulemaking) and interpretive rules (which do not) precisely to prevent agencies from doing an end-run around the processes attendant to lawmaking. See Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, 52 ADMIN. L. REV. 547, 555 (2000) ("[T]he agency has an incentive to mischaracterize a legislative rule as interpretative to circumvent the APA rulemaking procedure."). Yet *Auer* offers a loophole through which interpretive rules receive the force of law without having gone through even notice-and-comment rulemaking. The result is "[a]n unqualified version of *Seminole Rock* [that] threatens to undermine this doctrinal compromise by enabling agencies to issue binding legal norms while escaping both procedural constraints and meaningful judicial scrutiny." Stephenson & Pogoriler, *supra* at 1464. *Auer*'s erasure of the demarcation between legislative rules and interpretive rules thus sets it at odds with both the APA's text and design.

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[2] Agency rule drafters are apparently well aware of *Auer* deference and, in a recent study, almost 40 percent indicated that it played a role in the drafting of regulations. Christopher J. Walker, Chevron *Inside The Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 715-16 (2014).

Last term, this Court addressed the D.C. Circuit's "courageous (indeed, brazen) attempt to limit th[at] mischief by requiring an interpretive rule to go through notice and comment if it revises an earlier definitive interpretation of a regulation." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). The proper balance could be restored, though, "by abandoning *Auer* and applying the [APA] as written." *Id.* at 1213. Agencies would remain free to interpret their own regulations without notice and comment, but courts would decide—without deference—the correctness of those interpretations. As one commentator puts it, "[t]he administrative agency should be put to the election whether to obtain legislative effect by providing for notice and comment or to forego this effect and adopt the rule without notice and comment." Kevin W. Saunders, *Interpretive Rules With Legislative Effect: An Analysis And A Proposal For Public Participation*, 1986 DUKE L. J. 346, 382.

And so *Auer* should also be jettisoned for the additional reason that it creates binding law without process of any sort. Under *Auer*, agencies "may use [interpretive] rules not just to advise the public, but also to bind them." *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). There must be a "balance between power and procedure" that is lacking in the weight currently given to agency *amicus* briefs. *Id.* at 1211. Under *Auer*, an agency can dictate authoritatively the meaning of a regulation—and "the people are bound to obey it on pain of sanction" —by filing a brief. *Id.* at 1212. That type of

"drive-by" regulation ill serves the regulated community, and undermines the sense of procedural fairness that engenders public confidence in agency action. At a minimum, *Auer* should be overruled to the extent it allows a court to claim *Seminole Rock* agency deference to an interpretation announced in an *amicus* brief. Even if a brief appears to evidence the "considered judgment" of the agency, the APA drafters established rulemaking processes for good reason.[3]

To be sure, as a doctrinal matter, *Auer* "undoubtedly has important advantages" in that it imparts "certainty and predictability to the administrative process" by creating uniformity in the courts of appeals in most cases. *Christopher*, 132 S. Ct. 2156, 2168 & n.17 (citation omitted). But "however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker*, 133 S. Ct. at 1342 (Scalia, J., concurring in part and

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[3] For example, the "Dear Colleague" letter issued by the Department here—only as an apparent afterthought when petitioner raised the lack of one in this litigation, *infra* at 35—asserts that "[f]ew borrowers * * * enter into repayment within the [60-day] period." But in fact, the number of affected borrowers is very large, and retroactive application could devastate many, if not most, guarantors. An opportunity for industry comment would have corrected this error before the regulation was promulgated and highlights why agency pronouncements made without the benefit of notice-and-comment rulemaking are less deserving of deference.

dissenting in part). This Court should abandon *Auer* deference and restore the proper balance between executive and judicial authority.

II. The Continuing Vitality Of *Auer* Is An Issue Of Substantial Importance.

Even as the underpinnings of *Auer* and *Seminole Rock* deference have weakened over time, its practical consequences have intensified as federal agencies continue to grow exponentially in size and influence. See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). As this Court has observed, the administrative state "wields vast power and touches almost every aspect of daily life." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

The federal government now publishes in the Federal Register nearly 80,000 pages of agency notices, decisions, and rules—annually. COMPETITIVE ENTERPRISE INSTITUTE, 10,000 COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 3 (2015);[4] see also *INS* v. *Chadha*, 462 U.S. 919, 985-86 (1983) (White, J., dissenting) ("For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress * * * * ").

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[4] Available at https://cei.org/sites/default/files /10%2C000%20 Commandments%202015%20-%2005-12-2015.pdf.

Interpretive rules, in particular, are critically important in this modern reality. In the typical scenario, Congress passes a broadly worded statute accompanied by an authorization for agency lawmaking. The agency then promulgates an ambiguous rule that, although preceded by notice and comment, does not address many critical issues. The agency then uses interpretive rules—issued without public feedback—to provide the only meaningful guidance on those issues, guidance that under *Auer* and *Seminole Rock* generally binds courts unless it substantially deviates from the statute's or the rule's text. Yet deference to those interpretations only has the "perverse effect of undermining agencies' incentives to adopt clear regulations" in the first instance. Seminole Rock*'s Domain*, at 1461; see also *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (observing that agencies "need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment" and that the Administrative Procedure Act "does not remotely contemplate this regime").[5]

[5] If the Secretary had provided notice and an opportunity for public comment on the regulations at issue in this case, he would have heard from many members of the regulated community as to why rehabilitation agreements are very different from repayment agreements and have traditionally been treated as such.

The consequences of *Auer* deference are thus significant—particularly as the rise and reach of the modern administrative state continues to expand. That is "[b]ecause agency rules that comply with specified procedural formalities bind with the force of statutes [and therefore] *Seminole Rock* has a significant impact on the public's legal rights and obligations." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 615 (1996).

If an agency receives the same deference in interpreting regulations as it does in interpreting statutes, the agency has no incentive to draft clear regulations in the first instance—indeed, it has every incentive *not* to do so and instead "issue vague regulations" to "maximize agency power." *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part) (quoting *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting)). This, in turn, creates "arbitrary government," *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring), and "frustrat[es] the notice and predictability purposes of rulemaking." *Christopher*, 132 S. Ct. at 2168 (citation omitted). Under the *Auer* regime, agencies can "change the meaning of regulations at their discretion and without any advance notice to the parties." *Mortgage Bankers*, 135 S. Ct. at 1221 (Thomas, J., concurring in the judgment).

As this Court observed in *Christopher*, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the

agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time * * * and demands deference." 132 S. Ct. at 2168. And *Auer* only ever plays a role when the agency's interpretation is not the best or most straightforward reading of the regulation—if the meaning were plain from the text, there would be no need for deference to the agency's interpretation as it would command assent by virtue of its accuracy or power to persuade. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

Thus it is not uncommon for *Auer* to control the outcome of a case—as it did here—and enshrine an interpretation at odds with a plain reading of the regulation. See, e.g., *Decker*, 133 S. Ct. at 1339-40 (Scalia, J., concurring in part and dissenting in part) ("The agency's interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading * * * * "). Given the immense practical importance of *Auer* deference to businesses and consumers throughout the Nation—not to mention the explosive growth of the administrative state since *Seminole Rock* was decided—it is time for this Court to reconsider those precedents and hold that courts need not defer to an agency's interpretation of its own regulations.

III. This Case Is An Ideal Vehicle Through Which To Reconsider *Auer*.

The Seventh Circuit's published decision in this case is an ideal vehicle for reconsidering *Auer* and *Seminole Rock* deference because, as Judge Easterbrook explained below, "[t]he positions taken by the three members of the panel show that this is one of those situations in which the precise nature of deference (if any) to an agency's views may well control the outcome." App. 125. One panel member thought the "unambiguous" regulatory text meant one thing, while another panel member thought the "unambiguous" text meant just the opposite—so the "tie" went to the agency, because the third panel member thought the regulatory text was at least ambiguous and so *Auer* deference should apply. *Id.* at 61. There can be little serious question, then, that *Auer* deference was outcome-determinative in this case—which, like *Auer*, involves an agency interpretation set forth in an *amicus* brief invited by the court. And this case arises in the context of a motion to dismiss, so the issues are purely legal.

This case also exemplifies the serious shortcomings inherent in the *Auer* regime. Even assuming the regulation were vague—which petitioner disputes—giving effect to the Secretary's interpretation "disserves the very purpose behind the delegation of lawmaking power to administrative agencies, which is to 'resol[ve] * * * ambiguity in a statutory text.'" *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting) (alteration in original) (quoting *Pauley* v.

BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)). Such deference runs counter to the goal of making regulations "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." *Ibid.* So long as the status quo is otherwise, though, the interest in promoting accountable, transparent government will be ill served. See, e.g., Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI. KENT L. REV. 953, 954 (1997) (observing that the APA "was a historic compromise. It signified the acceptance of the administrative state as a legitimate component of the federal lawmaking system, but imposed upon it procedural constraints.").

Elections certainly have consequences and different administrations will naturally have different priorities and policy views when it comes to administrative agencies. But as Judge Wilkinson has observed, the Administrative Procedure Act "requires that the pivot from one administration's priorities to those of the next be accomplished with at least some fidelity to law and legal process." *N.C. Growers' Ass'n* v. *UFW*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). "Otherwise, government becomes a matter of the whim and caprice of the bureaucracy, and regulated entities will have no assurance that business planning predicated on today's rules will not be arbitrarily upset tomorrow." *Ibid.* When an agency can offer different—or even new—interpretations of regulations promulgated by the agency itself, and know that courts will defer to those

interpretations absent exceptional (and relatively undefined) circumstances, the result is contrary to the fundamental principles of our government under the Constitution. The Court should grant the petition and reverse *Auer* (and *Seminole Rock*).

IV. The Decision Below Conflicts With This Court's Decisions In *Auer* and *Christopher*.

Even if *Auer* remains the law, "whether *Auer* supports the Secretary's current position, when applied to conduct that predates the Secretary's *amicus* brief * * * is a substantial and potentially important question," as Judge Easterbrook observed below, that independently merits this Court's review. See App. 124.

A. In Conflict With *Auer*, The Seventh Circuit Deferred To An Agency Interpretation That Is Plainly Erroneous And Inconsistent With The Statute, The Regulations, And Prior Agency Guidance.

Auer itself makes clear that deference is inappropriate where, as here, the agency's interpretation is "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. At a minimum, under *Auer* the Department's interpretation must be supported by what the statute and regulations actually say. *Talk Am.*, 131 S. Ct. at 2260-61; *Seminole Rock*, 325

U.S. at 414. Because the Secretary's interpretation cannot satisfy this basic prerequisite, as Judge Manion recognized in his dissent below, the panel majority's decision to afford *Auer* deference is fundamentally inconsistent with *Auer* itself.

Under the Higher Education Act, "a borrower who has defaulted on a loan * * * shall be required to pay * * * reasonable collection costs." 20 U.S.C. § 1091a(b)(1). Similarly, the Department's regulation provides that loan guaranty agencies "shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim"—and that "[t]hese costs may include, but are not limited to, all attorney's fees, collection agency charges, and court costs." 34 C.F.R. § 682.410(b)(2).

The Act also requires loan guaranty agencies, like USA Funds, to provide a mechanism for the "rehabilitation" of student loans. See 20 U.S.C. § 1078-6. But the Act provides explicitly and without exception that in doing so, loan guaranty agencies "may, in order to defray collection costs—charge to the borrower an amount not to exceed 18.5 percent of the outstanding principal and interest at the time of the loan sale." *Id.* at § 1078-6(a)(1)(D)(i)(II)(aa).[6]

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[6] Effective July 1, 2014, the statute was amended to lower the percentage from 18.5 percent to 16 percent. Joint Resolution, Pub. L. No. 113-67, § 501(1), 127 Stat. 1187 (2013). Congress otherwise left the provision intact.

The plain meaning of the statute and regulation, then, is that student loan borrowers who are in default on their loans and have agreed to rehabilitation (like respondent) "*may*" be required to pay reasonable collection costs. Contrary to the panel majority's decision, categorically precluding loan guaranty agencies from charging those costs altogether is not an option. The authority to define "reasonable collection costs" does not, by any stretch, give the Secretary license to ignore statutory text. Congress "left a gap" for the Department to fill in determining the amount of collection costs that is "reasonable." See *Chevron*, 467 U.S. at 843. Congress did not, however, leave any "gap" for determining whether collection costs could be charged in the first place, because Congress already answered that question by saying yes, they "may." 20 U.S.C. § 1078-6(a)(1)(D)(i)(II)(aa). *Auer* deference may be strong, but it is not strong enough to change a statutory "may" into a "may not." Whatever deference an agency may enjoy, it cannot "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2446 (2014).

The Secretary's interpretation is inconsistent not only with the language of the statute, but also with the language of the Department's own regulations, codified at 34 C.F.R. § 682.405. Those regulations plainly contemplate collection costs—i.e., they require all rehabilitation agreements to inform borrowers that collection costs may be charged and that those

costs "may not exceed 18.5 [now 16] percent." *Id.* § 682.405(b)(1)(vi)(B).

Thus, perhaps not surprisingly, the Secretary's interpretation regarding rehabilitation agreements does not derive from the regulations regarding rehabilitation agreements found at 34 C.F.R. § 682.405, but from a different regulation entitled "Fiscal, administrative, and enforcement requirements." *Id.* § 682.410. That regulation does not reference rehabilitation agreements at all, save for an (irrelevant) requirement to suspend garnishment after a borrower makes a fifth qualifying payment under such an agreement. *Id.* § 682.410(b)(9)(i)(V). Instead, the regulation requires a guaranty agency to offer a defaulted borrower "[a]n opportunity to enter into a repayment agreement on terms satisfactory to the [guaranty] agency," *id.* § 682.410(b)(5)(ii)(D), before it "assesses collection costs," and before it reports the default to consumer reporting agencies. The Secretary's interpretation depends entirely on a "repayment agreement on terms satisfactory to the [guaranty] agency" in § 682.410 being the same thing as a "rehabilitation agreement" in § 682.405. Even though the regulatory scheme has been in place since 1994, neither the Department nor the panel majority identified any statute, regulation, notice, announcement, or brief (before the one filed in this case) stating that they are one in the same.

And they are not. The reasons for this are many, but include: (i) the lack of any cross-reference or other textual support in the regulations, App. 58;

(ii) regulatory text confirming the "discretion" by a guarantor inherent in "repayment agreements 'on terms satisfactory to the [guaranty] agency'" that is wholly lacking with respect to rehabilitation agreements, *id.* at 59, 73-74; (iii) contemporaneous contrary statements from the Department's own website, *id.* at 58; and (iv) the "absurd" implications of the Secretary's interpretation, *id.* at 74-75.

That is, if, as the Secretary contends, loan guaranty agencies are prohibited by 34 C.F.R. § 682.410(b)(5)(ii) from charging collection costs when a defaulted borrower agrees to a rehabilitation agreement within 60 days, then reporting the default to consumer reporting agencies must also be prohibited. But the whole point of a rehabilitation agreement is to remove the negative credit report of default from the borrower's record upon completion of the program. 20 U.S.C. § 1078-6(a)(1)(C); 34 C.F.R. § 682.405(b)(3)(i). One cannot "remove the record of default from the borrower's credit history," 34 C.F.R. § 682.405(b)(3)(i), if "reporting" the default is prohibited in the first place.

The panel majority's decision to afford *Auer* deference notwithstanding, the hopeless inconsistency between the Secretary's interpretation and the plain language of the statute and regulations conflicts with *Auer* itself, and thus should not be permitted to stand. Review is warranted to resolve the conflict and restore the proper metes and bounds of judicial deference to agency decision-making.

B. In Conflict With *Christopher*, The Seventh Circuit Afforded *Auer* Deference Without Fair Warning That Massive Liability Could Be Imposed For Conduct Undertaken Years Before The Agency Announced Its Interpretation.

The panel majority's decision conflicts not only with *Auer* but also with *Christopher*. Under *Christopher*, a court cannot defer to the interpretation of an agency in the absence of "fair warning" that the regulated parties could face "massive liability" for conduct that occurred before the interpretation's announcement. 132 S. Ct. at 2167-68. But that is precisely what happened here. The Department failed to provide petitioner (or any other loan guarantor) fair warning that it could face massive liability—including treble damages under RICO—for conduct that occurred for years before the Secretary filed its *amicus* brief in this case. The panel majority's decision to afford deference cannot be reconciled with *Christopher* and thus conflicts with this Court's precedents for that reason, too.

As evidence of the required "fair warning," the panel majority could muster only a paragraph buried in the middle of a trial-court brief filed by the Secretary in *Educational Credit Management Corp.* v. *Barnes*, 318 B.R. 482 (S.D. Ind. 2004), aff'd sub nom. *Black* v. *Educational Credit Management Corp.*, 459 F.3d 796 (7th Cir. 2006). But as the dissent below explains (at App. 77), that portion of the brief did not even cite the rehabilitation-agreement regulation—

§ 682.405—and the citation of the Rehabilitation portion of the Higher Education Act had nothing to do with the ability to charge collection costs, but merely illustrated the point (in the context of describing the overall scheme) that alternative payment schedules, as compared to the original loan schedule, were possible. App. 75-79. In any event, a single paragraph buried in a trial-court brief is hardly the "fair notice" that *Christopher* requires.

That is especially true given that the Secretary filed another brief on appeal in that case stating unequivocally that it would be a "mistaken assumption that rehabilitation would have enabled [the defaulted borrower] to pay lower collection costs." Brief for Appellee Secretary of United States Department of Education, *Black*, 459 F.3d 796 (No. 05-1102), 2005 WL 3738503, at *33. The Secretary went on to state that the regulation "plainly allows a guaranty agency to assess collection costs at a flat rate as long as the rate does 'not exceed' 18.5 percent. See 34 C.F.R. § 682.405(b)(1)(iv) [now, 34 C.F.R. § 682.405(b)(1)(vi)(B)]." *Ibid.* Contrary to the Secretary's current interpretation, his prior interpretation made no mention of any exceptions, qualifications, carve-outs, or safe harbors.

When an agency's interpretation is inconsistent at different stages of the same case, there is, at a minimum, "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk Am.*, 131 S. Ct. at 2261 (citation omitted). In the absence of

"considered judgment," deference is inappropriate. *Exelon Generation Co.* v. *Local 15, Int'l Bhd. of Elec. Workers*, 676 F.3d 566, 576 (7th Cir. 2012).

Affording deference is also inappropriate (and in conflict with *Christopher*) because the Department has acquiesced in the loan guaranty industry's long-standing practice of charging collection costs to all rehabilitated borrowers. Loan guaranty agencies like petitioner have long assessed collection costs from defaulted borrowers who enter into rehabilitation agreements. It is implausible, to say the least, that the Secretary somehow did not know about that industry practice, because the Department regularly conducts comprehensive audits of loan guaranty agencies. See 34 C.F.R. § 682.410(b)(1).

Petitioner, for instance, provides detailed data to the Department showing that collection costs are routinely assessed against defaulted borrowers who are making rehabilitation-agreement payments—even against those who entered into rehabilitation agreements within 60 days after a default claim is paid. The Department has never so much as hinted there is anything wrong with that practice—much less agreed that it could be the basis for RICO liability and treble damages. The Department now insists, however, that over the same period of time, its regulations and policies actually *prohibited* those costs. That interpretation is not entitled to deference under *Christopher*. 132 S. Ct. at 2168 ("Even more important, despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt

employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully. The only plausible explanation for the DOL's inaction is acquiescence.").

Moreover, the Secretary did not inform the industry of its current interpretation in its usual manner—a "Dear Colleague" letter—until petitioner pointed out that the Secretary had not done so. Dkt. No. 38, at 16. Only then, in an obvious response to petitioner, did the Secretary issue a "Dear Colleague" letter purporting to "restate" and "clarify" the rules regarding the collection of collection costs. Dkt. No. 46 (GEN-15-14). As the dissent below noted, that post hoc letter is "nothing short of an admission that the Department's rule is entirely new." App. 93.

If the Secretary really were only "clarifying" existing regulations, then surely the Department would, at some point in the past, have informed the beneficiaries of such a policy, i.e., defaulted borrowers. But the Secretary did not, and cannot, identify any prior communication or announcement. If the Department is to be believed, it stood by for well over a decade and did nothing while borrowers paid many millions of dollars in collection costs that, according to the Department (now), the loan guaranty agencies were prohibited from charging. And the public guidance the Department has provided on its website—and continues to provide to this day—makes no mention of the interpretation the Secretary has advanced in this litigation. Instead, the Department's

website warns defaulted borrowers in no uncertain terms that if they enter a rehabilitation agreement, "[c]ollection costs may be added to [their] principal balance," increasing the total amount they owe. *Id.* at 84-85. At the very least, the Department's reluctance to publicize the interpretation advanced for the first time in this litigation provides a "reason to suspect" whether that position truly reflects the Department's "considered judgment." See *Talk Am.*, 131 S. Ct. at 2261 (citation omitted).

The conduct of the Department confirms that *Auer* deference is inappropriate because the industry did not receive the "fair warning" required by *Christopher*. The panel majority's decision thus expands deference well beyond the limits of *Auer* in sharp conflict with *Christopher*—and the petition should be granted for that reason, too.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
Seventh Circuit.

Bryana BIBLE, Individually and on Behalf of the Proposed Class, Plaintiff-Appellant,
v.
UNITED STUDENT AID FUNDS, INC., Defendant-Appellee.

No. 14-1806. | Argued Oct. 2, 2014. | Decided Aug. 18, 2015.

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Opinion

HAMILTON, Circuit Judge.

Plaintiff Bryana Bible obtained a student loan under the Federal Family Education Loan Program. She defaulted in 2012 but promptly agreed to enter into a rehabilitation agreement that required her to make a series of reduced monthly payments. She timely made all of the payments that were required

of her under this agreement, and she remains current on her loan payments. Although Bible complied with her obligations under the repayment agreement, a guaranty agency assessed over $4,500 in collection costs against her.

The terms of Bible's loan were governed by a form document known as a Federal Stafford Loan Master Promissory Note (MPN). This form has been approved by the U.S. Department of Education and is used in connection with many student loans across the country. The MPN incorporates the Higher Education Act and its associated regulations. In pertinent part, the MPN provides that Bible must pay "reasonable collection fees and costs, plus court costs and attorney fees" if she defaults on her loan. As we will see, "reasonable collection fees and costs" are defined by regulations issued by the Secretary of Education under the authority expressly conferred by the Higher Education Act. The MPN provided that Bible would owe only those collection costs that are permitted by the Higher Education Act and its regulations.

Bible sued the guaranty agency (defendant United Student Aid Funds, Inc.) alleging breach of contract and a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*. Her breach of contract theory is that the MPN incorporated federal regulations that prohibit the guaranty agency from assessing collection costs against her because she timely entered into an alternative repayment agreement and complied with

that agreement. Her RICO claim alleges that the guaranty agency, in association with a debt collector and a loan service provider, committed mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343 when it assessed collection costs of more than $4,500 against her despite its representations that her "current collection cost balance" and "current other charges" were zero and that these costs would be "reduced" once she completed the rehabilitation process.

The district court granted the guaranty agency's motion to dismiss Bible's first amended class action complaint (we call this the "amended complaint") under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for relief. The district court held that both claims were "preempted" by the Higher Education Act. It reasoned that both claims depend on alleged violations of the Act and should not be permitted because the Act does not provide a private right of action. The district court held in the alternative that the amended complaint failed to state a claim that is plausible on its face. It concluded that the breach of contract claim failed because both the MPN and the Higher Education Act expressly permit imposing collection costs against borrowers who default on their loans. The district court also concluded that the RICO claim failed because Bible's amended complaint "has not shown participation in a scheme to defraud; commission of an act with intent to defraud; or the use of mails or interstate wires in furtherance of a fraudulent scheme." *Bible* v. *United*

Student Aid Funds, Inc., No. 1:13-CV-00575-TWP-TAB, 2014 WL 1048807, at *10 (S.D.Ind. Mar. 14, 2014).

We reverse. Neither of Bible's claims is preempted by the Higher Education Act. Bible's state law breach of contract claim is not preempted because it does not conflict with federal law. The contract at issue simply incorporates applicable federal regulations as the standard for compliance. Accordingly, the duty imposed by the state law is precisely congruent with the federal requirements. A state law claim that does not seek to vary the requirements of federal law does not conflict with federal law.

We apply the Secretary of the Education's interpretation of the applicable statutes and regulations, which is consistent with Bible's. (The Secretary accepted our invitation to file an *amicus* brief addressing the question.) The Secretary interprets the regulations to provide that a guaranty agency may not impose collection costs on a borrower who is in default for the first time but who has timely entered into and complied with an alternative repayment agreement. Nor is Bible's RICO claim preempted. RICO is a federal statute and thus is not preempted by another federal statute, and we see no conflict between RICO and the Higher Education Act. On the merits, both the breach of contract and RICO claims satisfy the plausibility standard under Rule 12(b)(6).

I. *Factual and Procedural Background*

We review *de novo* a district court's decision to grant a motion to dismiss under Rule 12(b)(6). *E.g.*, *CEnergy-Glenmore Wind Farm No. 1, LLC* v. *Town of Glenmore*, 769 F.3d 485, 487 (7th Cir. 2014). We accept as true all factual allegations in the amended complaint and draw all permissible inferences in Bible's favor. *E.g.*, *Fortres Grand Corp.* v. *Warner Bros. Entertainment Inc.*, 763 F.3d 696, 700 (7th Cir. 2014). To avoid dismissal under Rule 12(b)(6), Bible's amended complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Plausibility" is not a synonym for "probability" in this context, but it asks for "more than a sheer possibility that a defendant has acted unlawfully.'" *Olson* v. *Champaign County*, 784 F.3d 1093, 1099 (7th Cir. 2015), quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

In deciding a Rule 12(b)(6) motion, the court may consider documents attached to a complaint, such as contract documents, without converting the motion into one for summary judgment. *See* Fed.R.Civ.P. 10(c). Bible attached the following documents to her amended complaint: (1) the promissory note or MPN,

(2) an April 12, 2012 letter to Bible from General Revenue Corp. (GRC), which we call the "default letter," (3) an application for loan rehabilitation sent by GRC on April 27, 2012, which we call the "rehabilitation agreement," (4) a copy of Bible's payment history with the defendant guaranty agency United Student Aid Funds, Inc., and (5) a copy of a contract between USA Funds and Sallie Mae Corp.[1]

[1] Bible also attached to her amended complaint a legal brief filed by the Secretary of Education in *Educational Credit Mgmt. Corp.* v. *Barnes*, No. NA 00-0241-C-B/S (S.D. Ind.); GRC's interrogatory responses in *Bible* v. *General Revenue Corp.*, No. 12-CV-01236 (D. Minn.), and a June 26, 2008 newspaper article from *The Chronicle of Higher Education* concerning a contract between USA Funds and Sallie Mae. The brief was included as persuasive authority on a legal question. These two exhibits are not evidence, of course. When offered by a party opposing a Rule 12(b)(6) motion, however, and without converting the motion to one for summary judgment, such documents may be used to illustrate facts the party would be prepared to prove at the appropriate stage of the proceedings. A party opposing such a motion is free to elaborate upon the facts in a brief. *See, e.g.*, *Chavez* v. *Illinois State Police*, 251 F.3d 612, 650 (7th Cir. 2001) (court reviewing dismissal under Rule 12(b)(6) will consider new factual allegations on appeal provided they are consistent with complaint); *American Inter-Fidelity Exchange* v. *American Re-Insurance Co.*, 17 F.3d 1018, 1022 (7th Cir. 1994) (plaintiff may point to facts consistent with complaint to show ability to prevail); *Early* v. *Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (7th Cir. 1992) (plaintiff may allege additional facts without evidentiary support to oppose motion to dismiss). There is no reason she may not also add even non-evidentiary materials (such as newspaper articles) to illustrate what she plans to prove, especially in light of the post-*Iqbal* uncertainty about the federal pleading standard of "plausibility."

A. *The Higher Education Act and Regulatory Background*

Congress enacted the Higher Education Act of 1965 (HEA or the Act), now codified as amended at 20 U.S.C. § 1001 *et seq.*, "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 and internal quotation marks omitted); *see also* 20 U.S.C. § 1070(a) (identifying purpose of the statute). Among other things, the Act created the Federal Family Education Loan Program (FFELP), "a system of loan guarantees meant to encourage lenders to loan money to students and their parents on favorable terms." *Chae* v. *SLM Corp.*, 593 F.3d 936, 938-39 (9th Cir. 2010) (footnote omitted). The Secretary of Education administers the FFELP and has issued regulations to carry out the program.

In general, the FFELP regulates three layers of student loan transactions: (1) between lenders and borrowers, (2) between borrowers and guaranty agencies, and (3) between guaranty agencies and the Department of Education. *See Chae*, 593 F.3d at 939. Under the program, lenders use their own funds to make loans to students attending postsecondary institutions. These loans are guaranteed by guaranty agencies and reinsured by the federal government. *See* 20 U.S.C. § 1078(a)-(c). Because of the reinsurance commitment, the federal government serves as the ultimate guarantor on each loan.

This lawsuit deals primarily with the second layer of transactions—the relationship between a student borrower who has defaulted for the first time and her guaranty agency. When a borrower defaults on a loan and the lender is unable to recover the amount despite due diligence, the lender notifies the guaranty agency of the default and the guaranty agency purchases the loan from the lender. *See Chae*, 593 F.3d at 939. Once the lender has transferred the debt to the guaranty agency, that agency may recover its losses from the Department of Education. *See* 20 U.S.C. § 1078(c)(1)(A), (E); 34 C.F.R. § 682.406(a). The guaranty agency must then take numerous steps to collect the defaulted student loan. The regulations at issue here relate to this stage of the process.

To understand these regulations, some background is helpful. In the mid-1980s, Congress grew concerned that federal taxpayers were effectively footing the bill for the costs of collecting defaulted student loans. In 1986 Congress amended the HEA to require guaranty agencies to assess collection costs against borrowers to prevent these costs from being passed on to federal taxpayers. *See Black* v. *Educational Credit Mgmt. Corp.*, 459 F.3d 796, 799 (7th Cir. 2006). The relevant statutory provision provides simply that "a borrower who has defaulted on a loan * * * shall be required to pay * * * reasonable collection costs." 20 U.S.C. § 1091a(b)(1). Congress chose not to define the meaning of "reasonable collection costs" in the statute and instead "left it up to the Secretary [of Education] to interpret that term through

regulations." *Black*, 459 F.3d at 799; 20 U.S.C. § 1082(a)(1) (delegating authority to the Secretary of Education to "prescribe such regulations as may be necessary to carry out the purposes" of FFELP).

The regulations define "reasonable collection costs." Two regulations are central to this lawsuit.[2] We describe these regulations in detail below, and we ultimately agree with the interpretation of the Secretary of Education, which is consistent with Bible's. In short, 34 C.F.R. § 682.405 provides that guaranty agencies must create loan rehabilitation programs for all borrowers who have enforceable promissory notes, and 34 C.F.R. § 682.410 establishes fiscal, administrative, and enforcement requirements that a guaranty agency must satisfy to participate in the FFELP. One requirement is that a guaranty agency must give a borrower who has defaulted notice and the opportunity to enter into a repayment agreement before it assesses collection costs or reports the default to a consumer reporting agency. 34 C.F.R. § 682.410(b)(5)(ii)(D). The guaranty agency is not

[2] The FFELP regulations have been revised several times since 2006, when Bible signed the MPN. Her MPN provides that any amendment to the HEA and its associated regulations "governs the terms of any loans disbursed on or after the effective date of such amendment, and such amended terms are hereby incorporated into this MPN." App. 122. The amended complaint does not specify when disbursements to Bible took place. In the absence of any dispute, and because Bible defaulted in 2012, we apply the regulations that were in effect between July 1, 2010 and June 30, 2014.

permitted to charge collection costs to the borrower if (1) this is the first time the borrower has defaulted, (2) she enters into a repayment agreement within 60 days of receiving notice that the guaranty agency has paid the default claim, and (3) she complies with that agreement. Imposing collection costs on a borrower under these circumstances would be "unreasonable" within the meaning of 20 U.S.C. § 1091a(b)(1).

B. *Bible's Loan, Default, and Decision to Enter into the Rehabilitation Agreement*

In June 2006, Bible obtained a student loan. The written agreement governing her loan is the Federal Stafford Loan Master Promissory Note (MPN), which identifies Citibank as the "Lender" and defendant United Student Aid Funds (USA Funds) as the "Guarantor, Program, or Lender." The MPN expressly incorporates the Higher Education Act and its associated regulations into the terms of the contract: "Loans disbursed under this MPN are subject to the annual and aggregate loan limits specified in the Higher Education Act of 1965, as amended, 20 U.S.C. [§] 1070, et seq., and applicable U.S. Department of Education regulations (collectively referred to as the 'Act')."

The contract term covering "late charges and collection costs" states:

> The lender may collect from me: (i) a late charge for each late installment payment if I fail to make any part of a required

> installment payment within 15 days after it becomes due, and (ii) any other charges and fees *that are permitted by the Act for the collection of my loans.* If I default on any loans, I will pay reasonable collection fees and costs, plus court costs and attorney fees.

(Emphasis added.) The "governing law and notices" term provides: "The terms of this MPN will be interpreted in accordance with the applicable federal statutes and regulations, and the guarantor's policies. Applicable state law, except as preempted by federal law, may provide for certain borrower rights, remedies, and defenses in addition to those stated in this MPN."

In 2012, Citibank determined that Bible was in default and transferred the debt to USA Funds, which paid Citi-bank's default claim. To comply with its obligations under the HEA and its associated regulations, USA Funds, through its agent General Revenue Corp. (GRC), mailed Bible a form letter dated April 12, 2012 saying that her loan was in default and identifying several options for resolving her debt, including the opportunity for loan rehabilitation. This default letter included a table with the following information:

	Current Principal	Current Interest	Current Collection Cost Balance	Current Other Charges	Current Interest Rate
Citibank, N.A.	6556.64	32.94	0.00	0.00	6.800%
Citibank, N.A.	6934.09	34.83	0.00	0.00	6.800%
Citibank, N.A.	2186.35	11.07	0.00	0.00	6.800%
Citibank, N.A.	2295.07	11.61	0.00	0.00	6.800%

The letter noted that Bible's current total amount due was $18,062.60.

Between April 12 and April 25, Bible and her attorney spoke to GRC on the phone three times to negotiate a loan rehabilitation agreement. Bible and GRC agreed on a rehabilitation plan requiring monthly payments of $50. On April 27, GRC faxed Bible a form rehabilitation agreement. Bible promptly signed the agreement and returned it by fax on April 30, 2012.

The rehabilitation agreement included another table, identical to the one displayed in the default letter except for the current interest column:

	Current Principal	Current Interest	Current Collection Cost Balance	Current Other Charges	Current Interest Rate
Citibank, N.A.	6556.64	51.24	0.00	0.00	6.800%
Citibank, N.A.	6934.09	54.18	0.00	0.00	6.800%
Citibank, N.A.	2186.35	17.22	0.00	0.00	6.800%
Citibank, N.A.	2295.07	18.06	0.00	0.00	6.800%

The agreement also said that Bible's current total amount due was $18,112.85. Accumulating interest accounted for the $50.25 increase in Bible's total balance. The figures for her "current collection cost balance" and "current other charges" remained at all times $0.

Five paragraphs above the signature line, toward the end of the rehabilitation agreement, the following language appears:

> Once rehabilitation is complete, collection costs that have been added will be reduced to 18.5% of the unpaid principal and accrued interest outstanding at the time of Loan Rehabilitation. Collection costs may be capitalized at the time of the Loan Rehabilitation by your new lender, along with outstanding

accrued interest, to form one new principal amount.

The paragraph immediately above the signature line states: "By signing below, I understand and agree that the lender may capitalize collection costs of 18.5% of the outstanding principal and accrued interest upon rehabilitation of my loan(s)."

After signing the rehabilitation agreement, Bible made nine on-time payments of $50. Although she fully complied with her obligations under this agreement, USA Funds assessed collection costs against her in the amount of $4,547.44. It applied her monthly payments toward the collection costs rather than the principal. When Bible filed this lawsuit, she had not completed the rehabilitation process. (Her loan had not yet been sold to an eligible lender.) She remains current on her loan under the terms of the rehabilitation agreement.

C. *Procedural History*

Bible filed a complaint individually and on behalf of a proposed class of other borrowers who had entered into loan agreements under the HEA but defaulted, later entered into similar rehabilitation agreements, and were assessed collection costs. She moved to certify the class and then filed an amended complaint alleging breach of contract under Indiana law and a violation of RICO, 18 U.S.C. § 1962(c). USA Funds moved to dismiss. The district court granted the motion to dismiss and entered a final

judgment dismissing both claims with prejudice. It also denied as moot Bible's motion for class certification. Bible appeals the district court's decision regarding both claims. After oral argument, we invited the Secretary of Education to file an *amicus* brief addressing his interpretation of the relevant statutory framework and federal regulations. He did so, and the parties have responded to those views.

II. *Analysis*

We conclude that (A) Bible has stated a viable breach of contract claim under Indiana law; (B) federal law does not preclude Bible from pursuing this state-law claim; and (C) Bible has stated a viable RICO claim under federal law, though it remains to be seen whether she can support that claim with evidence of fraudulent intent.

A. *Breach of Contract Claim*

"Under Indiana law, the elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages." *U.S. Valves, Inc.* v. *Dray*, 190 F.3d 811, 814 (7th Cir. 1999), citing *Fowler* v. *Campbell*, 612 N.E.2d 596, 600 (Ind.App.1993). The parties agree that the MPN is a valid contract and that it governs the terms of Bible's loan, including the consequences of her default. They disagree, however, about whether the amended

complaint has adequately pled a breach of the MPN and resulting damages.[3]

1. *Breach*

a. *Incorporation by Reference*

Bible alleges that USA Funds breached the MPN by assessing collection costs even though she timely entered into a repayment agreement and complied with her obligations under that agreement. She argues that the MPN incorporated federal regulations that prohibit guaranty agencies from imposing collection costs against first-time defaulters who promptly agree to repay their loans within 60 days of receiving notice from the guaranty agency that it has paid the lender's default claim and who have complied with that agreement. She relies on 34 C.F.R. §§ 682.405 and 682.410 and language in the MPN to the effect that the guaranty agency can collect from the borrower only "charges and fees that are permitted by the Act."

We agree with Bible that the MPN incorporated the HEA and its associated regulations. "Other writings, or matters contained therein, which are referred to in a written contract may be regarded as

[3] USA Funds argues that the rehabilitation agreement is not a valid contract because it was not supported by consideration. We do not reach this issue because Bible's breach of contract claim alleges a breach of the MPN, not the rehabilitation agreement.

incorporated by the reference as a part of the contract and, therefore, may properly be considered in the construction of the contract." *I.C.C. Protective Coatings, Inc.* v. *A.E. Staley Mfg. Co.*, 695 N.E.2d 1030, 1036 (Ind.App.1998); *see also*, *e.g.*, *Jones* v. *City of Logansport*, 436 N.E.2d 1138, 1148 (Ind.App.1982) (contract incorporated federal occupational safety and health regulations). The page of the contract that sets out the terms of the loan refers to the HEA and its regulations no fewer than 16 times, though once would be enough. In addition to the more general governing law provision, which provides that the terms of the contract "will be interpreted in accordance with the applicable federal statutes and regulations," the specific term covering "late charges and collection costs" states that "[t]he lender may collect from me * * * any other charges and fees that are permitted by the Act." And the contract defines "the Act" as the HEA "and applicable U.S. Department of Education regulations."

USA Funds relies on a sentence in the MPN granting it the right to impose "reasonable collection fees and costs, plus court costs and attorney fees." USA Funds reads this language in isolation to mean that it can impose collection costs at any time after the borrower has defaulted. This interpretation fails to give weight to the preceding sentence, which limits the lender's power to impose only those charges and fees "that are permitted by the Act." Basic principles of contract law require a court to consider a contract's provisions together and in a way that harmonizes

them. *E.g.*, *Hinc* v. *Lime-O-Sol Co.*, 382 F.3d 716, 720 (7th Cir. 2004) (Indiana law). If USA Funds charged Bible collection costs in violation of the HEA and its regulations, then it breached the contract.

b. *Requirements for Imposing Collection Costs*

Bible has plausibly alleged a breach of the MPN by alleging that USA Funds assessed collection costs that were not authorized by the Higher Education Act and its regulations. This conclusion is supported by two independent grounds. The author of this opinion agrees with the Secretary of Education and Bible that under the best interpretation of the statutes and regulations, the collection costs assessed here were prohibited. Cf. *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. ___, 135 S.Ct. 1199, 1208 n. 4, 191 L.Ed.2d 186 (2015) ("Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says.").

Second, this author and Judge Flaum agree that even if this were not the best interpretation of the statutes and accompanying regulations, it is at least a reasonable one, and we defer to that interpretation because it reflects the reasoned position of the Secretary of Education, who is tasked with administering the program. *See Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Auer*

v. *Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

i. *The Statutory and Regulatory Requirements*

Beginning with interpretation without deference to the agency, Bible acknowledges that guaranty agencies are required to impose collection costs on borrowers who have defaulted in certain circumstances. Both the HEA itself and the implementing regulations make this clear. *See* 20 U.S.C. § 1091a(b)(1) ("[A] borrower who has defaulted on a loan * * * shall be required to pay * * * reasonable collection costs."); *id.* § 1078-6(a)(1)(D)(i)(II)(aa) (upon successful rehabilitation, a guaranty agency may, in order to defray collection costs, "charge to the borrower an amount not to exceed 18.5 percent of the outstanding principal and interest at the time of the loan sale"); 34 C.F.R. § 682.410(b)(2) ("[T]he guaranty agency shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan.").[4] Bible argues, however, that the regulations prohibit USA Funds from imposing collection costs in her circumstances: a first-time defaulter who she promptly agreed to enter into a rehabilitation agreement within 60 days of receiving notice that USA Funds

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[4] Again, this opinion cites and quotes the versions of the statutes and regulations applicable to Bible's loan. For example, the 18.5% cap on collection costs has since been reduced to 16%.

had paid her lender's default claim, and who has complied with that agreement. She contends that imposing collection costs in these circumstances is "unreasonable" under 20 U.S.C. § 1091a(b)(1).

Two key regulations define the phrase "reasonable collection costs" in § 1091a(b)(1). The first regulation, 34 C.F.R. § 682.405, requires guaranty agencies to create loan rehabilitation programs for all borrowers that have enforceable promissory notes. These programs are designed to give eligible borrowers an opportunity to rehabilitate defaulted loans so that, upon successful rehabilitation, the loans may be purchased by eligible lenders and removed from default status. 34 C.F.R. § 682.405(a).[5]

A loan is considered rehabilitated only after two requirements are met: (1) the borrower has timely made nine out of ten payments required under a monthly repayment agreement, and (2) the loan has been sold to an eligible lender. 34 C.F.R. § 682.405(a)(2)(i)-(ii). Subsection (b) of this regulation then establishes specific requirements for terms that must be included in the rehabilitation agreement. For example, the guaranty agency must provide the borrower with a written statement confirming the borrower's "reasonable and affordable payment amount" and "inform[ing]

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[5] Some loans, such as loans for which a judgment has already been obtained, are exempted from this provision. *See* 34 C.F.R. § 682.405(a)(1). None of these exemptions is relevant here.

the borrower of the amount of the collection costs to be added to the unpaid principal at the time of the sale." 34 C.F.R. § 682.405(b)(1)(vi).

The second regulation, 34 C.F.R. § 682.410, is even more specific. It establishes fiscal, administrative, and enforcement requirements that a guaranty agency must satisfy to participate in the FFELP. Paragraph (b)(2) addresses collection costs:

> Collection charges. Whether or not provided for in the borrower's promissory note and subject to any limitation on the amount of those costs in that note, the guaranty agency shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim. These costs may include, but are not limited to, all attorney's fees, collection agency charges, and court costs. [Subject to certain exceptions not relevant here], the amount charged a borrower must equal the lesser of—
>
> > (i) The amount the same borrower would be charged for the cost of collection under the formula in 34 C.F.R. [§] 30.60; or
> >
> > (ii) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

34 C.F.R. § 682.410(b)(2). This paragraph makes clear that guaranty agencies must charge a borrower

reasonable collection costs, and it establishes a cap on the maximum *amount* that can be charged by the guaranty agency. Paragraph (b)(2), however, does not specify the *circumstances* under which these costs may be assessed. That issue is addressed by other portions of § 682.410, which create procedural safeguards for student borrowers.

First, some context. Guaranty agencies have two primary ways of pushing student-borrowers to repay their defaulted loans: (1) reporting the delinquent account to a consumer reporting agency (which lowers the borrower's credit rating) and (2) assessing collection costs against the borrower. Because the Department of Education was concerned about recent graduates facing these adverse consequences without first being given an opportunity to cure their defaults, it created protections in § 682.410(b)(5)(ii). It provides that guaranty agencies must take certain actions before either reporting the default or assessing collection costs:

> The guaranty agency, after it pays a default claim on a loan *but before it reports the default to a consumer reporting agency or assesses collection costs against a borrower*, shall, within the timeframe specified in paragraph (b)(6)(ii) of this section, provide the borrower with—
>
> > (A) Written notice that meets the requirements of paragraph (b)(5)(vi) of this section regarding the proposed actions;

> (B) An opportunity to inspect and copy agency records pertaining to the loan obligation;
>
> (C) An opportunity for an administrative review of the legal enforceability or past-due status of the loan obligation; and
>
> (D) An opportunity to enter into a repayment agreement on terms satisfactory to the agency.

34 C.F.R. § 682.410(b)(5)(ii) (emphasis added).

This provision does not specify a particular timeframe for these actions, but it includes two cross-references that do. First, subparagraph (b)(6)(ii) requires the guaranty agency to send the written notice mentioned in (b)(5)(ii) within 45 days of the date it pays the lender's default claim. Second, subparagraph (b)(5)(iv)(B) requires the agency to give the borrower at least 60 days from the date of the initial notice to request administrative review of the loan.

Subparagraph (b)(5)(ii) effectively creates a safe harbor for borrowers who find themselves in default for the first time. When a borrower is first notified that a guaranty agency has paid a default claim on her loan, she has a 60-day window to request administrative review of the debt or to enter into a repayment agreement with the agency. If she does not take either action, the guaranty agency can then take collection actions against her, report her default to a consumer reporting agency, and assess collection

costs against her in the amount specified by § 682.410(b)(2).

To be sure, subparagraph (b)(5)(iv)(B) mentions the opportunity to request administrative review of the loan obligation, not the opportunity to enter into a repayment agreement with the agency. But that is not a problem for Bible. Her point is that subparagraph (b)(5)(ii) requires the guaranty agency to provide the borrower with all four things before reporting the debt to a consumer reporting agency or assessing collection costs, and one of those things (administrative review) triggers a waiting period of at least 60 days. The regulations do not force the borrower to choose between requesting administrative review and entering into a repayment program. The borrower has a right to request administrative review and then to decide whether to enter into a repayment agreement. Accordingly, the borrower has at least 60 days to enter into an alternative repayment agreement. That Bible did not request administrative review of her loan obligation in this case is beside the point; she had at least 60 days to do so, and before that time ran out, she entered into the rehabilitation agreement.

This understanding is confirmed by § 682.410(b)(6)(ii), which requires the guaranty agency to inform the borrower "that if he or she does not make repayment arrangements acceptable to the agency, the agency will promptly initiate procedures to collect the debt," such as garnishing her wages, filing a civil suit, or taking her income tax refunds. 34 C.F.R.

§ 682.410(b)(6)(ii). What would be the point of warning the borrower that declining to make repayment arrangements would trigger costly debt collection activities if the guaranty agency could initiate these procedures and assess those costs regardless of whether she agrees to repay?

That the regulations create this sort of safe harbor is not surprising. Under USA Funds' interpretation of the regulations, a guaranty agency could assess collection costs against a borrower even though it was *never* forced to "initiate procedures to collect the debt." This would allow the guaranty agency to charge for costly actions that it might never need to take, such as wage garnishment or filing a civil suit. This case illustrates the point. USA Funds assessed over $4,500 in collection costs even though it merely sent one letter, sent and received one fax, spoke to Bible and her attorney on the phone several times, and cashed Bible's monthly checks.

The safe harbor of subparagraph (b)(5)(ii) also creates an incentive for first-time defaulters to rehabilitate their loans by voluntary repayment. If first-time defaulters knew that they would face collection costs regardless of whether they agree to repay, they would have less incentive to enter into the repayment program voluntarily. These regulations are designed to reward cooperation.

This concept of providing a borrower with notice and an opportunity to resolve the default before being subject to adverse consequences, such as credit

reporting or collection costs, is not new. When the Department first incorporated this concept into the FFELP regulations in 1992, it was actually borrowing from a requirement that had been imposed on guaranty agencies back in 1986 under the federal tax refund offset program. Under that program, guaranty agencies were required to provide borrowers with notice of the proposed offset and an opportunity to avoid that offset by entering into a satisfactory repayment agreement. *See* Letter from Lynn B. Mahaffie, Dep't of Education, Dear Colleague Letter Gen-15-14, at 2-3 (July 10, 2015). The disputed regulations here are based on that same model: the defaulted borrower must be given an opportunity to avoid the adverse consequences by promptly agreeing to repay the debt voluntarily.

The intent to create this safe harbor is further shown by a related statutory provision dealing with credit reporting. Under the HEA, Congress expressly provided that before reporting the default to a consumer reporting agency, the guaranty agency must provide the borrower with notice that the loan will be reported as in default "*unless* the borrower enters into repayment." 20 U.S.C. § 1080a(c)(4) (emphasis added). "[I]f the borrower has not entered into repayment within a reasonable period of time," *then* the guaranty agency must report the default. *Id.* The clear implication of § 1080a(c)(4) is that if the borrower timely enters into repayment, then the guaranty agency may *not* report the loan as in default.

The Secretary of Education issued the disputed regulation here, 34 C.F.R. § 682.410(b)(5), to implement this statutory requirement found in § 1080a(c)(4). *See* Letter from Lynn B. Mahaffie, Dep't of Education, Dear Colleague Letter Gen-15-14, at 2 (July 10, 2015), citing 57 Fed.Reg. 60280, 60355-56 (Dec. 18, 1992). Subparagraph (b)(5)(ii) discusses credit reporting and the assessment of collection costs in the exact same way: "but before it reports the default to a consumer reporting agency or assesses collection costs against a borrower * * * * " USA Funds has given us no persuasive reason to treat one of the stated adverse consequences of default (a bad credit report) differently from the other (collection costs). Yet that is precisely what its interpretation of the statutory framework and related regulations would do.

This conclusion is based on the text of the applicable statutory provisions, regulations, and the MPN itself. USA Funds does not squarely address the textual basis of Bible's claim but responds with three arguments. First, it argues that § 682.410(b)(2) allows it to impose collection costs, and the regulations do not explicitly prohibit the imposition of collection costs against a borrower who has defaulted but promptly entered into a repayment agreement. This argument is not persuasive. Paragraph (b)(2) merely establishes the background rule that the guaranty agency must assess "reasonable collection costs" against the borrower and establishes the cap on the maximum amount of costs that can be charged.

It does not say anything about the circumstances under which these costs can be imposed. As explained, other parts of the regulation such as subparagraph (b)(5)(ii) impose more specific requirements about the circumstances in which collection costs may be assessed.

Second, USA Funds contends that Bible's interpretation of § 682.410(b)(5)(ii)(D) ignores the fact that the repayment agreement must be "on terms satisfactory to the agency." It appears to argue that under this language the guaranty agency retains the discretion to assess collection costs whenever it wants. But this interpretation is inconsistent with the introductory paragraph of the regulation, which makes clear that the agency must provide the borrower an opportunity to enter into a repayment agreement *before* collection costs are assessed. Guaranty agencies do not have unfettered discretion to impose whatever collection costs they want, whenever they want, as the argument suggests.[6]

[6] A "rehabilitation" agreement is one type of authorized "repayment agreement." *See* 34 C.F.R. § 682.405(a)(2) (a loan is "rehabilitated" after the borrower has voluntarily "made and the guaranty agency has received nine of the ten payments required under a *monthly repayment agreement*") (emphasis added); *see also* 20 U.S.C. § 1078-6(a)(4) (provision authorizing loan rehabilitation refers to borrower making "scheduled repayments"); accord, Letter from Lynn B. Mahaffie, Dep't of Education, Dear Colleague Letter Gen-15-14, at 5 (July 10, 2015) ("Thus, a rehabilitation agreement is simply a specific form of a satisfactory repayment agreement.").

Contrary to USA Funds' arguments, Bible's interpretation still gives meaning to the phrase "on terms satisfactory to the agency." Under her theory, USA Funds retained the discretion to set the terms of the repayment agreement. After all, it transmitted the form document to Bible that became the rehabilitation agreement. It could have insisted on higher monthly payments, for example. USA Funds had the power to set the initial terms of its offer and to reject any proposed counteroffer. It did not have the power, though, to impose collection costs in contravention of § 682.410(b)(5)(ii).

Third, USA Funds points to another provision in the MPN: "If I default, the guarantor may purchase my loans and capitalize all then-outstanding interest into a new principal balance, and collection fees will become immediately due and payable." This provision, however, does not displace the guaranty agency's obligations under 34 C.F.R. § 682.410. The collection fees become "immediately due and payable" only after the guaranty agency has first provided the borrower with (1) written notice that meets the requirements spelled out in subparagraph (b)(5)(vi), (2) an opportunity to inspect and copy agency records pertaining to the loan obligation, (3) an opportunity for administrative review of the enforceability or past-due status of the loan obligation, and (4) an opportunity to enter into a repayment agreement. *See* 34 C.F.R. § 682.410(b)(5)(ii)(A)-(D). Interpreting the provision as USA Funds suggests would contradict § 682.410(b)(5)(ii). Recall, moreover, that USA

Funds had told Bible that she owed zero collection costs when she first defaulted. It was not until after she signed the rehabilitation agreement that she finally learned about the costs.

ii. *Deference to the Secretary of Education's Interpretation*

Even if the preceding analysis does not provide the best interpretation of the statutory framework and accompanying regulations, the author and Judge Flaum agree the same result would still be correct based on the deference we owe to the Secretary of Education, who is tasked with administering the FFELP and issuing the implementing regulations.

Because the HEA does not define "reasonable collection costs," Congress "explicitly left a gap for the agency to fill," *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and delegated to the Secretary of Education authority to "prescribe such regulations as may be necessary to carry out the [Act's] purposes." 20 U.S.C. § 1082(a)(1). The Secretary exercised that expressly delegated authority by issuing 34 C.F.R. § 682.410, "which establishes the basic rules for the assessment of collection costs against borrowers who have defaulted on their student loans." *See Black* v. *Educational Credit Mgmt. Corp.*, 459 F.3d 796, 800 (7th Cir. 2006). The Secretary's reasonable interpretation of the Act is entitled to substantial deference. *See Chevron*, 467

U.S. at 843-44, 104 S.Ct. 2778. And the agency's interpretation of its own regulations is "controlling" unless it is (1) plainly erroneous or inconsistent with the regulation, (2) does not reflect the agency's fair and considered judgment on the matter in question, or (3) represents a *post hoc* rationalization advanced by the agency seeking to defend past agency action against attack. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. ___, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012), citing *Auer* v. *Robbins*, 519 U.S. 452, 461-62, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (some citations omitted).

The Secretary's interpretation of "reasonable collection costs" in 20 U.S.C. § 1091a(b)(1) is reasonable. The Secretary interprets "reasonable" to mean that similar costs must be assessed against borrowers who are at similar stages of delinquency. Under the Secretary's view, a borrower who promptly enters into a voluntary repayment agreement and complies with that agreement, thereby obviating the need for the guarantor to initiate costly debt collection procedures, is not similarly situated to someone who does not, thereby forcing the guarantor to undertake costly debt collection procedures.

Even if we thought the interpretation urged by USA Funds were better in the abstract, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778 (footnote omitted); *see also Michigan* v. *EPA*, 576 U.S. ___, 135 S.Ct. 2699, 2707, 192

L.Ed.2d 674 (2015) ("*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers."); *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985) ("This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.").

USA Funds has not shown that the Secretary's interpretation is unworthy of deference. The Secretary's decision to interpret 34 C.F.R. § 682.410(b)(5)(ii) as creating a safe harbor for borrowers in Bible's position is not plainly erroneous or inconsistent with the regulation. It reflects the agency's fair and considered judgment on the question. And it does not represent a *post hoc* rationalization by the agency seeking to defend past agency action against attack. There is no indication from the record that the Secretary has ever taken a contrary position since the regulation was first adopted in 1992. And as explained above, when the Department of Education first issued this regulation, it was merely borrowing from a requirement that had previously been imposed on guaranty agencies under the federal tax refund offset program. *See* Letter from Lynn B. Mahaffie, Dep't of Education, Dear Colleague Letter Gen-15-14,

at 2-3 (July 10, 2015) (explaining history of the "notice and opportunity to resolve" concept).

In addition, the Secretary took this same position in a legal brief filed in an earlier case in this circuit, *Educational Credit Mgmt. Corp.* v. *Barnes*, 318 B.R. 482 (S.D.Ind.2004), *aff'd sub nom. Black* v. *Educational Credit Mgmt. Corp.*, 459 F.3d 796 (7th Cir. 2006), interpreting § 682.410(b)(5) in the same manner it does here. Both its reasoning and its conclusion have remained exactly the same.[7] Cf. *Christopher*, 132 S.Ct. at 2165-68 (no *Auer* deference where agency's interpretation would have imposed "massive liability" for conduct that occurred before the announcement of the interpretation, agency's announcement was preceded by long period of acquiescence to industry practice, and agency materially changed its reasoning during course of litigation).

To summarize, Bible has alleged sufficiently that USA Funds breached its contract with her by assessing over $4,500 in collections costs after she timely entered into and complied with a monthly

[7] *See* App. 54-55 ("Department rules require the guarantor who acquires a loan by reason of the default of the borrower * * * to charge collection costs *only after* providing the debtor an opportunity to contest the debt and to enter into a repayment arrangement for the debt * * * * The regulations therefore direct guarantors to charge collection costs *only* to those debtors who cause the guarantor to incur collection costs by failing to agree promptly to repay voluntarily * * * * *Only* those defaulters who ignore this opportunity face collection cost charges.") (emphases added).

repayment agreement, in violation of the applicable regulations that were incorporated into the parties' contract.

2. *Damages*

We next address whether Bible has adequately pled damages. USA Funds argues she has not because she defaulted on her loan and continues to owe money on that obligation. This argument is meritless. Of course Bible continues to owe money under her loan obligation. That does not mean she has not been damaged by USA Funds' imposing over $4,500 in unauthorized collection costs. These costs represent new charges that have been added to her accrued interest and principal, thereby increasing the total amount she owes on her account. Because these charges were not permitted by her contract, she has plausibly alleged damages, even if the remedy might take the form of a credit to her account rather than cash in her pocket. Bible has plausibly alleged a viable breach of contract claim under state law.

B. *Preemption & the "Disguised Claim" Theory*

We next examine whether federal law preempts or otherwise displaces Bible's state law claim. "Preemption can take on three different forms: express preemption, field preemption, and conflict preemption." *Aux Sable Liquid Products* v. *Murphy*, 526 F.3d 1028, 1033 (7th Cir. 2008). USA Funds

relies on conflict preemption. It also argues that the breach of contract claim is nothing more than a "disguised claim" for a violation of the Higher Education Act and is thus "preempted" by the HEA. Neither theory has merit. Federal law does not preempt or otherwise displace Bible's breach of contract claim.

1. *Conflict Preemption*

Conflict preemption can occur in two situations: (1) when "it is impossible for a private party to comply with both state and federal requirements," or (2) when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (citations and internal quotation marks omitted). USA Funds does not contend that it would be impossible, without violating federal law, for it to comply with the state law duty Bible's suit seeks to impose. Instead, it invokes the second species of conflict preemption known as "obstacle" preemption. USA Funds argues that entertaining Bible's breach of contract claim would frustrate Congress's goal of "uniformity" because it would require many state and federal courts to interpret HEA regulations in potentially inconsistent ways. We reject this contention.

This argument proves far too much. Under this theory, conflict preemption would occur any time a court would be required to interpret a regulation to

decide a case arising under the common law or other sources of law independent of the regulation itself. But courts interpret federal regulations all the time without triggering preemption concerns. The mere possibility that a court would need to interpret a regulation does not itself establish preemption. *See CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993) ("To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter * * * * "), citing *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-84, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); *English* v. *General Electric Co.*, 496 U.S. 72, 87, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) ("Ordinarily, the mere existence of a federal regulatory or enforcement scheme, even one as detailed as § 210 [of the Energy Reorganization Act of 1974], does not by itself imply pre-emption of state remedies."); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) ("To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive."); *Keams* v. *Tempe Technical Institute, Inc.*, 39 F.3d 222, 226-27 (9th Cir. 1994) (holding that detailed regulatory scheme under the HEA did not imply preemption of state tort remedies against accreditors). That is the very point of 34 C.F.R. § 682.410(b)(8), which provides that paragraphs (b)(2), (5), and (6)—the provisions at issue here—

preempt only "State law * * * that would *conflict with or hinder satisfaction* of the requirements of these provisions." (Emphasis added.)

The real question is whether entertaining Bible's breach of contract claim actually conflicts with the HEA and its associated regulations. It does not. We begin with *Wigod* v. *Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012), where we dealt with a nearly identical issue in the context of the federal Home Affordable Mortgage Program (HAMP). In *Wigod*, the plaintiff brought state law claims against her mortgage service provider, including a breach of contract claim alleging that the defendant breached a written agreement that incorporated the HAMP requirements. Like USA Funds in this case, the defendant in *Wigod* argued that the state law claims were preempted by the federal guidelines under principles of conflict preemption. We rejected the argument. 673 F.3d at 577-81.

Although *Wigod* dealt with a different regulatory framework, its reasoning applies directly here. Bible's claim is that USA Funds breached the MPN by acting contrary to the federal regulations incorporated into the contract. Just as in *Wigod*, "the state-law duty allegedly breached is imported from and delimited by federal standards." *Wigod*, 673 F.3d at 579. In this situation, federal law simply provides the standard of compliance, and the parties' duties are actually enforced under state law. *See id.* at 579-80. There is no conflict.

The Fourth Circuit reached the same conclusion regarding the HEA in *College Loan Corp.* v. *SLM Corp.*, 396 F.3d 588 (4th Cir. 2005). In that case, the plaintiff sued Sallie Mae and its affiliates under state law, alleging that they had a contract that incorporated the requirements of the HEA and its regulations. The district court held that the state law claims were preempted. The Fourth Circuit reversed. The court held that the plaintiff's state law claims were not preempted even though they relied on establishing a violation of the HEA and its regulations:

> This point is particularly obvious in relation to [plaintiff's] contract claim. As parties to the Agreement, [the parties] voluntarily included federal standards (the HEA) in their bargained-for private contractual arrangement. Both *expressly agreed* to comply with the HEA. In that context, [defendants'] argument that enforcement of the Agreement's terms is preempted by the HEA boils down to a contention that it was free to enter into a contract that invoked a federal standard as the indicator of compliance, then to proceed to breach its duties thereunder and to shield its breach by pleading preemption. In this case at least, federal supremacy does not mandate such a result.

Id. at 598 (citations omitted). The Fourth Circuit's reasoning applies with equal force here. Unable to distinguish *Wigod* or *College Loan Corp.* in meaningful ways, USA Funds seeks help from *Chae* v. *SLM*

Corp., 593 F.3d 936 (9th Cir. 2010). But *Chae* actually reinforces our conclusion. There, borrowers sued Sallie Mae under state law for its handling of their student loans. Applying principles of conflict preemption, the Ninth Circuit held that the claims were preempted by the HEA because "[p]ermitting varying state law challenges across the country, with state law standards that may differ and impede uniformity" would pose an obstacle to Congress's purpose in creating the FFELP. *Chae*, 593 F.3d at 945. The Ninth Circuit, however, carefully distinguished *College Loan Corp.* on grounds directly applicable here, saying that the plaintiff in *College Loan Corp.* had "sought to enforce FFELP rules, not to vary them." *Id.* at 946, citing 396 F.3d at 591-94. In *Chae*, though, the plaintiffs were "not seek[ing] to buttress the FFELP framework, but rather to alter it in their home state." *Id.* They were asking the court to impose a *higher* standard of compliance than was required by federal law. Such claims are preempted, held *Chae*, but that reasoning does not apply here.

Like the plaintiff in *College Loan Corp.* and unlike those in *Chae*, Bible is not attempting to require more of the defendant than was already required by the HEA and its regulations. She seeks only to enforce the federal standards that the parties agreed to in their contract. This case is therefore not different from *Wigod*, where we held that state law claims attempting to enforce the requirements of the HAMP guidelines were not preempted by federal law. In *Wigod, College Loan Corp.*, and now this case, the

plaintiffs' state law claims were complementary to, not in conflict with, the federal requirements. Bible's claim is not preempted by federal law.

2. *The "Disguised Claim" Theory*

In addition to its formal preemption argument, USA Funds argues that Bible's state law claim is "preempted" because it is nothing more than a "disguised claim" for a violation of the HEA, and the HEA does not provide a private right of action. We considered and rejected this same theory in *Wigod*. There the defendant-lender referred to it as an "end-run" theory rather than a "disguised claim" theory. The difference is merely semantic. The defense theory in both cases is that the lack of a private right of action under a regulatory statute necessarily preempts or otherwise displaces a state law cause of action that makes the violation of that regulatory statute an element of the claim. This theory is mistaken at its core: "The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law. To find otherwise would require adopting the novel presumption that where Congress provides no remedy under federal law, state law may not afford one in its stead." *Wigod*, 673 F.3d at 581 (citation omitted).

USA Funds attempts to distinguish *Wigod* on two grounds. First, it says there was no administrative enforcement scheme under the HAMP. That

is simply not true as a matter of fact. *See Spaulding* v. *Wells Fargo Bank, N.A.*, 714 F.3d 769, 773-74 (4th Cir. 2013) (describing administrative enforcement scheme under HAMP); *Wigod*, 673 F.3d at 556-57 (same).

Second, USA Funds contends that *Wigod* is distinguishable because there the Secretary of the Treasury had issued a directive saying that the HAMP must be implemented in compliance with state common law and statutes. *See Wigod*, 673 F.3d at 580. This does not distinguish *Wigod* either. We noted that the directive was additional evidence that federal law did not preempt state law. *See id.* (noting that Department of Treasury's "tacit view of its program's lack of preemptive force" was entitled to "some weight"). We did not suggest that our rejection of the end-run theory depended on this supplemental directive. (In fact, we discussed the supplemental directive in a different section in the opinion.) If anything, there is even less reason to find preemption in this case because USA Funds voluntarily agreed to comply with the only federal requirements that Bible is attempting to enforce. In *Wigod*, by contrast, the plaintiff had brought claims against the defendant under state tort law in addition to her breach of contract claim.

We reiterate the lesson from *Wigod.* The absence of a private right of action under federal law provides no reason to dismiss a state law claim just because the claim refers to or incorporates some element of the federal law. Congress's decision not to supply a

remedy under federal law does not necessarily mean that it also intended to displace state law remedies. The lack of a private right of action under the HEA itself does not preclude Bible's breach of contract claim.

C. *RICO Claim*

We now turn to Bible's civil RICO claim alleging a violation of 18 U.S.C. § 1962(c). Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). A civil remedy is available under 18 U.S.C. § 1964. To establish a violation of § 1962(c), Bible must eventually prove four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *E.g.*, *Jennings* v. *Auto Meter Products, Inc.*, 495 F.3d 466, 472 (7th Cir. 2007). USA Funds contends that Bible has failed to allege plausibly the existence of an enterprise, racketeering activity, or a pattern. Whether or not detailed allegations of each element (other than the alleged fraud) are required at the pleading stage, cf. *Johnson* v. *City of Shelby*, 574 U.S. ___, 135 S.Ct. 346, 347, 190 L.Ed.2d 309 (2014) (per curiam) (reversing dismissal for failure to invoke proper statute in complaint); *Runnion* v. *Girl Scouts of Greater Chicago*, 786 F.3d 510, 517-18, 528 (7th Cir. 2015) (reversing dismissal of complaint), we find

that Bible's allegations are sufficient. It remains to be seen whether she can marshal evidence to support her claim, but that's a matter for further proceedings in the district court.

1. *Enterprise*

RICO defines the term "enterprise" broadly to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An association-in-fact does not require any structural features beyond "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purposes." *Boyle* v. *United States*, 556 U.S. 938, 946, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009). But the definition does require that the defendant be a "person" that is distinct from the RICO enterprise. *United Food & Commercial Workers Unions & Employers Midwest Health Benefits Fund* v. *Walgreen Co.*, 719 F.3d 849, 853-54 (7th Cir. 2013) (citations omitted). Under § 1962(c), the plaintiff must also establish that the defendant "person" participated in the operation or management of the distinct enterprise. *Reves* v. *Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993).

Bible identifies USA Funds as the defendant "person" for purposes of RICO, and she defines the "enterprise" as an association-in-fact consisting of

USA Funds, GRC, and Sallie Mae. She alleges that the members of the enterprise associated for the common purpose of maximizing revenue before, during, and after the loan rehabilitation process by unlawfully imposing collection costs on borrowers who had defaulted. USA Funds uses GRC as its debt collector, and Sallie Mae is the parent company of GRC. Although Sallie Mae and USA Funds are "technically independent," Sallie Mae has purchased a number of USA Funds' departments and exerts "extensive financial and operational control" over USA Funds. Am. Compl. ¶ 95.

Our cases have distinguished between two situations: a run-of-the-mill commercial relationship where each entity acts in its individual capacity to pursue its individual self-interest, versus a truly joint enterprise where each individual entity acts in concert with the others to pursue a common interest. *See United Food & Commercial Workers*, 719 F.3d at 855 ("This type of interaction, however, shows only that the defendants had a commercial relationship, not that they had joined together to create a distinct entity for purposes of improperly filling * * * prescriptions."); *Crichton* v. *Golden Rule Ins. Co.*, 576 F.3d 392, 400 (7th Cir. 2009) (distinguishing "garden-variety marketing arrangement" comprised of distinct entities from RICO enterprise). This distinction is important. Without it, "every conspiracy to commit fraud that requires more than one person to commit is a RICO organization and consequently every fraud that requires more than one person to commit is a

RICO violation." *Stachon* v. *United Consumers Club, Inc.*, 229 F.3d 673, 676 (7th Cir. 2000), quoting *Bachman* v. *Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) (footnote and internal quotation marks omitted).

Mindful of this distinction, we conclude that Bible has pled more than a run-of-the-mill commercial relationship. Bible alleges a number of facts permitting the reasonable inference that, with respect to managing accounts before, during, and after the loan rehabilitation process, USA Funds, GRC, and Sallie Mae work as a single enterprise.

First, she alleges an unusual degree of economic interdependence among the entities. According to the amended complaint, USA Funds agreed to place all defaulted loans with Sallie Mae for portfolio management. Sallie Mae was then authorized to refer a large number of the defaulted loans to its "affiliates" or subsidiary debt collectors such as GRC. In addition, USA Funds committed to sell at least half of its rehabilitated loans to Sallie Mae. Under this arrangement, USA Funds not only paid Sallie Mae directly to manage its portfolio but also compensated Sallie Mae indirectly by using its affiliates and subsidiaries for debt collection and by agreeing to sell a large chunk of rehabilitated loans to Sallie Mae.

Second, Bible alleges that the entities do not operate as completely separate entities in managing the loan rehabilitation process. For example, she alleges that: the printout on top of the rehabilitation

agreement indicates that it was sent from a Sallie Mae fax machine; in answers to interrogatories in another lawsuit, GRC identified five Sallie Mae officials who had approved and provided input into the wording of GRC's collection correspondence, including the correspondence at issue in this case; Sallie Mae assumes responsibility for compliance with some of USA Funds' statutory duties, including the delivery of privacy policies to borrowers; Sallie Mae has agreed to a marketing plan under which Sallie Mae will promote USA Funds as a guaranty agency; Sallie Mae has agreed not to use another guaranty agency unless, despite Sallie Mae's best efforts, a school or lender insists; associate counsel at Sallie Mae recently appeared at a settlement conference in a Fair Debt Collection Practices Act lawsuit against GRC purporting to have settlement authority on behalf of GRC; and in another FDCPA lawsuit, GRC negotiated a settlement release that covered Sallie Mae and other entities "related to" Sallie Mae, including USA Funds, despite the fact that neither Sallie Mae nor USA Funds were named as defendants in the case.

These allegations distinguish this case from cases like *United Food & Commercial Workers*, 719 F.3d at 854-55 (noting that complaint failed to allege "that officials from either company involved themselves in the affairs of the other"), and *Crichton*, 576 F.3d at 400 (noting that plaintiff's claim "begins and ends" with the fraud allegedly committed by individual entity, not enterprise). Taken together, Bible's

allegations indicate a common purpose, relationships among the three entities associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purposes. *See, e.g.*, *Sykes* v. *Mel Harris & Associates, LLC*, 757 F. Supp. 2d 413, 426-27 (S.D.N.Y. 2010) (complaint plausibly alleged RICO enterprise comprised of debt-buying company, debt collection agency, process service company, and others).

USA Funds contends that even if there is an enterprise, USA Funds' own alleged actions could not amount to participation in the operation or management of the enterprise's affairs because USA Funds did not operate or manage the collection efforts related to Bible's defaulted loans. We disagree. Bible alleges that USA Funds "directed GRC to unlawfully and fraudulently impose collection costs [on] borrowers," Am. Compl. ¶ 88, and that "GRC carried out these instructions." *Id.*, ¶ 89. She also alleges that GRC secured a release for USA Funds and Sallie Mae in the FDCPA case mentioned above because "both [USA Funds] and Sallie Mae were intimately involved in GRC's debt collection activities." *Id.* ¶ 105.

USA Funds points out that merely performing a service for another entity is not sufficient to establish this element. That is correct as far as it goes. *See Goren* v. *New Vision Int'l, Inc.*, 156 F.3d 721, 728 (7th Cir. 1998) ("Indeed, simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under § 1962(c); instead, the individual

must have participated in the operation and management of the enterprise itself."). But that principle does not help USA Funds. If we were to apply it here, it might mean that GRC did not participate in the operation or management of the enterprise's affairs since GRC was hired by USA Funds to perform the debt collection activities. But the same cannot be said for USA Funds, which hired GRC, directed it to impose the collection costs at issue, and was "intimately involved" in GRC's debt collection activities more generally. Bible's amended complaint pleads factual content permitting the reasonable inference that USA Funds, in conjunction with Sallie Mae, actually directed the enterprise's debt collection activities even though GRC was the entity that dealt with the borrower most directly. She has plausibly alleged that USA Funds conducted or participated in the enterprise's affairs.

2. *Racketeering Activity and Fraudulent Intent*

USA Funds next argues that Bible has not plausibly alleged racketeering activity. "Racketeering activity" is defined in 18 U.S.C. § 1961(1)(B) to include mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. "The elements of mail fraud * * * are: '(1) the defendant's participation in a scheme to defraud; (2) defendant's commission of the act with intent to defraud; and (3) use of the mails in furtherance of the fraudulent scheme.'" *Williams* v. *Aztar Indiana Gaming Corp.*,

351 F.3d 294, 298-99 (7th Cir. 2003), quoting *United States* v. *Walker*, 9 F.3d 1245, 1249 (7th Cir. 1993). The elements of wire fraud are the same except that it requires use of interstate wires rather than mail in furtherance of the scheme. *E.g.*, *United States* v. *Green*, 648 F.3d 569, 577-78 (7th Cir. 2011).

Bible alleges both mail and wire fraud. Her allegations are subject to Federal Rule of Civil Procedure 9(b), which requires her to plead fraud with particularity. *E.g.*, *Slaney* v. *Int'l Amateur Athletic Federation*, 244 F.3d 580, 597 (7th Cir. 2001). As a result, Bible "must, at a minimum, describe the two predicate acts of fraud with some specificity and state the time, place, and content of the alleged false representations, the method by which the misrepresentations were communicated, and the identities of the parties to those misrepresentations." *Id.*

Bible's fraud allegations are based on the form default letter and rehabilitation agreement. According to the amended complaint, USA Funds, through its agent GRC, mailed the default letter telling Bible that her loan was in default. The letter said that her "current collection cost balance" and "current other charges" were zero. Like the default letter, the rehabilitation agreement, which was faxed, said that her "current collection cost balance" and "current other charges" were zero. She alleges that USA Funds uses form documents substantially similar to the default letter and rehabilitation agreement in its dealings with thousands of other borrowers who have defaulted on their loans.

Bible's theory of fraud is that the statements in the default letter and rehabilitation agreement that her "current collection cost balance" and "current other charges" were zero were false, misleading, or contained material omissions. They implied that collection costs would not be assessed against her if she promptly agreed to enter into a repayment program. According to the amended complaint, these statements were designed to deceive her into entering into the rehabilitation program by concealing the fact that thousands of dollars in collection costs would be imposed by the guaranty agency before she had completed the rehabilitation process.

USA Funds argues that Bible has not plausibly alleged fraud because the collection costs were permitted by federal regulations and because she has failed to allege that USA Funds intended to deceive her. Neither argument can justify dismissal under Rule 12(b)(6). Whether Bible can eventually come forward with evidence of fraudulent intent is a question for the district court on remand.

As discussed above, the collection costs were not permitted by federal regulations, at least as interpreted by the Secretary of Education. In addition, even if the costs had been permitted by the regulations, Bible alleges that USA Funds misled her in its correspondence leading to her agreeing to the repayment program. We recognize that the correspondence to Bible signaled that collection costs could be assessed in the future. Yet that same correspondence said that she owed no collection costs, which

could reasonably be understood as implying that there would be nothing to add in the future. A Rule 12(b)(6) motion to dismiss is not a suitable procedure for determining that these documents could not possibly have been misleading to Bible or other borrowers like her.

The question of USA Funds' intent also cannot be decided on the pleadings. At this stage of the litigation, Bible has plausibly alleged that USA Funds intended to deceive her. *See* Fed.R.Civ.P. 9(b) (fraudulent intent "may be alleged generally"). She alleges that it sent her a form saying that her collection costs were zero and that it made this representation intending to induce her to enter into a repayment program by hiding that she would be forced to pay over $4,500 in collection costs if she did. These representations could be deemed literally false. Even if they could avoid literal falsity, omission or concealment of material information can be sufficient to constitute mail or wire fraud. *See United States* v. *Morris*, 80 F.3d 1151, 1161 (7th Cir. 1996) ("We reiterated, moreover, that the statutes apply not only to false or fraudulent representations, but also to the omission or concealment of material information, even where no statute or regulation imposes a duty of disclosure."); *Emery* v. *American General Finance, Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995); *United States* v. *Biesiadecki*, 933 F.2d 539, 543 (7th Cir. 1991); *United States* v. *Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985).

The rehabilitation agreement warned Bible that collection costs could be capitalized at the time of rehabilitation by the new lender. *See* App. 139 ("Collection costs may be capitalized at the time of the Loan Rehabilitation by your new lender, along with outstanding accrued interest, to form one new principal amount."); *id.* ("By signing below, I understand and agree that the lender may capitalize collection costs of 18.5% of the outstanding principal and accrued interest upon rehabilitation of my loan(s)."). One straightforward reading of this language is that it authorized the new lender—not the guaranty agency—to capitalize *existing collection costs*, not to impose new ones, and then only after rehabilitation is complete (i.e., after the guaranty agency has sold the loan to a private lender).

At this preliminary pleading stage, we do not know USA Funds' state of mind when it sent the default letter or rehabilitation agreement. Bible has plausibly alleged that the statements in the default letter and the rehabilitation agreement were designed to induce her to enter into the repayment agreement while concealing that she would be assessed over $4,500 in collection costs if she did so. Her allegations of racketeering activity should survive the Rule 12(b)(6) motion to dismiss.[8]

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[8] On the RICO claims, USA Funds repeats the same argument it made on Bible's breach of contract claim, contending that she has failed to allege an injury. For the same reasons, we reject this contention. Bible's alleged injury is that she made

(Continued on following page)

3. ***Pattern***

We turn next to USA Funds' argument that Bible has failed to allege a pattern of racketeering activity. "A pattern of racketeering activity consists, at the very least, of two predicate acts of racketeering committed within a ten-year period." *Jennings* v. *Auto Meter Products, Inc.*, 495 F.3d 466, 472 (7th Cir. 2007), citing 18 U.S.C. § 1961(5). To prove a pattern, Bible will need to satisfy the "continuity plus relationship" test, which requires that the predicate acts be related to one another (the relationship prong) and that they pose a threat of continued criminal activity (the continuity prong). *Id.* at 473, quoting *Midwest Grinding Co.* v. *Spitz*, 976 F.2d 1016, 1022 (7th Cir. 1992). The relationship prong is satisfied "if the criminal acts 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *DeGuelle* v. *Camilli*, 664 F.3d 192, 199 (7th Cir. 2011), quoting *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 240, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). The continuity prong is satisfied by showing

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monthly payments for costs she did not owe, which constitutes a financial loss. Nothing more is required to plead an injury under § 1962(c). *See Haroco, Inc.* v. *American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (7th Cir. 1984) (holding that plaintiffs' allegations of excessive interest charges resulting from defendants' alleged fraudulent scheme to overstate the prime rate satisfied the injury requirement), *aff'd*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

either that the criminal behavior, although it has ended, was so durable and repetitive that it "carries with it an implicit threat of continued criminal activity in the future," *Midwest Grinding Co.*, 976 F.2d at 1023, or that the past conduct "by its nature projects into the future with a threat of repetition," *H.J. Inc.*, 492 U.S. at 241, 109 S.Ct. 2893.

Whether or not Bible needed to plead details of her pattern theory, cf. *Runnion* v. *Girl Scouts*, 786 F.3d at 528, Bible's allegations satisfy the relationship-plus-continuity test. She alleges that USA Funds, through its enterprise, unlawfully imposed collection costs on thousands of borrowers in default in the same manner it did to her. She alleges that USA Funds has sent the form document that became the rehabilitation agreement in this case more than 100,000 times over a period of several years. Bible also alleges that the conduct at issue is USA Funds' standard operating procedure and that it is continuous and ongoing. These allegations satisfy the relationship-plus-continuity test. *See*, *e.g.*, *Corley* v. *Rosewood Care Center, Inc.*, 142 F.3d 1041, 1050 (7th Cir. 1998) (relationship-plus-continuity test satisfied where plaintiff alleged defendant systematically overcharged residents at several nursing homes).

4. *Preemption*

We have one last loose end to tie up: the district court determined that Bible's RICO claim was "preempted" by the Higher Education Act. *See Bible* v.

United Student Aid Funds, Inc., 2014 WL 1048807, at *10. It is well settled that federal law does not preempt a federal law claim alleging a violation of another federal statute. Preemption is limited to conflicts between federal and state law. The alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute is another issue entirely. *See POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. ___, 134 S.Ct. 2228, 2236, 189 L.Ed.2d 141 (2014).

Realizing that the HEA does not preempt the RICO claim, USA Funds argues instead that the absence of a private right of action under the HEA precludes Bible's RICO claim because Bible's RICO theory alleges only a violation of the HEA. USA Funds relies principally on *McCulloch* v. *PNC Bank Inc.*, 298 F.3d 1217, 1226-27 (11th Cir. 2002) (per curiam), and *United Food & Commercial Workers Unions & Employers Midwest Health Benefits Fund* v. *Walgreen Co.*, No. 12 C 204, 2012 WL 3061859, at *4 (N.D.Ill. July 26, 2012), *aff'd on other grounds*, 719 F.3d 849 (7th Cir. 2013), for the proposition that non-compliance with a regulatory statute that does not itself provide a private right of action necessarily forecloses any RICO claim based on that non-compliance.

We are skeptical of this legal principle (our court has never adopted it), but we need not decide that question now because it is not presented by Bible's allegations. USA Funds' argument simply mischaracterizes Bible's theory. Her RICO claim is not based

on regulatory non-compliance. It is based on alleged misrepresentations and deception in the default letter and the rehabilitation agreement. Even if the regulations permitted USA Funds to assess the collection costs, Bible alleges that USA Funds committed fraud by concealing that these collection costs would be imposed when it sent the default letter and the rehabilitation agreement. Thus, Bible's RICO claim does not necessarily require her to prove that USA Funds violated the HEA or its regulations, even if such proof might strengthen her claims.[9] Even if we agreed with *McCulloch* and the district court in *United Food & Commercial Workers* on this issue, neither decision considered this alternative theory Bible is pursuing. *See McCulloch*, 298 F.3d at 1226-27 (lenders' failure to comply with HEA disclosure obligations was not actionable under RICO); *United Food & Commercial Workers*, 2012 WL 3061859, at *4 (noting that plaintiff's RICO claim depended on violation of regulatory statutes referenced in complaint). The absence of a private right of action under the HEA itself does not preclude Bible's RICO claim.

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[9] Suppose discovery or a former employee showed that USA Funds included certain language in the default letter or rehabilitation agreement to hide the extent of its non-compliance with the regulations. That might indicate that USA Funds intended to defraud borrowers, who might have reasonably relied on the regulatory framework to protect them. The point for our purposes, though, is that a violation of the HEA and its regulations is not essential to Bible's fraud claims. Even if the collection costs were permitted by the regulations, Bible's theory is that statements in the form documents sent to her were misleading.

Conclusion

Neither of Bible's claims is preempted or otherwise displaced by federal law, and she has plausibly alleged all of the elements of both claims. The judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

FLAUM, Circuit Judge, concurring in part and concurring in the judgment.

I join in full Judge Hamilton's analysis of USA Funds' preemption argument and Bible's RICO claim. With respect to Bible's breach of contract claim, I agree with the portion of the analysis that defers to the Secretary of Education's interpretation of the statute and corresponding regulations. However, I am unable to join subsection II.A.1.b.i of Judge Hamilton's opinion, which offers an alternative ground for holding that USA Funds was prohibited from assessing collection costs against Bible—that is, that the text of the regulations unambiguously supports Bible's interpretation of the statutory and regulatory scheme. Instead, I find the regulatory landscape sufficiently complex to merit deference to the agency's reasonable interpretation.

In order to bring Bible's rehabilitation agreement within the purview of 34 C.F.R. § 682.410(b)(5)(ii)'s prohibition on the imposition of collection costs, we are necessarily required to infer that Bible's rehabilitation agreement qualifies as a "repayment

agreement on terms satisfactory to the [guaranty] agency." And while Judge Hamilton assumes from the outset that "rehabilitation agreement" and "repayment agreement" are overlapping concepts, in my view, this is no small inferential leap.

Judge Manion, in his dissent, makes a strong case for the proposition that the two concepts are separate and distinct, and thus, that the repayment agreement provisions of § 682.410(b)(5)(ii) do not apply to the loan rehabilitation program described in 34 C.F.R. § 682.405. Indeed, the Department of Education's website lists "Loan Repayment" and "Loan Rehabilitation" as independent options for "getting your loan out of default." Fed. Student Aid, U.S. Dep't of Educ., *Getting out of Default*, https://studentaid.ed.gov/sa/repay-loans/default/get-out (last visited Aug. 5, 2015). Moreover, there is no cross-reference or other textual indication in the regulations suggesting that the rehabilitation agreements described in § 682.405 constitute repayment agreements "on terms satisfactory to the agency" under § 682.410(b)(5)(ii), such that a rehabilitation agreement might fall within the scope of § 682.410(b)(5)(ii)'s exception to the general rule that collection costs will be assessed against borrowers in default. Rather, the sole reference to collection costs in § 682.405 appears to assume the assessment of collection costs in the rehabilitation context. *See* § 682.405(b)(1)(vi)(B) (explaining that the guaranty agency must inform a borrower entering into a rehabilitation agreement "[o]f the amount of any collection costs to be added to

the unpaid principal of the loan when the loan is sold to an eligible lender, which may not exceed 18.5 percent of the unpaid principal and accrued interest on the loan at the time of the sale").

Further, it is unsurprising that a rehabilitation agreement may not qualify as "satisfactory" to a guarantor. The language of § 682.410(b)(5)(ii) suggests that a guaranty agency retains discretion in determining which terms render a repayment agreement "satisfactory." Under § 682.405, however, guaranty agencies have almost no discretion in setting the terms of rehabilitation agreements: the regulation requires that a borrower's monthly repayment amount be "[r]easonable and affordable," § 682.405(b)(1)(i), and sets forth specific guidelines to which a guarantor must adhere in calculating that amount. *See* § 682.405(b)(1)(iii) ("The guaranty agency initially considers the borrower's reasonable and affordable payment amount to be an amount equal to 15 percent of the amount by which the borrower's Adjusted Gross Income (AGI) exceeds 150 percent of the poverty guideline amount applicable to the borrower's family size and State, divided by 12, except that if this amount is less than $5, the borrower's monthly rehabilitation payment is $5."). The regulation also specifies that "[t]he agency may not impose any other conditions unrelated to the amount or timing of the rehabilitation payments in the rehabilitation agreement." § 682.405(b)(1)(vi). It is therefore no great leap to conclude that rehabilitation agreements and repayment agreements "on terms satisfactory to the agency" are mutually exclusive concepts.

On the other hand, Judge Hamilton's position that the rehabilitation agreements described in § 682.405 are a subset of the repayment agreements referenced in § 682.410(b)(5)(ii) is intuitively appealing. After all, just like other forms of loan repayment, rehabilitation offers borrowers a path back to good standing, and does not permit them to avoid eventual repayment in full. *See* § 682.405(b)(4) (explaining that "[a]n eligible lender purchasing a rehabilitated loan must establish a repayment schedule that meets the same requirements that are applicable to other FFEL Program loans of the same loan type as the rehabilitated loan").

Moreover, I am skeptical of the dissent's assertion that the regulations shield from collection costs only those borrowers who agree to immediate repayment of the full outstanding balance of their defaulted loans. The repayment agreement provision, § 682.410(b)(5)(ii), was clearly drafted with the intent to permit borrowers who have lapsed into default the opportunity to regain good standing and to avoid many of the adverse consequences—i.e., report to a credit bureau and assessment of collection costs—associated with default. Yet to make that opportunity available only to those borrowers capable of immediately paying their outstanding loan balance in full would render this second chance illusory. Practically speaking, it would be impossible for the vast majority of borrowers in default—who presumably have defaulted on their loans as a result of their inability to make far lower monthly payments—to eliminate the

entirety of their student debt (which could easily reach into the tens of thousands of dollars) in a single payment. And I think it unlikely that, in drafting this regulation, the Secretary sought to exclude nearly every borrower in default from its purview.

In sum, while I question certain aspects of each of my respected colleagues' positions, they both offer plausible readings of this complex and ambiguous regulatory scheme. I therefore believe the appropriate course of action is to accept the guidance that we sought from the Secretary of Education. Under the Supreme Court's decision in *Auer* v. *Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), it is generally appropriate to defer to an agency's interpretation of its own regulations, even when that interpretation is informally announced. *See Christopher* v. *SmithKline Beecham Corp.*, ___ U.S. ___, 132 S.Ct. 2156, 2159, 183 L.Ed.2d 153 (2012) ("*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief * * * * "). Here, the Secretary has unequivocally advanced the position that the applicable regulations do not permit a guaranty agency to assess collection costs against a first-time defaulted borrower who timely enters into a rehabilitation agreement and fully complies with that agreement. Given the regulations' lack of clarity with respect to this issue, I cannot conclude that the Secretary's position is either plainly erroneous or inconsistent with the regulations. *See L.D.G.* v. *Holder*, 744 F.3d 1022, 1029 (7th

Cir. 2014). Accordingly, I join that portion of Judge Hamilton's analysis that relies on administrative deference. I note, however, that while the Secretary's amicus filing has proven helpful in resolving this dispute, an unambiguous regulatory scheme is preferable to soliciting the agency's interpretive guidance. Thus, while I accept the Secretary's proffered interpretation here, perhaps the Department might consider reexamining and revising the language of the regulations.

MANION, Circuit Judge, concurring in part and dissenting in part.

I agree with the court's conclusion that Bible's claims are not preempted, but I disagree that she pleaded a valid breach of contract or RICO claim. As a matter of law, United Student Aid Funds, Inc., did not breach the Master Promissory Note (MPN) and did not commit the fraud upon which Bible's RICO claim is predicated. Bible's entire theory is erected atop an erroneous equivocation, that the loan rehabilitation agreement of 34 C.F.R. § 682.405 is the same as the repayment agreement of § 682.410. I say Bible's theory because it truly is her own contrivance. There is no evidence to suggest that the Department of Education ever interpreted the regulations in the manner advanced by Bible prior to our request for an amicus brief in this case. In fact, the record reflects that the Department agreed with USA Funds' interpretation and had no cause to question USA Funds'

regulatory compliance, that is, until the Department filed its amicus brief. Applying the Department's *post hoc* rule to USA Funds is both wrong and unjust. The fraud is on the guarantors and, because the Department ultimately guarantees the loans, on the taxpayer. For this and for the detailed reasons that follow, I respectfully dissent.

A. Background

Before setting out my analysis and rebuttal to Bible's arguments and the court's opinion, it is important to understand what this case is about and how the court and I came to disagree. I provide the following background as a means of presenting the big picture.

To obtain a student loan, Bible entered into a loan agreement with Citibank. At some point she quit making payments. After about nine months of nonpayment (270 days), Citibank declared her loan in default. USA Funds, the guarantor, stepped forward and "bought" the loan. USA Funds' agent, General Revenue Corp. (GRC), offered Bible several options.[1] The first option was to pay the loan in full. Unable to pay the full amount, she declined that option. The

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[1] I am referring to the options GRC provided to rectify Bible's default. GRC also offered Bible opportunities to review the records pertaining to her loans and to request an administrative review of the legal enforceability or past-due status of her loans. She did not take advantage of these opportunities, and they are not the subject of this litigation.

second option, which was offered at the same time, would have given her a new payment plan that perhaps would have lowered her monthly payments and stretched out the repayment period, or she could have negotiated a lower amount. Had she exercised the first option, she would not have incurred costs nor would have the credit reporting agencies been notified of her default. Had she exercised the second option, she would have incurred costs, but would have avoided notification to the credit reporting agencies of her default. As with the first option, Bible did not have the wherewithal to exercise the second option. The third option, which was offered at the same time as the first two that she refused, was to enter into a rehabilitation agreement whereby USA Funds would sell her loans to a new lender who would establish a new repayment schedule, her default would be eliminated, and her costs capped at 18.5% of her outstanding balance.

Bible and her lawyers chose the third option and entered into negotiations for a loan rehabilitation agreement. After several days of negotiations, Bible agreed to enter into the loan rehabilitation process by signing an agreement to do so. At the time of signing, Bible had accrued no collection costs. That is why the chart in the court's opinion shows zero costs. But from that time forward, costs would accrue.

To show her good-faith intention to rehabilitate her loans, Bible agreed to make monthly payments in the amount of $50.00 for a period of nine or ten months. At the end of that period, she would have

shown her good faith and willingness to abide by a new repayment schedule. It should be noted that the $50.00 payments were by no means sufficient to cover the amount due each month. Rather, the payments could only cover about one-half of the interest that accrued over the rehabilitation period. After the nine- or ten-month period of good-faith payments, Bible was eligible for a new loan repayment schedule for an amount that included outstanding principal and accumulated interest and costs. The latter amounts would be capitalized into the new loan total when USA Funds sold the loan to a new lender. As best we know at this juncture, Bible's loans were sold to a new lender and, according to the court, she is current on payments under the new schedule.

The dispute in this case is confined to the issue of costs. As indicated above, when she entered into the rehabilitation agreement no costs had yet accrued. However, from that time forward, costs accrued. Presumably these costs resulted from USA Funds "buying" Bible's loans from Citibank, corresponding and negotiating with Bible over several days, preparing her loans for resale, finding a buyer, and finalizing the sale of her loans. Presumably, this process occurred during the nine or ten months that Bible was making the good-faith payments of $50.00.

Bible now insists that USA Funds should not have charged her costs for this process. But that flies in the face of the statute, which expressly permits costs so long as they are limited to 18.5% of the new loan total. She relies instead on a novel theory that

would grant her a complete exemption from costs despite the plain language of the statute. Based on her interpretation, Bible claims that USA Funds breached her loan contract and committed fraud sufficient to violate the RICO Act. But as I will demonstrate in detail below, there was no breach of contract and absolutely no fraud committed when she accepted loan rehabilitation. There is certainly no RICO violation. The court implies this by its very mild recognition of the RICO claim simply because it was recited in the complaint.

The only saving grace that the court falls back on, if there is such a thing in this case, is that the Department has submitted, at the court's invitation, an amicus brief. But that brief establishes a brand new interpretation that was not present when the events of this case unfolded. Aside from the fact that the law is not ambiguous and the Department's interpretation is unreasonable, the fact that there was no notice and opportunity to oppose the Department's substantial "revision" gives us a very good reason not to defer to the Department's interpretation.

B. Bible's theory relies on two fundamental errors.

With the big picture now before us, I start my analysis with the Department's new interpretation, that is, Bible's theory. Section 682.410(b)(2) requires the guarantor to "charge a borrower an amount equal

to reasonable costs incurred by the agency in collecting a loan." Bible's interpretation, now endorsed by the Department, is that a guarantor must charge a borrower "reasonable costs" *except* when the borrower agrees to loan rehabilitation within 60 days of being offered the opportunity and honors the agreement. Bible relies on the regulation's requirement that the guarantor not charge collection costs until it offers the borrower certain opportunities, chief among them the "opportunity to enter into a repayment agreement on terms satisfactory to the agency." § 682.410(b)(5)(ii)(D).

There are two fundamental errors with Bible's theory. First, the regulation's waiting period for charging costs applies to a different kind of repayment agreement than a rehabilitation agreement. Second, the regulation does not contain an exception to charging costs for any kind of repayment agreement, let alone a rehabilitation agreement. Only by relying on these errors is it possible for Bible to argue that USA Funds' assessment of collection costs was a breach of contract and that USA Funds' letter reporting Bible's current collections costs as zero was fraudulent.

The correct interpretation is this: the rehabilitation agreement is not the same as the "repayment agreement on terms satisfactory to the agency" mentioned in the administrative regulation. The two are separate, and the regulations governing each are also separate, even though the guarantors' current practice is to offer a defaulted borrower a rehabilitation

agreement at the same time they offer her a repayment agreement. To avoid collection costs and a report of default, the borrower must choose the repayment agreement and either pay her balance in full or come to "terms satisfactory to the agency" that do not include collection costs. The alternative rehabilitation agreement is not a "repayment agreement on terms satisfactory to the agency," and accepting it does not allow the borrower to escape collection costs and default reporting. Rather, by agreeing to loan rehabilitation instead of loan repayment the borrower incurs costs and her default is reported, but her costs will be capped at 18.5% and her default will be cleared from her credit report if she successfully completes loan rehabilitation.

C. Loan repayment, not loan rehabilitation, offers defaulted borrowers the opportunity to avoid collection costs and default reporting.

Although Bible accepted neither loan repayment in full nor repayment through another agreement, it is necessary to review how loan repayment works in order to understand Bible's errors. Once a borrower is in default, by failing to make a monthly payment for nine months (270 days), 20 U.S.C. § 1085(*l*); 34 C.F.R. § 682.200(b)(1), the lender hands the loan over to the guarantor who pays the default claim. Under 34 C.F.R. § 682.410, the guarantor then has 45 days to provide the borrower with a written notice and opportunities to inspect the loan records, request an

administrative review, and "enter into a repayment agreement on terms satisfactory to the agency." § 682.410(b)(5)(ii) & (6)(ii). The guarantor may not assess any collection costs against the borrower or report the borrower's default to the credit reporting agencies until it provides the borrower with the notice and opportunities. § 682.410(b)(5)(ii). The notice must, among other things, "[d]emand that the borrower immediately begin repayment of the loan," explain "that all costs incurred to collect the loan will be charged to the borrower," and explain the opportunity "to reach an agreement on repayment terms satisfactory to the agency to prevent the agency from reporting the loan as defaulted to consumer reporting agencies." § 682.410(b)(5)(vi)(D), (E) & (G). Sixty days after the guarantor has sent the notice, if the borrower has not "reach[ed] an agreement on repayment terms satisfactory to the agency to prevent the agency from reporting the loan as defaulted," then the guarantor "shall" report the borrower's default to all national credit reporting agencies. § 682.410(b)(5)(i); *cf.* 20 U.S.C. § 1080a(c)(4) (requiring only a 30-day wait before reporting default).

If the borrower agrees to a repayment agreement sufficiently acceptable to the guarantor for the guarantor to not report the default, then the guarantor will not report the borrower's default to all the national credit reporting agencies. 34 C.F.R. § 682.410(b)(5)(vi)(G); 20 U.S.C. § 1080a(c)(4). Although the borrower may avoid the *report* of her default in this way, she is still in default and therefore must pay collection costs: "a

borrower who has defaulted on a loan made under this subchapter * * * shall be required to pay * * * reasonable collection costs[.]" 20 U.S.C. § 1091a(b)(1). So, although the guarantor is prevented from charging collection costs *before* it provides the notice and opportunities, 34 C.F.R. § 682.410(b)(5)(ii), it is required to charge collection costs afterwards. Again, "the guaranty agency shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting." § 682.410(b)(2). That said, the guarantor has the discretion to not charge collection costs under a repayment agreement because the repayment agreement is "on terms satisfactory to the agency." § 682.410(b)(5)(ii)(D). Thus, the borrower may avoid collection costs either by ensuring that the guarantor does not incur collection costs, that is, by paying the loan balance in full upon the guarantor's demand for payment, or by coming to "terms satisfactory to the agency" that do not include collection costs. *Id.*

Obviously, a "repayment agreement on terms satisfactory to the agency" requires, at most, payment in full of the outstanding balance and, at least, terms that actually stand a chance of paying off the loan. § 682.410(b)(5)(ii)(D). If the borrower pays her outstanding balance in full, then she avoids the report of default and collection costs. If she is unable to pay in full, but comes to terms that do not include collection costs, then she also avoids the report of default and collection costs. If she cannot reach such favorable terms but can still reach a repayment agreement,

then she avoids the report of default but not collection costs. Finally, if the borrower declines to accept a repayment agreement (perhaps she cannot afford one), then, according to the regulations, the guarantor reports the borrower's default to the national credit reporting agencies and charges collection costs. § 682.410(b)(5)(i); § 682.410(b)(2).

D. Loan rehabilitation is a separate opportunity, after a borrower has rejected loan repayment, to remove the loan from default status and erase the report of default.

Yet, for a borrower like Bible who cannot afford repayment there is a way out: loan rehabilitation. Loan rehabilitation is a separate program, § 682.405, for those borrowers who are unable to meet the stricter repayment obligations of § 682.410. It requires only payments that the borrower can afford; it removes the loan from collection, clears the default from the borrower's credit history, and limits collection costs to 18.5% (now 16%) of the loan's outstanding balance and accrued interest. 20 U.S.C. § 1078-6; 34 C.F.R. § 682.405. It is a lengthy process and takes as long as it took to get into default (nine months) but it allows the borrower time to get back on her feet. *Id.* However, loan rehabilitation will incur the report of default and collection costs. This is because it is only available to a borrower whose default has been (or will be) reported and whose loan is in collection, in other words, a borrower who has

rejected a repayment agreement satisfactory to the guarantor.

While the post-2006 regulations may describe loan rehabilitation as a type of monthly repayment agreement (explained below), it is not "a repayment agreement on terms satisfactory to the agency" because it is not a repayment agreement that can repay the loan. § 682.410(b)(5)(ii)(D). Loan rehabilitation requires that the borrower voluntarily make nine out of ten monthly payments (which can be as little as $5.00) to demonstrate the borrower's good-faith intention to repay the loan. § 682.405(b)(1)(iii). The nine token payments alone are insufficient to rehabilitate the loan, because the loan must be sold to a new lender for it to be considered rehabilitated. § 682.405(a)(2)(ii). Only after the loan is sold to a new lender who establishes a new repayment schedule is the loan rehabilitated and back in a standard repayment status. § 682.405(b)(4). Thus, because a loan in the process of rehabilitation is still in default and under collection until it is sold to a new lender, "[a] guaranty agency may charge the borrower and retain collection costs in an amount not to exceed 18.5 percent of the outstanding principal and interest at the time of sale of a loan rehabilitated[.]" 20 U.S.C. § 1078-6(a)(1)(C) (effective July 1, 2006).

E. Loan rehabilitation is not loan repayment.

Central to Bible's theory is her claim that the rehabilitation agreement of 34 C.F.R. § 682.405 is the repayment agreement in 34 C.F.R. § 682.410(b)(5)(ii)(D). It is not. Although § 682.405(a)(2) states that "[a] loan is considered to be *rehabilitated* only after [t]he borrower has made and the guaranty agency has received nine of the ten qualifying payments required under a monthly *repayment agreement,*" this is merely a description, not a definition. It does not allow the term "repayment agreement" in § 682.410 to be replaced with "rehabilitation agreement." A rehabilitation agreement may be a type of repayment agreement, but it is not the "repayment agreement on terms satisfactory to the agency" required by § 682.410(b)(5)(ii)(D).

There are several reasons why the two agreements are not the same. *First*, it is apparent from their differing levels of discretion. Section 682.410 requires that the guarantor offer a repayment agreement "on terms satisfactory to the [guaranty] agency." § 682.410(b)(5)(ii)(D). Quite obviously, whether the terms of a particular agreement are satisfactory to the guarantor is largely a matter of the guarantor's discretion. The Department agrees with this. Gov't. Amicus Br. 8, 15. On the other hand, the terms of a rehabilitation agreement are mandated by § 682.405(b)(1). The amount and timing of each payment are defined by the regulation, and "[t]he agency may not impose any other conditions unrelated to the amount or timing of the rehabilitation

payments in the rehabilitation agreement." § 682.405(b)(1)(i)-(vi). According to Bible, every rehabilitation agreement must be a repayment agreement satisfactory to the guarantor because the guarantor accepts each agreement. But even that is mandated by the regulation: "A guaranty agency * * * must enter into a loan rehabilitation agreement with the Secretary. The guaranty agency must establish a loan rehabilitation program for all borrowers with an enforceable promissory note for the purpose of rehabilitating defaulted loans * * * * " § 682.405(a)(1).

Second, the history of the regulations also demonstrates that they are not the same. Section 682.405(a)(2) did not describe the rehabilitation agreement as a "repayment agreement" until September 8, 2006, but § 682.410 always used the term.

Third, a guarantor is prevented from both charging collection costs and reporting the default until it provides the borrower with the opportunity to enter into a repayment agreement satisfactory to the guarantor. § 682.410(b)(5)(ii). If a rehabilitation agreement necessarily is a repayment agreement satisfactory to guarantor, so that the guarantor is prevented from charging collection costs, then the guarantor would also be prevented from reporting the default. Yet, one of the primary purposes of loan rehabilitation is to clear the report of default from the borrower's credit history, including the default reported by the guarantor, which the guarantor must do once loan rehabilitation is complete. § 682.405(b)(3)(i); 20 U.S.C. § 1078-6(a)(1)(C).

If timely acceptance of a rehabilitation agreement prevented collection costs, then it should also prevent default reporting. But if it prevented default reporting, then one of the primary purposes of loan rehabilitation would be pointless. Obviously, Bible does not argue that the timely acceptance of loan rehabilitation prevents the report of default because it would be absurd.

Fourth, it is unreasonable to hold that a rehabilitation agreement is "satisfactory to the agency" for actual repayment of the loan. *Id.* The loan rehabilitation's "monthly repayment agreement" is only part of the agreement. The nine token payments are used to prove the borrower's good-faith intention to repay the loan once it is purchased by a new lender, not to repay the loan to the guarantor. It is the new lender that sets the actual repayment schedule that will repay the rehabilitated loan. 34 C.F.R. § 682.405(a)(2)(ii), (b)(4). In Bible's case the loan rehabilitation payments did not even cover the interest accruing on her loans.

F. The *Barnes/Black* litigation does not support Bible's theory that loan rehabilitation is loan repayment.

The Department's brief in *Ed. Credit Mgmt. Corp.* v. *Barnes*, 318 B.R. 482 (S.D.Ind.2004), *aff'd sub nom. Black* v. *Educ. Credit Mgmt. Corp.*, 459 F.3d 796 (7th Cir. 2006), does not support Bible's theory. Bible misrepresents the Department's brief in *Barnes* just as she does the regulation's description of a

rehabilitation agreement. In *Barnes*, the Department intervened in a bankruptcy proceeding to defend 34 C.F.R. § 682.410(b)(2), the section of the regulation that allows a guaranty agency to charge collection costs based on a flat-rate formula. The Department was defending the regulation from the bankruptcy trustee's challenge that the use of the flat-rate formula for charging collection costs was arbitrary and capricious. Bible relies on a particular passage from the Department's brief:

> Department rules require the guarantor who acquires a loan by reason of the default of the borrower (* * *) to charge collection costs *only after providing the debtor an opportunity to contest the debt and to enter into a repayment arrangement for the debt.* 34 C.F.R. § 682.410(b)(5). The guarantor, moreover is not bound by the original loan repayment schedule, but can agree to any repayment arrangement that debtor can afford, regardless of the amount of time needed to pay the debt off under that arrangement. *See* 20 U.S.C. § 1078-6(a) (defaulter may have loan *rehabilitated* and default status cured after 12 installment payments to the guarantor); § 10786(b) (defaulter may regain eligibility for new student aid after six reasonable and affordable payments based on the borrower's total financial circumstances).
>
> The regulations therefore direct guarantors to charge collection costs *only* to those debtors who cause the guarantor to incur

> collection costs by failing to agree promptly to repay voluntarily.

Appellant's App. 55 (emphasis added; last emphasis in original).

As part of its much larger effort to prove that the regulation's use of a flat-rate formula was reasonable, the Department briefly explained that the same regulation allowed borrowers to avoid collection costs if they promptly agreed to *repay* voluntarily. In its explanation, the Department was clearly referring to the repayment agreement of § 682.410, not the rehabilitation agreement of § 682.405, as is evident from the brief's straightforward citation to § 682.410(b)(5). The Department went on to explain that the guarantor is not bound in a repayment agreement by the original repayment schedule. According to Bible, because the Department supported this subsequent proposition with a citation to the loan rehabilitation statute, 20 U.S.C. § 1078-6, the Department was somehow explaining that a guarantor is prevented from charging collection costs if a borrower timely accepts a rehabilitation agreement. It was not.[2]

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[2] The Department cited § 1078-6 with a "see" introductory signal, which is used when "there is an inferential step between the authority cited and the proposition it supports." THE BLUE BOOK: A UNIFORM SYSTEM OF CITATION 58 (Columbia Law Review Ass'n et al. eds., 20th ed.2015). The citation's inferential step is that repayment agreements are like rehabilitation agreements in that they are not bound by the original repayment schedule. Whereas, Bible would have the

(Continued on following page)

When we affirmed *Barnes*, we held that the Higher Education Act (HEA) expressly allows a guarantor to impose collection costs on rehabilitated loans:

> Nothing in the HEA prohibits a guaranty agency from assessing collection costs as a flat-rate percentage upon rehabilitation. To the contrary, the statute explicitly provides that "[a] guaranty agency may charge the borrower and retain collection costs in an amount not to exceed 18.5 percent of the outstanding principal and interest at the time of sale of a loan rehabilitated." 20 U.S.C. § 1078-6(a)(1)(C). Thus, even if Barnes's loans could have been rehabilitated through his Chapter 13 proceeding, the 18.06% that ECMC charged Barnes for collection costs falls within the bounds of what is allowed under the HEA's loan rehabilitation provisions.

Black, 459 F.3d at 803. In so holding we did not disagree with the Department's interpretation of its rules. On the contrary, we agreed with the Department, which then told us in its brief:

> Furthermore, the Trustee's argument rests upon a mistaken assumption that rehabilitation would have enabled Barnes to pay lower

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inferential step be that rehabilitation agreements are like repayment agreements in that the borrower can avoid collection costs. For that to be the case, the citation would have had to support the sentence before the one it did.

> collection costs. The Trustee suggests that, if Barnes has rehabilitated his loan, ECMC could not have assessed collection costs at a flat rate. According to the Trustee, ECMC could have recovered only the actual costs that it incurred in collecting Barnes' student loan during the period leading up to rehabilitation.
>
> But the regulation governing rehabilitation plainly allows a guaranty agency to assess collection costs at a flat rate as long as the rate does "not exceed" 18.5 percent. *See* 34 C.F.R. § 682.405(b)(1)(iv).

Br. for Appellee Secretary of United States Department of Education, *Black*, 459 F.3d 796, 2005 WL 3738503, at 33 (citation omitted). Neither we nor the Department recognized a special exception that would have prevented a guarantor from charging a borrower collection costs on rehabilitated loans. We plainly said that "[*n*]*othing* in the HEA prohibits a guaranty agency from assessing collection costs as a flat-rate percentage upon rehabilitation." *Black*, 459 F.3d at 803 (emphasis added). Nothing in the *Barnes*/*Black* litigation supports the theory that Bible, and now the Department, advances.[3]

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[3] In its brief before the district court in *Barnes*, the Department made clear that guarantors must charge collection costs or those costs will be borne by the taxpayer:

> To restate the problem which the regulation addresses: the student loan guarantor must recover enough to meet its collection costs, or those costs

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G. The regulation's collection-cost provisions contain no exemption for rehabilitated loans.

Bible's theory is contrary to the plain language of the statutes and regulations because nowhere do the statutes and regulations contemplate that "reasonable costs" equals "no costs" for borrowers who timely enter into a rehabilitation agreement. *See* 20 U.S.C. §§ 1078-6, 1091a; 34 C.F.R. §§ 682.405,

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> will be charged to the taxpayer—exactly what § 484A [20 U.S.C. 1091a(b)] was intended to prevent.

Appellant's App. 66. The Department also disagreed that collection costs assessed by the flat-rate formula could be unreasonable if the costs are in excess of actual costs. Its argument concerned the costs incurred by a guarantor who uses a collection contractor, such as USA Funds used GRC:

> A debtor may object that a contractor incurred only modest costs in generating a particular payment, and that the contingent fee earned by the contractor for payment exceeds the "actual costs" of collecting that amount. Such an objection misses the point: the creditor incurs a negotiated contingent fee owed to the contractor for that payment, regardless of the effort needed by the contractor to secure that particular payment. The creditor must pay the contractor, and that cost is a real expense for the guarantor, and one incurred solely because the debtor previously has failed to pay the debt. Because the guarantor incurs that fee, the guarantor can, and must, pass that real cost on to the debtor. *Debtors whose loans have been referred by guarantors to contingent fee contractors for collection action have no basis for objecting to liability for a contingent fee charged as a "flat rate" percentage of the payment recovered.*

Appellant's App. 60 (emphasis added).

682.410. That is why we held in *Black* that "[*n*]*othing* in the HEA prohibits a guaranty agency from assessing collection costs as a flat-rate percentage upon rehabilitation." *Black*, 459 F.3d at 803 (emphasis added). The regulation's only exception for collection costs refers to *limiting* collection costs to 18.5% on rehabilitated and consolidated loans. § 682.410(b)(ii)(2) ("Except as provided in §§ 682.401(b)(18)(i) and 682.405(b)(1)(iv)(B)"). Plainly, collection costs cannot be limited on rehabilitated loans unless they are first allowed.

Bible's theory tries to explain this incongruity by saying that the regulations' references to collection costs refer to those borrowers who fail to timely agree to loan rehabilitation, or fail to honor the agreement. This cannot be the case. First, the regulations' references to collection costs do not refer to a borrower who fails to honor the rehabilitation agreement because the limitation applies "at the time of the loan sale," 20 U.S.C. § 1078 6(a)(1)(D)(i)(II)(aa), and the loan cannot be sold unless the borrower honors the rehabilitation agreement, § 1078-6(a)(1)(A). Second, and more importantly, the references do not refer to a borrower who fails to agree to loan rehabilitation within the 60-day deadline because there is no deadline for loan rehabilitation.

The regulatory scheme does not require that a guarantor offer loan rehabilitation, only that the guarantor have a program where "[a] borrower *may request* rehabilitation of the borrower's defaulted loan held by the guaranty agency." § 682.405(b)(1)

(emphasis added). It was not until 2010 that the regulation was amended to require guarantors to "[*i*]*nform* the borrower of the options that are available to the borrower to remove the loan from default, including an explanation of the fees and conditions associated with each option." § 682.410(b)(5)(vi)(M) (effective July 1, 2010; emphasis added). When the Department finalized the regulations in 2006, they said, "We believe the regulations accurately reflect the HEA and Congressional intent. *Borrowers must request, or in some fashion initiate, loan rehabilitation* so that the period during which the 9 qualifying payments must be made is clear for both the guaranty agency and the borrower." 71 Fed.Reg. 64389 (Nov. 1, 2006) (emphasis added).

Thus, the regulations do not require a guarantor to offer rehabilitation, but merely to make rehabilitation available. If there is no requirement to offer rehabilitation, and therefore no deadline, then there is nothing to gauge whether a borrower has "timely" or "promptly" entered into a rehabilitation agreement. This is the whole reason for Bible's equivocation between a rehabilitation agreement and a repayment agreement satisfactory to the guarantor. Bible needs the repayment agreement's deadline to create the special category of borrowers who "promptly" enter into rehabilitation agreements. But as I have explained at length above, the rehabilitation agreement of § 682.405 is not a repayment agreement satisfactory to the guarantor of § 682.410. Without

Bible's fictitious special category, the regulations allow costs on rehabilitated loans without exception.

Simply put, nowhere do the statutes or regulations say that collection costs may be assessed except when, or unless, the borrower timely agrees to loan rehabilitation and honors that agreement. Bible's interpretation would turn loan rehabilitation into a kind of at-will deferment. A borrower could make no payment on her loans for nine months and then make only token payments for another nine months, all without collection costs, only to have her loan purchased by a new lender and the default erased from her record. This was not what Congress intended. As explained by the Department in 2006:

> We believe the regulations accurately reflect the HEA and Congressional intent * * * * Additionally, a reasonable and affordable payment amount needs to be established, and the consequences of loan rehabilitation, *such as the addition of collection costs to the rehabilitated loan amount*, the post-rehabilitation payment period and the likely increased payment amount, need to be explained to the borrower.

71 Fed.Reg. 64389 (emphasis added).

H. Bible takes advantage of the guarantors' practice of offering loan rehabilitation at the same time as loan repayment.

Bible obfuscates the regulations in another way. She takes advantage of the fact that USA Funds offered her loan rehabilitation at the same time as it offered her loan repayment. The regulations do not require that the guarantor immediately offer a defaulted borrower loan rehabilitation. Nevertheless, the current practice—at least as practiced by USA Funds in this case—appears to be for the guarantor to offer loan rehabilitation at the same time it offers loan repayment. The Department endorses this method of giving the borrower a choice. Its website states:

You have several options for getting your loan out of default. These include

- loan repayment
- loan rehabilitation, and
- loan consolidation.

Addendum to Appellee's Response to Gov't Amicus Br. The Department clearly describes loan repayment and loan rehabilitation as separate options and gives the impression that they are options provided concurrently. (Loan consolidation is also a separate option, but is not at issue in this case.) The Department's description of loan repayment does not mention collection costs, whereas its description of loan rehabilitation does. *Id.* ("Outstanding collection

costs may be added to the principal balance."). The Department's description of loan rehabilitation includes collections costs because the regulations allow them. 71 Fed.Reg. 64389 ("the consequences of loan rehabilitation, such as the addition of collection costs to the rehabilitated loan amount * * * need to be explained to the borrower").

When a guarantor offers loan rehabilitation at the same time as loan repayment there is an incentive for the borrower to choose loan rehabilitation because it is less expensive in the short term. But by choosing loan rehabilitation, the borrower necessarily rejects loan repayment. Because the borrower rejects loan repayment, the guarantor must report the default and assess collection costs. And, remember that the guarantor is prohibited from charging collection costs before offering loan repayment. So, when the guarantor offers loan rehabilitation at the same time as loan repayment it is not allowed to assess collection costs until the borrower chooses loan rehabilitation, thereby rejecting loan repayment. If the borrower has not previously defaulted, then collection costs will be zero when loan rehabilitation is offered.

This practice is entirely permissible under the regulations as long as the guarantor meets the separate requirements for each option. Borrowers are not harmed by the practice, so long as they receive the necessary warnings regarding collection costs and other consequences. As can be seen from an examination of GRC's correspondence with Bible, this was the practice followed here.

I. Bible fails to state a claim for either breach of contract or RICO because USA Funds and GRC complied with the regulations.

The default letter sent by GRC to Bible stated: "Without a dispute, failure to pay the account in full, agree to a satisfactory repayment arrangement, or utilize another recovery option as outlined on the attached insert, may result in additional collection efforts." Appellant's App. 131. At the top of the attached insert was a call-out box which stated in bold type: "If you are unable to pay in full the outstanding balance on your defaulted loan(s), call a representative to find out which of the following additional options you qualify for." *Id.* at 133. The insert then listed three additional options: 1) "Alternative Payment Arrangements," 2) "Loan Rehabilitation," and 3) "Loan Consolidation." *Id.*

The first option, "to pay in full the outstanding balance on [the] defaulted the [sic] loan(s)" and the additional option, "Alternative Payment Arrangements," were both the "repayment agreement on terms satisfactory to the agency" of § 682.410. By paying the outstanding balance in full, Bible would have avoided collection costs and the report of de-fault.[4]

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[4] Bible's MPN included an acceleration clause that made the entire unpaid balance of Bible's loan immediately due and payable in the event of default. Appellant's App. 122. It also states that "the guarantor may purchase [her] loans and capitalize all then-outstanding interest into a new principal balance,
(Continued on following page)

By choosing "Alternative Payment Arrangements," Bible would have avoided the default but not collection costs. USA Funds' description of the "Alternative Payment Arrangements" stated that "[a] portion of each payment received from you will be allocated to pay collection costs." *Id.* But Bible chose neither of those options. Instead of choosing loan repayment, Bible chose loan rehabilitation, which USA Funds described as "the opportunity to resolve a loan default and improve your credit record by removing the guarantors' report of your loan default." *Id.* GRC also informed Bible that "[*a*]*s part of your eligibility for loan rehabilitation*, you will be assessed collection costs at a reduced rate of 18.5% of the outstanding balance at the time your loan is purchased by an eligible lender, and the purchasing lender may add these costs to your outstanding loan principal." *Id.* (emphasis added). By choosing loan rehabilitation Bible rejected loan repayment, thereby incurring the collection costs permitted under the statutes and regulations.

Both the default letter and the loan rehabilitation application letter listed Bible's current collection-cost balance on each of her four loans as zero because it was. Appellant's App. 132, 137. USA Funds was prohibited from charging collection costs until Bible acted on its offer of loan repayment, or the offer expired. 34 C.F.R. § 682.410(b)(5)(ii). Had Bible paid

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and collection fees will become immediately due and payable." *Id.*

her account in full she would have avoided collection costs, but she did not, she chose loan rehabilitation. When she chose loan rehabilitation she rejected loan repayment and collection costs began accruing. By choosing loan rehabilitation Bible agreed "that the lender may capitalize collection costs of 18.5% of the outstanding principal and accrued interest upon rehabilitation of my loan(s)." Appellant's App. 139.

USA Funds abided by the statutes and regulations. USA Funds neither breached the contract nor committed fraud. For this reason, Bible's breach of contract claim and RICO claim should be dismissed.

J. We cannot give deference to the Department's interpretation because the statutes and regulations unambiguously allow collection costs and because the Department's interpretation is unreasonable, inconsistent with prior interpretations, and without warning.

The Department—in response to our request for an amicus brief—claims that it has always interpreted its regulations to provide an exception to collection costs when a borrower promptly enters into a rehabilitation agreement and complies with that agreement. It also claims that its interpretation deserves deference under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and *Auer* v. *Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

The Department's interpretation is not entitled to deference. First, Congress may have left it up to the Department to define "reasonable collection costs," but the Department has already clearly defined the term, 34 C.F.R. §§ 682.410(b)(2)(i), 682.405(b)(1)(vi)(B), and we need look no further. The regulations define "reasonable collections costs" with a flat-rate formula that must be capped at 18.5% of the principal and accrued interest for rehabilitated loans. *Id.* *See also* Department's letter to guaranty agency directors, *infra* at 674-75. The definition the Department now advocates does not comport with those regulations. Instead, the Department's interpretation amounts to a new rule that determines *when* costs will be charged for rehabilitated loans, not *what* those costs will be. That was not a gap "explicitly left [ ] for the agency to fill." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. Congress stated quite explicitly that a guarantor may charge the borrower collection costs on a rehabilitated loan. 20 U.S.C. § 1078-6(a)(1)(D)(i)(II). We are not allowed "to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). Because the regulation is not ambiguous regarding collection costs for rehabilitated loans, and because the Department's interpretation is plainly erroneous and inconsistent with the regulation, it is not entitled to deference. *Id.*; *Auer*, 519 U.S. at 461, 117 S.Ct. 905.

Moreover, the Department's amicus brief demonstrates that its interpretation is entirely new and inconsistent with its prior interpretations. *See Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 515, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) ("an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view" (quotation marks omitted)). The Department's reasoning appears to be taken wholesale from Bible's briefs with supporting material that actually undermines its case. There is nothing in the record that demonstrates that the concept existed prior to Bible's attorneys filing this class action. (As I explained above, the Department's brief in *Barnes* did not advocate the position it now holds.)

In an effort to provide some record that the Department developed this interpretation before Bible's lawsuit, the Department provided two letters: a 1994 general letter to the directors of guaranty agencies and a 1997 letter to the vice president of Texas Guaranteed Student Loan Corporation. Although the excerpts are long, I include them to show how unreasonable and inconsistent the Department's interpretation is. From the 1994 general letter addressed to the guaranty agency directors:

> [W]e have concluded that the amount of the collection costs currently assessed borrowers as reasonable under 34 CFR 682.410(b)(2) is not reasonable when the borrower has shown the initiative to address the default through

> one of these two programs [loan rehabilitation and loan consolidation]. Therefore, the Department has decided to modify its earlier policy guidance to restrict *the amount of collection costs that will be considered "reasonable" under these circumstances to be an amount that does not exceed 18.5 percent of the outstanding amount of principal and accrued interest on the loan at the time the agency arranges the lender purchase to rehabilitate the loan* or certifies the pay-off amount to the consolidating lender. This percentage is consistent with the percentage a guaranty agency is allowed to retain under the loan rehabilitation program at the time of lender purchase.

Gov't Amicus Br. 3a (emphasis added). This letter contains no mention of an exception for borrowers who promptly agree to rehabilitation, and it explicitly states that collection costs on rehabilitated loans that do not exceed 18.5% of the outstanding balance and accrued interest are "reasonable."

Now, from the 1997 letter, which the Department sent to the loan corporation's vice president in response to his question concerning collection costs for loan repayment agreements under § 682.410(b)(5)(ii)(D):

> The Department agrees with your interpretation of 34 CFR 682.410(b)(5)(ii)(D) and its interaction with § 682.410(b)(2)(i). This provision of the regulations provides the borrower an opportunity to enter into a satisfactory repayment agreement before the agency

> either reports the default to a credit bureau or assesses collections costs against the borrower as required in § 682.410(b)(2). *You also are correct that "terms satisfactory to the agency* * * * " does not require that the loan be paid in full and provides the agency with discretion in establishing a satisfactory repayment agreement with the borrower. If the agency obtains a signed repayment agreement from the borrower within the 60-day period, and the borrower begins to make payments, the agency is *not required* to assess the borrower collection costs. Collection costs related to the default would be assessed only if the borrower failed to continue to make payments by the repayment agreement.

Gov't Amicus Br. 1a (emphasis added). This letter does not concern loan rehabilitation at all. Instead, it confirms that while § 682.410(b)(2) requires the guarantor to charge collection costs, the provision requiring a "repayment agreement on terms satisfactory to the agency" grants the guarantor the *discretion* to not charge costs. That is a far cry from providing an exception for borrowers who promptly enter into a rehabilitation agreement and comply with that agreement. In fact, the proper inference from the Department's letter is that, since § 682.405 does not grant the guarantor the same discretion as § 682.410(b)(5)(ii)(D) does, the guarantor *must* charge collection costs on rehabilitated loans.

To accept the Department's extraordinary position requires us to hold that a *single* letter to an assistant vice president of *one* guaranty agency explaining that the agency has the *discretion not* to charge collection costs under a *repayment agreement* constitutes sufficient notice for the rule that *all* agencies are *prohibited* from charging costs on *rehabilitated loans.* That is hardly the kind of "fair warning" required of the Department, especially since Bible seeks to "invoke the [Department's] interpretation of ambiguous regulations to impose potentially massive liability on [USA Funds] for conduct that occurred well before that interpretation was announced." *Christopher* v. *SmithKline Beecham Corp.*, ___ U.S. ___, 132 S.Ct. 2156, 2167, 183 L.Ed.2d 153 (2012) (quotation marks omitted).

The Department's recent July 10, 2015, letter purporting to "restate and clarify the rules" (provided to the court by the Department as a "citation of additional authority") is nothing short of an admission that the Department's rule is entirely new. Ultimately, the Department is not interpreting the regulations. Instead,

> What [the Department] claims for itself here is not the power to make political judgments in implementing Congress' policies, nor even the power to make tradeoffs between competing policy goals set by Congress. It is the power to decide—without any particular fidelity to the text—which policy goals [the Department] wishes to pursue.

Michigan v. *E.P.A.*, ___ U.S. ___, 135 S.Ct. 2699, 2713, 192 L.Ed.2d 674 (2015) (Thomas, J., concurring) (citation omitted). This raises serious constitutional questions.

The Department's interpretation is not entitled to deference. Furthermore, even if the Department truly interpreted the statutes and regulations prior to the events of this case as it claims, we cannot apply the interpretation to USA Funds. To subject USA Funds—indeed, an entire industry—to RICO liability based on a rule that was never enforced—and only recently announced—is manifestly unjust.

For all of these reasons, I respectfully dissent.

Bible* v. *United Student Aid Funds, Inc.

United States District Court for the
Southern District of Indiana, Indianapolis Division

March 14, 2014, Decided; March 14, 2014, Filed

Case No. 1:13-cv-00575-TWP-TAB

Reporter

2014 U.S. Dist. LEXIS 33320

BRYANA BIBLE individually and on behalf of the proposed class, Plaintiff, v. UNITED STUDENT AID FUNDS, INC., Defendant.

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Judges: Hon. Tanya Walton Pratt, United States District Judge.

Opinion by: Tanya Walton Pratt

Opinion

ENTRY ON MOTION TO STRIKE AND MOTION TO DISMISS

This matter is before the Court on a Motion to Strike (Dkt. 45) and Motion to Dismiss (Dkt. 47) filed by Defendant United Student Aid Funds, Inc. ("USA Funds"). Plaintiff Bryana Bible ("Ms. Bible") purports to represent a class of borrowers who obtained student loan funds through the Federal Family Education Loan Program ("FFELP") and whose loans were guaranteed by USA Funds. Ms. Bible asserts a breach of contract claim and alleges that USA Funds violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") by charging collection costs on her defaulted loan and applying her payments to these collection costs. Oral argument was held on the motions on February 12, 2014, and the Court took the matter under advisement. Having considered the parties' arguments and briefs, the Court now **DENIES** the Motion to Strike (Dkt. 45) and **GRANTS** the Motion to Dismiss (Dkt. 47).

I. BACKGROUND

USA Funds is a guarantee agency for student loans. Among other things, it guarantees student loans under the Higher Education Act's ("HEA") Federal Family Education Loan Program ("FFELP"). Under FFELP, private lenders make loans to students attending post-secondary institutions, which are guaranteed by agencies such as USA Funds. If a

borrower defaults on the loan, the loan is transferred to the guarantee agency which pays the private lender for the debt and then itself seeks payment from the borrower.

Ms. Bible obtained an FFELP student loan in 2006. Citibank was the private lender and USA Funds is the guarantor of Ms. Bible's loan. Ms. Bible electronically signed a Federal Stafford Loan Master Promissory Note ("MPN") on June 12, 2006, which covers all of her student loans. Dkt. 38-3. The MPN explicitly provides that Ms. Bible

> * * * promise[s] to pay all loan amounts disbursed under the terms of the MPN, plus interest and other charges and fees that may become due as provided in this MPN* * * * If I do not make any payment on the loan made under this MPN when it is due, *I will also pay reasonable collection costs*, including but not limited to attorney's fees, court costs, and other fees.

Dkt. 38-3 at 2, ¶ 15 (emphasis added). The MPN further provides that in the event Ms. Bible defaulted on the loan, the lender could accelerate her loan such that the entire unpaid balance would become immediately due and payable; the guarantor would then be able to purchase the loan and capitalize all then-outstanding interest into a new principal balance, and collection fees would become due and payable. Dkt. 38-3 at 3. Under the "Repayment" paragraph of the MPN, the agreement states that payments on the loan may be applied in the following order: late

charges, fees, and collection costs first, outstanding interest second and outstanding principal last. Dkt. 38-3 at 6. Under the "Consequences of Default" section, the MPN states that failure to repay the loan under the MPN may result in collection charges (including attorney fees) being assessed. Dkt. 38-3 at 7-8.

In 2012, Citibank found Ms. Bible in default, a fact which she does not dispute. Thereafter, the loan was assigned, purchased, or otherwise transferred to USA Funds, and USA Funds paid Citibank's default claim for the loan. After default, Ms. Bible's loan was placed with General Revenue Corporation ("GRC") for collection. GRC subsequently offered Ms. Bible the opportunity to rehabilitate her defaulted loan, which would remove it from default status after certain conditions were met. GRC sent a letter to Ms. Bible dated April 12, 2012, which explained the loan rehabilitation program and included a notice entitled "Options for Resolving Your Loan Debt." Dkt. 38-4 at 4. Under the program, Ms. Bible had the opportunity to resolve her loan default by entering into a Loan Rehabilitation Program whereby if she made nine on time payments within ten months, the rehabilitation commitment would be complete and her defaulted student loan would be eligible for purchase by a lender. Once the rehabilitated loan is purchased by a new lender, the loans would no longer be considered in default and the default status would be removed from her credit record. The letter also stated, "As part of your eligibility for loan rehabilitation, you will be assessed collection costs at a reduced rate of 18.5%

of the outstanding balance at the time your loan is purchased by an eligible lender, and the purchasing lender may add these costs to your outstanding loan principal* * * *" *Id*.

On or about April 27, 2012, GRC sent Ms. Bible a rehabilitation program application packet which informed her that her current collection cost balance as of that date was $0.00. Dkt. 38-5 at 3. The GRC letter also stated that this was the amount owed "[a]s of the date of this letter" and "[b]ecause your credit agreement may require you to pay interest on the outstanding portion of your balance, as well as late charges *and costs of recovery* * * * the amount required to pay your account in full on the day you send payment may be greater than the amount stated here." Dkt. 38-5 at 1 (emphasis added). The Capitalization Authorization Letter provided by GRC in the rehabilitation application packet stated, "Once rehabilitation is complete, *the collection costs that have been added* will be reduced to 18.5% of the unpaid principal and accrued interest outstanding at the time of Loan Rehabilitation. *Collection costs* may be capitalized at the time the Loan Rehabilitation by your new lender* * * *" Dkt. 38-5 at 5 (emphasis added). Ms. Bible agreed to make ten payments of $50.00 per month in order to rehabilitate her loan. USA Funds subsequently imposed collection costs in the amount of $4,547.44.

Despite multiple references to the imposition of collection costs in both the MPN and the Rehabilitation Agreement, Ms. Bible now claims that USA

Funds unlawfully imposed collection costs on her, arguing that neither the MPN nor the Rehabilitation Agreement authorized the imposition of collection costs. Ms. Bible asserts that the HEA does not authorize the imposition of collection costs in situations like hers where a borrower in default promptly enters into a Rehabilitation Agreement, and because the original student loan agreement (*i.e.* the MPN) is governed by the HEA, the collection terms in the MPN do not apply. Essentially she argues that the HEA does not authorize the imposition of collection costs on borrowers who default on their loans once they enter into a Rehabilitation Agreement, and because the MPN incorporates the HEA by reference, USA Funds acted unlawfully by imposing collection costs on her. She also argues that USA Funds breached the contract because the original rehabilitation application sent to her on April 27, 2012 stated that her current collection cost balance was $0.00, and she argues USA Funds was not authorized to increase this amount, only decrease the amount.

Furthermore, Ms. Bible's First Amended Complaint (Dkt. 38) also asserts a claim under RICO. Ms. Bible asserts that USA Funds, GRC, and Sallie Mae collaborated to fraudulently represent to her that her collection costs were $0.00 in order to induce her to sign the Rehabilitation Agreement, knowing that USA Funds would subsequently impose unlawful collection costs on her. Ms. Bible also alleges that they then illegally applied her payments to collection costs, instead of to the interest and principal that she

owed. Ms. Bible purports to represent a class of approximately 100,000 student loan borrowers who have defaulted on their loans, entered into Rehabilitation Agreements, and were subsequently charged collection costs.

II. LEGAL STANDARD

When reviewing a 12(b)(6) motion, the court takes all well-pleaded allegations in the complaint as true and draws all inferences in favor of the plaintiff. *Bielanski* v. *Cnty. of Kane*, 550 F.3d 632, 633 (7th Cir. 2008) (citations omitted). However, the allegations must "give the defendant fair notice of what the * * * claim is and the grounds upon which it rests" and the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Pisciotta* v. *Old Nat'l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Stated differently, the complaint must include "enough facts to state a claim to relief that is plausible on its face." *Hecker* v. *Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009) (citations omitted). To be facially plausible, the complaint must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted). When ruling on a motion to dismiss, a court generally should only consider the complaint's allegations. *Centers* v. *Centennial Mortg., Inc.*, 398 F.3d 930, 933 (7th Cir. 2005) (citation omitted).

However, "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c).

III. DISCUSSION

A. Motion to Strike

USA Funds filed a Motion to Strike paragraphs 95-107 and Exhibits 7 and 8 of Ms. Bible's First Amended Complaint under Federal Rule of Civil Procedure 12(f) (Dkt. 45). Rule 12(f) of the Federal Rules of Civil Procedure provides that "the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are disfavored because they potentially only serve to delay. *Heller Fin., Inc.* v. *Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

USA Funds asserts that the information contained in paragraphs 95-102 and Exhibits 7 and 8 was improperly disclosed in another case for which the sanction was dismissal of the lawsuit. The previous lawsuit was filed in 2008 in the Northern District of Illinois and did not involve Ms. Bible. Exhibit 7 consists of a copy of a June 26, 2008 online article from the *Chronicle of Higher Education*, entitled "Contract Raises New Concerns over Sallie Mae's Ties to Guarantor." Dkt. 38-8. The article is based on a "Guarantee Services Agreement" between USA Funds and Sallie Mae, Inc. which the author of the article claims was leaked to the website Wikileaks. Exhibit

8 is a copy of the "Guaranty Services Agreement" referenced in the article. Ms. Bible obtained Exhibits 7 and 8 from the internet and references the Guaranty Services Agreement's storage on the Wikileaks website in her First Amended Complaint. Dkt. 38 at 19. Paragraphs 95-102 of Ms. Bible's First Amended Complaint are based on the information contained in Exhibits 7 and 8.

In the course of discovery in the prior lawsuit, USA Funds produced documents, including the Guarantee Services Agreement, to opposing counsels pursuant to counsels' agreement that such production would be for "attorneys' eyes only" until the protective order covering the original defendant could be modified to include all defendants, including USA Funds. Despite the verbal agreement, plaintiff's counsel provided the agreement to his client, another attorney and a reporter at the *Chronicle of Higher Learning*. On June 24, 2008, USA Funds learned that a copy of the confidential document had been posted on Wikileaks. The district court in that case granted USA Funds' motion to dismiss the case as a sanction for this and a number of other violations of professional conduct by plaintiff's counsel, and the Seventh Circuit upheld the dismissal. *See Salmeron* v. *Enterprise Recovery Sys., Inc.*, 579 F.3d 787 (7th Cir. 2009).

USA Funds now argues that this material should be stricken from Ms. Bible's First Amended Complaint under Rule 12(f) because it is "immaterial, impertinent, or scandalous," has no material relation to or bearing on the subject matter of the litigation,

and will prejudice USA Funds. USA Funds also argues that Ms. Bible should not be permitted to benefit from sanctionable conduct. In contrast, Ms. Bible argues that she lawfully obtained the information that has been publically available online for the past five years. Both parties cite to *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 428 (E.D.N.Y 2007) in support of their arguments. In *Zyprexa*, the district court reviewed whether non-parties could be enjoined from further disseminating information that was improperly released by a party's expert witness and a reporter. The leaked documents, which were subject to a protective order, were widely disseminated to various organizations and individuals, and excerpts were published in an article in *The New York Times*. The court issued an injunction requiring the recipients of the leaked documents to return them, and against the conspirators who distributed the documents to these individuals. However, the court confined the injunction to only these individuals, finding it was doubtful that an injunction could be enforced against the "constantly expanding universe" of people who would have access to the documents online as a result of the original breach of the protective order. *Id.* at 397.

USA Funds compares Ms. Bible to the individuals who initially received the documents from the expert who violated the protective order in *Zyprexa*; however, the Court finds that Ms. Bible is more akin to the individuals in the "constantly expanding universe," as characterized by the *Zyprexa* court. Ms.

Bible obtained these documents from publically available online sources, not from the parties in the *Salmeron* case. The documents have been available in the public domain for more than five years, and this Court does not have the power or ability to limit its access. *See Zyprexa*, 474 F. Supp. 2d at 428 ("[I]t is unlikely that the court can now effectively enforce an injunction against the internet in its various manifestations, and it would constitute a dubious manifestation of public policy were it to attempt to do so."). Ms. Bible's complaint does not put this material "in the public eye" any more than the internet has already done so. In addition, the dismissal sanction in *Salmeron* was not only for the improper disclosure of confidential documents, but was also for a host of other professional conduct violations, so the sanction of dismissal for the disclosure carries less weight than it would had the disclosure been the only violation.

Additionally, USA Funds has not shown that the paragraphs and exhibits at issue are immaterial, scandalous, impertinent, or prejudicial. Ms. Bible uses the materials in an attempt to support her RICO claim in order to show an enterprise and pattern of racketeering activity, so she has shown that they are relevant to her complaint. In addition, USA Funds' only argument that the materials are "scandalous" or "impertinent" is based upon the improper disclosure in a previous lawsuit, which, as discussed, does not support a motion to strike. Therefore, USA Funds' Motion to Strike (Dkt. 45) is **DENIED**.

B. Motion to Dismiss

1. Preemption under the HEA

USA Funds asserts that Ms. Bible's claims should be dismissed because they are preempted by the HEA. USA Funds argues that Ms. Bible's breach of contract and RICO claims are essentially disguised as claims for violations of the HEA, and there is no private right of action under the HEA. In response, Ms. Bible argues that she is bringing a state law claim for breach of contract, and that the requirements of the HEA are simply terms of the MPN incorporated by reference.

The Higher Education Act of 1965, now codified at 20 U.S.C. §§ 1001-1155, was passed "to keep the college door open to all students of ability, regardless of socioeconomic background." *Rowe* v. *Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir. 2009) (internal quotation marks omitted). As part of that effort, Congress established the FFELP as a system of loan guarantees meant to encourage private lenders to loan money to students and their parents on favorable terms. *See* 20 U.S.C. §§ 1071-1087-4; *Rowe*, 559 F.3d at 1030. The Secretary of the Department of Education is authorized to "prescribe such regulations as may be necessary to carry out the purposes" of the FFELP. 20 U.S.C. § 1082(a)(1). Under that authority, the Department of Education has promulgated detailed regulations. *See* 34 C.F.R. §§ 682.100-682.800. The private lenders must abide by the terms of the FFELP regulations, and may assign

their loans to third-party loan servicers who must also abide by the regulations. *See* 20 U.S.C. § 1082(a)(1); 34 C.F.R. §§ 682.203, 682.700(a). When a borrower defaults on his or her student loan and the lender is unable to recover the amount despite due diligence, the lender recoups its loss from a guarantor. 34 C.F.R. § 682.102(e)(7). Guarantors must enter into agreements with the Department of Education in order to participate in the FFELP. 20 U.S.C. § 1078(c). When a lender assigns a guaranty agency a defaulted loan, the guaranty agency must take steps to recover the defaulted amount, but may recover up to one hundred percent of its losses from the Department of Education if it is unable to collect the debt. 34 C.F.R. §§ 682.404(a), 682.410(b)(6).

The HEA does not provide for a private cause of action but, rather, "only provides for a suit brought by or against the Secretary of Education." 20 U.S.C. §1082(a)(2). "[T]he HEA provides administrative remedies, whereby the Secretary of Education can monitor and sanction Defendants' non-compliance with the statute." *McCulloch* v. *PNC Bank Inc.*, 298 F.3d 1217, 1226 (11th Cir. 2002); *see also* 20 U.S.C. §§ 1082(g) (authority to impose civil penalties upon lenders), 1082(h) (authority to impose sanctions) 1082(j) (authority to take emergency action against lenders).

Ms. Bible claims that she is not attempting to enforce the requirements of the HEA, but that is exactly what she is attempting to do by claiming that USA Funds acted contrary to the HEA by imposing

collection costs. Merely rephrasing her suit as a breach of contract action does not salvage her claim. "[A borrower] cannot circumvent the statutory and regulatory scheme by calling his claim a breach of contract." *Gibbs* v. *SLM Corp.*, 336 F. Supp. 2d 1, 16 (D. Mass. 2004) *aff'd*, 05-1057, 2005 U.S. App. LEXIS 29462, 2005 WL 5493113 (1st Cir. Aug. 23, 2005); *cf. McCulloch*, 298 F.3d at 1226-27 (plaintiffs were not permitted to circumvent the HEA's administrative remedies by "packaging" their HEA claim as a RICO claim). In order to decide the merits of Ms. Bible's claims, the Court would necessarily have to interpret and apply the HEA, not merely the language of the MPN. The Court declines Ms. Bible's invitation to deviate in view of the overwhelming number of courts that have addressed this issue and concluded that there is no express or implied private right of action under the HEA, thus such claims, even when recharacterized as breach of contract or RICO claims, fail to state a cause of action. *See, e.g.*, *Parola* v. *Citibank (S. Dakota) N.A.*, 894 F. Supp. 2d 188, 196 (D. Conn. 2012); *McCulloch*, 298 F.3d at 1221; *Gibbs*, 336 F. Supp. 2d at 14; *Labickas* v. *Ark. St. Univ.*, 78 F.3d 333, 334 (8th Cir. 1996); *Parks Sch. of Bus.* v. *Symington*, 51 F.3d 1480, 1485 (9th Cir. 1995); *L'ggrke* v. *Benkula*, 966 F.2d 1346, 1348 (10th Cir. 1992); *Bartels* v. *Alabama Comm. Col.*, 918 F. Supp. 1565, 1573 (S.D. Ga. 1995); *N.Y. Inst. of Dietetics, Inc.* v. *Great Lakes Higher Ed. Corp.*, No. 94-CIV-4858, 1995 U.S. Dist. LEXIS 13692, 1995 WL 562189 (S.D.N.Y. Sept. 21, 1995), *Moy* v. *Adelphi Inst., Inc.*, 866 F. Supp. 696, 705 (E.D.N.Y.1994); *Hudson* v.

Acad. of Court Reporting, 746 F. Supp. 718, 721 (S.D. Ohio 1990); *St. Mary of the Plains Col.* v. *Higher Ed. Loan Program of Kansas, Inc.*, 724 F. Supp. 803, 806-07 (D. Kan. 1989). Thus, the Court concludes that Ms. Bible's claims are preempted by the HEA and she has therefore failed to state a cause of action.

2. Breach of Contract

a. The Master Promissory Note explicitly permits collection costs

Even if the Court were to find that the HEA does not preempt Ms. Bible's claims, they still fail under the plain language of the MPN. The MPN is attached to Ms. Bible's First Amended Complaint, so the Court may properly consider it in deciding this Motion to Dismiss. *See* Fed. R. Civ. P. 10(c); *Bogie* v. *Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013) ("[D]istrict courts are free to consider any facts set forth in the complaint that undermine the plaintiff's claim * * * includ[ing] exhibits attached to the complaint[.]")

Ms. Bible electronically executed the MPN on June 12, 2006, and does not dispute that the MPN governs all of her loans obtained through the FFELP Program. Dkt. 38-3 at 2. The MPN states in at least six different places that collection costs would be imposed in the event of default and/or that payments would be allocated to collection costs prior to being allocated to principal and interest. *See* Dkt. 38-3 at 2 ("If I do not make any payment on any loan made under this MPN when it is due, I will also pay

reasonable collection costs, including but not limited to attorney's fees, court costs, and other fees."); Dkt. 38-3 at 3 ("If I default on any loans, I will pay reasonable collection fees and costs, plus court costs and attorney fees."); *Id.* ("Payments submitted by me or on my behalf * * * may be applied first to charges and collection costs that are due, then to accrued interest that has not been capitalized, and finally to the principal amount."); *Id.* ("If I default, the guarantor may purchase my loans and capitalize all then-outstanding interest into a new principal balance, and collection fees will become immediately due and payable."); Dkt. 38-3 at 6 ("All payments and prepayments may be applied in the following order: late charges, fees, and collection costs first, outstanding interest second, and outstanding principal last."); Dkt. 38-3 at 7 ("If I default, the entire unpaid balance and accrued collection fees on the applicable loans will become immediately due and payable.").

Ms. Bible focuses her argument on a single paragraph of the MPN entitled "Late Charges and Collection Costs," arguing that it states USA Funds may only impose "charges and fees that are permitted by the Act for the collection of my loans." Dkt. 38-3 at 3; Bible Brief Dkt. 52 at 11. She argues that this sentence renders the terms of the MPN unenforceable because the term of the HEA control. Importantly, Ms. Bible ignores the statement immediately following that language, which states, "If I default on my loans, I will pay reasonable collection fees and costs, plus court costs and attorney fees." Dkt. 38-3 at 3.

Contrary to Ms. Bible's inexplicable argument, the MPN itself clearly includes provisions that allow for the imposition of collection costs in the event of default. She provides no support for her argument that the HEA renders all terms of the MPN void and unenforceable, and such an interpretation goes against the principle that the Court must accept an interpretation of the contract which harmonizes its provisions, as opposed to one which causes the provisions to be conflicting. *R. R. Donnelley & Sons, Co.* v. *Henry-Williams, Inc.*, 422 N.E.2d 353, 356 (Ind. Ct. App. 1981). Thus, the Court finds that a breach of contract claim based solely on the language of the MPN fails.

b. The Rehabilitation Agreement permits collection costs

Ms. Bible's breach of contract claim also fails under the language of the Rehabilitation Agreement. Ms. Bible argues that USA Funds breached the terms of the Rehabilitation Agreement by imposing collection costs not authorized by the HEA (which, as discussed above, provides no private right of action) and by imposing collection costs after informing her that her collection costs were $0.00. As with the MPN, the documents included with the Rehabilitation Agreement clearly state that collection costs would be imposed.

In the initial letter sent to Ms. Bible on April 12, 2012, which was the notice required to be sent

by USA Funds within forty-five days of paying Citibank's default claim under 34 C.F.R. § 682.410(b)(5)(ii)(D), GRC, on behalf of USA Funds, informed Ms. Bible that her *current* collection balance was $0.00, but also stated,

> Because your credit agreement may require you to pay interest on the outstanding portion of your balance, as well as late charges *and costs of recovery*, which vary from day to day, as you agreed in your credit agreement, the amount required to pay your account in full on the day you send payment *may be greater than the amount stated here*.

Dkt. 38-4 at 3 (emphasis added). In addition, the page entitled "Options for Resolving Your Loan Debt" states, "As part of your eligibility for loan rehabilitation, *you will be assessed collection costs* at a reduced rate of 18.5% of the outstanding balance at the time your loan is purchased by an eligible lender* * * *" Dkt. 38-4 at 4 (emphasis added). The notice also stated that these collection costs would be assessed on her account sixty days after the default claim purchase. Dkt. 38-4 at 4. Thus, prior to entering into the Rehabilitation Agreement, Ms. Bible was clearly informed that if she entered into the loan rehabilitation program, the amount she owed would increase and would include collection costs.

On April 27, 2012, GRC sent a rehabilitation application to Ms. Bible outlining the requirements of the rehabilitation program for rehabilitating her loans and removing them from default status. The

application included a cover letter, an Automated Withdrawal Authorization, and a Capitalization Authorization Letter. The cover page of the correspondence again stated,

> Because your credit agreement may require you to pay interest on the outstanding portion of your balance, as well as late charges *and costs of recovery*, which vary from day to day, as you agreed in your credit agreement, the amount required to pay your account in full on the day you send payment *may be greater than the amount stated here*.

Dkt. 38-5 at 2 (emphasis added). The Capitalization Authorization Letter stated that Ms. Bible's loans would only be rehabilitated "after purchase by an eligible lender" and that "[c]ollection costs may be capitalized at the time of the Loan Rehabilitation by your new lender, along with outstanding accrued interest, to form one new principal amount." Dkt. 38-5 at 5. As long as Ms. Bible's loans were in default status, she would be assessed collection costs. The only way to avoid collection costs was for Ms. Bible's loans to no longer be in a state of default; this would not occur until after she had satisfied all of the requirements of the rehabilitation program. *See* 34 C.F.R. § 682.405 ("A loan is considered to be rehabilitated only after [t]he borrower has made and the guaranty agency has received nine of the ten payments required under a monthly repayment agreement [and] [t]he loan has been sold to an eligible lender."). The Capitalization Authorization Letter

also states that once rehabilitation is complete (*i.e.* the loan has been purchased by an eligible lender) "collection costs that have been added will be reduced to 18.5% of the unpaid principal and accrued interest outstanding at the time of the Loan Rehabilitation." *Id.* Finally, the Capitalization Authorization Letter states directly above the signature block, "By signing below, I understand and agree that the lender may capitalize collection costs of 18.5% of the outstanding principal and accrued interest upon rehabilitation of my loan(s)." *Id.* This language clearly informed Ms. Bible that she would be assessed collection costs during the loan rehabilitation program.[1] The plain language of the documents conflicts with Ms. Bible's theory of recovery, thus she has failed to state a claim for relief.

c. The HEA permits collection costs

Additionally, the HEA itself does not prohibit the assessment of collection costs as argued by Ms. Bible. As stated previously, Ms. Bible's argument is that by stating that the lender may collect charges and fees permitted by the Act for the collection of her loans, the MPN only permits USA Funds to impose collection costs authorized by the HEA. She argues that the HEA gives borrowers sixty days to enter into a rehabilitation agreement and avoid collection costs,

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[1] This language is also consistent with 34 C.F.R. § 682.405(b)(1)(vi) of the HEA regulations, as discussed *infra*.

citing 34 C.F.R. §§ 682.410(b)(5)(ii)(D) and 682.410(b)(5)(iv)(B). Paragraph (b)(5)(ii)(D) states that after the guaranty agency (*i.e*. USA Funds) pays a default claim on a loan, but before it reports the default to a consumer reporting agency or assesses collection costs, it shall, within the time period specified in paragraph (b)(6)(ii) (*i.e*. forty-five days), provide the borrower with the opportunity to enter into a repayment agreement on terms agreeable to the agency.

Paragraph (b)(6)(ii) requires that the guaranty agency send a notice to the borrower containing certain information within forty-five days after paying a lender's default claim. Paragraph (b)(5)(iv)(B) states that the deadline established by the guaranty agency for requesting administrative review under paragraph (b)(5)(ii)(C) must allow the borrower sixty days from the date of the notice to request such administrative review.[2] These provisions say nothing about giving a borrower sixty days to enter into a repayment agreement in order to avoid collection costs. It merely states that a guaranty agency cannot impose collection costs until the notice to the borrower has been sent, and the sixty day time period that Ms. Bible keeps referring to is the time period in which she had to request administrative review to dispute the validity of the loan. *See* 34 C.F.R. § 682.410(b)(5)(ii)(C) ("opportunity for an

[2] Ms. Bible does not assert that she requested administrative review, nor does she dispute the validity of her loan.

administrative review of the legal enforceability or past-due status of the loan obligation").

As pointed out by USA Funds, the HEA regulations explicitly require guarantors to assess collection charges to defaulting borrowers. 34 C.F.R. § 682.410(b)(2) states:

> Collection charges. Whether or not provided for in the borrower's promissory note and subject to any limitation on the amount of those costs in that note, the guaranty agency *shall* charge a borrower an amount equal to *reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim*. These costs may include, but are not limited to, all attorney's fees, collection agency charges, and court costs.

(emphasis added). Ms. Bible does not address this particular paragraph of the regulation in her brief, except to argue that USA Funds should not be permitted to rely on the language of the HEA while arguing that she may not do so in her breach of contract claim. The imposition of collection costs is clearly and explicitly authorized—and mandated—by the HEA regulations.

The regulation section specifically addressing the loan rehabilitation agreement also contemplates that collection costs will be imposed during the period the borrower is participating in the loan rehabilitation program. 34 C.F.R. § 682.405(b)(1)(vi) states that the guaranty agency must provide the borrower with a

written statement informing her of the amount of the collection costs to be added to the unpaid principal at the time the successfully rehabilitated loan is sold to another lender, and that these costs may not exceed 18.5% of the unpaid principal and accrued interest at the time of the sale. Thus, the HEA regulations acknowledge that collection costs will be imposed on borrowers during rehabilitation program, and USA Funds did not act contrary to the HEA in doing so.

Ms. Bible cites to a brief filed in *Educ. Credit Mgmt. Corp.* v. *Barnes*, 318 B.R. 482 (S.D. Ind. 2004) to support her argument that a borrower may avoid collection costs in their entirety if she enters into a rehabilitation agreement. However, a legal brief is not binding or persuasive authority, and Ms. Bible cites to no other legal authority issued by a court in support of her argument. Additionally, there is nothing in the plain language of HEA or the regulations that prohibits imposition of collection costs once the notice has been sent and a repayment agreement has been entered into.

Ms. Bible also attempts to argue that this District [sic] previously stated that delinquent borrowers had the opportunity to avoid the assessment of collection costs by paying or negotiating new terms for the loan, and if no response to the letter informing the borrower of her payment options was received, only then may the delinquency permit the assessment of collection costs. *Barnes*, 318 B.R. at 491 n.9. However, this was not the issue before the court in that bankruptcy action, which was to determine the

constitutionality of HEA regulations. The District Court's discussion of what occurs in a "typical delinquency" was in a footnote, and is arguably dicta that cites to no regulations or other legal authority. Based upon the plain language of the HEA, the Court concludes that the HEA does not prohibit the assessment of collection costs in the manner set forth in Ms. Bible's First Amended Complaint, and she has thus failed to state a claim upon which relief may be granted.

Having determined that the HEA does not provide borrowers with a private right of action, the Court concludes that Ms. Bible has not stated a claim against USA Funds. In addition, there is nothing in the terms of the MPN, the Rehabilitation Agreement, or the HEA that prohibits the imposition of collection costs in the manner alleged by Ms. Bible in her First Amended Complaint. Therefore, USA Funds' Motion on Ms. Bible's breach of contract claim is **GRANTED**.

3. RICO claim

In her final claim, Ms. Bible asserts that USA Funds committed a RICO violation in association with GRC and Sallie Mae. As previously discussed, this claim is preempted by the HEA, as it merely restates allegations that USA Funds violated the HEA. In addition, this claim is without merit because Ms. Bible cannot show that USA Funds acted unlawfully or fraudulently in the imposition of collection costs or application of her payments to collection

costs pursuant to her MPN and Rehabilitation Agreement. Ms. Bible alleges that USA Group committed mail and wire fraud, but she has not shown participation in a scheme to defraud; commission of an act with intent to defraud; or the use of mails or interstate wires in furtherance of a fraudulent scheme. 18 U.S.C. §§ 1341 and 1343. Indeed, Ms. Bible's Complaint and the attached exhibits show that USA Funds did not engage in any racketeering activity, therefore, she has not stated a claim under RICO. Therefore, USA Funds' Motion on this claim is **GRANTED**.

IV. CONCLUSION

For the reasons set forth above, USA Funds' Motion to Strike (Dkt. 45) is **DENIED**, and its Motion to Dismiss (Dkt. 47) is **GRANTED**. Ms. Bible's First Amended Complaint is **DISMISSED with prejudice**. Accordingly, the Plaintiff's Motion for Class Certification (Dkt. 4) is **DISMISSED** as moot.

SO ORDERED.

Date: 03/14/2014

/s/ Tanya Walton Pratt

Hon. Tanya Walton Pratt, Judge
United States District Court
Southern District of Indiana

2015 WL 5883960
United States Court of Appeals,
Seventh Circuit.

Bryana BIBLE, Individually and on Behalf of the Proposed Class, Plaintiff-Appellant,
v.
UNITED STUDENT AID FUNDS, INC., Defendant-Appellee.

No. 14-1806. | Oct. 5, 2015.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 13-CV-00575-TWP-TAB—Tanya Walton Pratt, Judge.

Attorneys and Law Firms

E. Michelle Drake, Attorney, Anna P. Prakash, Attorney, Nichols Kaster, PLLP, Minneapolis, MN, for Plaintiff-Appellant.

Arnold Bradley Fagg, Attorney, Morgan, Lewis & Bockius LLP, Washington, DC, Bonnie L. Martin, Attorney, Amanda Couture, Attorney, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Indianapolis, IN, for Defendant-Appellee.

Before FLAUM, MANION, and HAMILTON, Circuit Judges.

Opinion

On consideration of appellee's petition for rehearing and rehearing en banc, filed on September 1, 2015, no judge in active service has requested a vote on the

petition for rehearing en banc, and all judges on the original panel have voted to deny the petition. Accordingly, the petition for rehearing is DENIED.

EASTERBROOK, Circuit Judge, concurring in the denial of rehearing en banc.

If default on a student loan causes the lender to collect on a federal guaranty, the borrower must pay "reasonable collection costs" to curtail the expense to the Treasury. 20 U.S.C. § 1091a(b)(1). A federal regulation nonetheless provides that a borrower who signs (and complies with) a "repayment agreement," thus reimbursing the guarantor, need not add collection costs to the debt. 34 C.F.R. § 682.410(b)(5)(ii)(D).

Bryana Bible stopped paying her student loan but later agreed to a rehabilitation program, governed by 34 C.F.R. § 682.405, under which she paid $50 a month (not enough to cover even half of the monthly interest) in anticipation that she would eventually resume making full payments, after which the note would be sold to a new private lender. When signing the rehabilitation contract, Bible promised to pay collection costs that could not exceed 18.5% of her loan.[†]

[†] Two paragraphs of the rehabilitation agreement address collection costs. One reads: "Once rehabilitation is complete, collection costs that have been added will be reduced to 18.5% of the unpaid principal and accrued interest outstanding at the

(Continued on following page)

But when the holder of her note sought to recover those costs, Bible replied with this suit characterizing the effort as a form of mail or wire fraud and seeking millions of dollars in damages under RICO, even though the guaranty funds have not been repaid and the premise of § 682.410(b)(5)(ii)(D) has not been fulfilled. She contends that a rehabilitation agreement under § 682.405 must be treated the same as a repayment agreement under § 682.410 and that, by treating these two programs differently, United Student Aid Funds has committed thousands of federal felonies—at least one per borrower. Bible also contends that United Student Aid Funds must pay damages for breach of contract, even though her original loan agreement and her rehabilitation agreement permit the lender to assess collection costs. Reversing the district court, the panel held that Bible's suit may proceed on both the RICO and contract claims.

Each member of the panel wrote separately. The lead opinion, by Judge Hamilton, concludes that the addition of collection costs to a loan in rehabilitation is forbidden because every "rehabilitation agreement"

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time of Loan Rehabilitation. Collection costs may be capitalized at the time of the Loan Rehabilitation by your new lender, along with outstanding accrued interest, to form one new principal amount." The other, appearing immediately above the signature block, reads: "By signing below, I understand and agree that the lender may capitalize collection costs of 18.5% of the outstanding principal and accrued interest upon rehabilitation of my loan(s)."

is a "repayment agreement." Judge Manion, in dissent, concludes that a "rehabilitation agreement" is not a "repayment agreement." The two kinds of agreements are governed by separate regulations, and "rehabilitation" does not produce "repayment" when it doesn't even cover ongoing interest. Judge Flaum saw merit in both of these views and wrote that:

> Judge Manion, in his dissent, makes a strong case for the proposition that the two concepts are separate and distinct, and thus, that the repayment agreement provisions of [34 C.F.R.] § 682.410(b)(5)(ii) do not apply to the loan rehabilitation program described in 34 C.F.R. § 682.405. Indeed, the Department of Education's website lists "Loan Repayment" and "Loan Rehabilitation" as independent options for "getting your loan out of default." [Citation omitted.] Moreover, there is no cross-reference or other textual indication in the regulations suggesting that the rehabilitation agreements described in § 682.405 constitute repayment agreements "on terms satisfactory to the agency" under § 682.410(b)(5)(ii), such that a rehabilitation agreement might fall within the scope of § 682.410(b)(5)(ii)' s exception to the general rule that collection costs will be assessed against borrowers in default. Rather, the sole reference to collection costs in § 682.405 appears to assume the assessment of collection costs in the rehabilitation context. *See* § 682.405(b)(1)(vi)(B) (explaining that the guaranty agency must inform a borrower entering into a rehabilitation

> agreement "[o]f the amount of any collection costs to be added to the unpaid principal of the loan when the loan is sold to an eligible lender, which may not exceed 18.5 percent of the unpaid principal and accrued interest on the loan at the time of the sale").

Slip op. 50-51. But Judge Flaum thought that the court is required by *Auer* v. *Robbins*, 519 U.S. 452 (1997), to accept the agency's view that collection costs may not be assessed against borrowers who sign rehabilitation agreements—even though this view was announced in a brief filed as *amicus curiae* in this suit and contradicts some earlier statements by the Department of Education (although it is arguably consistent with the position taken in one filing in one district court in 2004 but never laid out in the Federal Register or another place the regulated industry might access; compare Judge Hamilton's conclusion, slip op. 28-29, with Judge Manion's, slip op. 66-70).

The petition for rehearing en banc asks the court to consider whether *Auer* supports the Secretary's current position, when applied to conduct that predates the Secretary's *amicus* brief. That is a substantial and potentially important question, but an antecedent issue is whether *Auer* is sound. In concurring opinions to *Perez* v. *Mortgage Bankers Association*, 135 S.Ct. 1199 (2015), three Justices (including *Auer*'s author) expressed deep reservations about deferring to the position an agency adopts through means other than rulemaking. *See also Christopher* v. *SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012);

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L.Rev. 612 (1996).

I do not think that it would be a prudent use of this court's resources to have all nine judges consider how *Auer* applies to rehabilitation agreements, when *Auer* may not be long for this world. The positions taken by the three members of the panel show that this is one of those situations in which the precise nature of deference (if any) to an agency's views may well control the outcome.

The petition for rehearing does not contend that this litigation meets the standards for en banc review independent of the *Auer* question. None of the other circuits has considered whether repayment and rehabilitation agreements should be treated the same for the purpose of collection costs under § 1091a(b)(1). Indeed, legal issues about the student-loan program rarely arise in any circuit outside of bankruptcy litigation. But an agency's (or litigant's) invocation of *Auer* deference is a frequent occurrence, and one whose effects this litigation illuminates—for deference has set the stage for a conclusion that conduct, in compliance with agency advice when undertaken (and consistent with the district judge's view of the regulations' text), is now a federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while the case was on appeal.

RELEVANT STATUTES AND REGULATIONS

20 U.S.C.A. § 1091a

§ 1091a. Statute of limitations, and State court judgments

(a) In general

(1) It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced.

(2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by—

(A) an institution that receives funds under this subchapter and part C of subchapter I of chapter 34 of Title 42 that is seeking to collect a refund due from a student on a grant made, or work assistance awarded, under this subchapter and part C of subchapter I of chapter 34 of Title 42;

(B) a guaranty agency that has an agreement with the Secretary under section 1078(c) of this title that is seeking the repayment of the amount due from a borrower on a loan made under part B of this subchapter after such guaranty agency reimburses the previous holder of the loan for its loss on account of the default of the borrower;

(C) an institution that has an agreement with the Secretary pursuant to section 1087c or 1087cc(a) of this title that is seeking the repayment of the amount due from a borrower on a loan made under part C or D of this subchapter after the default of the borrower on such loan; or

(D) the Secretary, the Attorney General, or the administrative head of another Federal agency, as the case may be, for payment of a refund due from a student on a grant made under this subchapter and part C of subchapter I of chapter 34 of Title 42, or for the repayment of the amount due from a borrower on a loan made under this subchapter and part C of subchapter I of chapter 34 of Title 42 that has been assigned to the Secretary under this subchapter and part C of subchapter I of chapter 34 of Title 42.

(b) Assessment of costs and other charges

Notwithstanding any provision of State law to the contrary—

(1) a borrower who has defaulted on a loan made under this subchapter and part C of subchapter I of chapter 34 of Title 42 shall be required to pay, in addition to other charges specified in this subchapter and part C of subchapter I of chapter 34 of Title 42 reasonable collection costs;

(2) in collecting any obligation arising from a loan made under part B of this subchapter, a guaranty agency or the Secretary shall not be subject to a

defense raised by any borrower based on a claim of infancy; and

(3) in collecting any obligation arising from a loan made under part D of this subchapter, an institution of higher education that has an agreement with the Secretary pursuant to section 1087cc(a) of this title shall not be subject to a defense raised by any borrower based on a claim of infancy.

(c) State court judgments

A judgment of a State court for the recovery of money provided as grant, loan, or work assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42 that has been assigned or transferred to the Secretary under this subchapter and part C of subchapter I of chapter 34 of Title 42 may be registered in any district court of the United States by filing a certified copy of the judgment and a copy of the assignment or transfer. A judgment so registered shall have the same force and effect, and may be enforced in the same manner, as a judgment of the district court of the district in which the judgment is registered.

(d) Special rule

This section shall not apply in the case of a student who is deceased, or to a deceased student's estate or the estate of such student's family. If a student is deceased, then the student's estate or the estate of the student's family shall not be required to repay any financial assistance under this subchapter and

part C of subchapter I of chapter 34 of Title 42, including interest paid on the student's behalf, collection costs, or other charges specified in this subchapter and part C of subchapter I of chapter 34 of Title 42.

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20 U.S.C.A. § 1078-6

§ 1078-6. Default reduction program

(a) Other repayment incentives

(1) Sale or assignment of loan

(A) In general

Each guaranty agency, upon securing 9 payments made within 20 days of the due date during 10 consecutive months of amounts owed on a loan for which the Secretary has made a payment under paragraph (1) of section 1078(c) of this title, shall—

(i) if practicable, sell the loan to an eligible lender; or

(ii) beginning July 1, 2014, assign the loan to the Secretary if the guaranty agency has been unable to sell the loan under clause (i).

(B) Monthly payments

Neither the guaranty agency nor the Secretary shall demand from a borrower as monthly payment amounts described in subparagraph (A) more than is

reasonable and affordable based on the borrower's total financial circumstances.

(C) Consumer reporting agencies

Upon the sale or assignment of the loan, the Secretary, guaranty agency or other holder of the loan shall request any consumer reporting agency to which the Secretary, guaranty agency or holder, as applicable, reported the default of the loan, to remove the record of the default from the borrower's credit history.

(D) Duties upon sale

With respect to a loan sold under subparagraph (A)(i)—

(i) the guaranty agency—

(I) shall, in the case of a sale made on or after July 1, 2014, repay the Secretary 100 percent of the amount of the principal balance outstanding at the time of such sale, multiplied by the reinsurance percentage in effect when payment under the guaranty agreement was made with respect to the loan; and

(II) may, in the case of a sale made on or after July 1, 2014, in order to defray collection costs—

(aa) charge to the borrower an amount not to exceed 16 percent of the outstanding principal and interest at the time of the loan sale; and

(bb) retain such amount from the proceeds of the loan sale; and

(ii) the Secretary shall reinstate the Secretary's obligation to—

(I) reimburse the guaranty agency for the amount that the agency may, in the future, expend to discharge the guaranty agency's insurance obligation; and

(II) pay to the holder of such loan a special allowance pursuant to section 1087-1 of this title.

(E) Duties upon assignment

With respect to a loan assigned under subparagraph (A)(ii)—

(i) the guaranty agency shall add to the principal and interest outstanding at the time of the assignment of such loan an amount equal to the amount described in subparagraph (D)(i)(II)(aa); and

(ii) the Secretary shall pay the guaranty agency, for deposit in the agency's Operating Fund established pursuant to section 1072b of this title, an amount equal to the amount added to the principal and interest outstanding at the time of the assignment in accordance with clause (i).

(F) Eligible lender limitation

A loan shall not be sold to an eligible lender under subparagraph (A)(i) if such lender has been found by the guaranty agency or the Secretary to have substantially failed to exercise the due diligence required of lenders under this part.

(G) Default due to error

A loan that does not meet the requirements of subparagraph (A) may also be eligible for sale or assignment under this paragraph upon a determination that the loan was in default due to clerical or data processing error and would not, in the absence of such error, be in a delinquent status.

(2) Use of proceeds of sales

Amounts received by the Secretary pursuant to the sale of such loans by a guaranty agency under paragraph (1)(A)(i) shall be deducted from the calculations of the amount of reimbursement for which the agency is eligible under paragraph (1)(D)(ii)(I) for the fiscal year in which the amount was received, notwithstanding the fact that the default occurred in a prior fiscal year.

(3) Borrower eligibility

Any borrower whose loan is sold or assigned under paragraph (1)(A) shall not be precluded by section 1091 of this title from receiving additional loans or grants under this subchapter and part C of subchapter I of chapter 34 of title 42 (for which he or she is otherwise eligible) on the basis of defaulting on the loan prior to such loan sale or assignment.

(4) Applicability of general loan conditions

A loan that is sold or assigned under paragraph (1) shall, so long as the borrower continues to make scheduled repayments thereon, be subject to the same

terms and conditions and qualify for the same benefits and privileges as other loans made under this part.

(5) Limitation

A borrower may obtain the benefits available under this subsection with respect to rehabilitating a loan (whether by loan sale or assignment) only one time per loan.

(b) Satisfactory repayment arrangements to renew eligibility

Each guaranty agency shall establish a program which allows a borrower with a defaulted loan or loans to renew eligibility for all title IV student financial assistance (regardless of whether the defaulted loan has been sold to an eligible lender or assigned to the Secretary) upon the borrower's payment of 6 consecutive monthly payments. The guaranty agency shall not demand from a borrower as a monthly payment amount under this subsection more than is reasonable and affordable based upon the borrower's total financial circumstances. A borrower may only obtain the benefit of this subsection with respect to renewed eligibility once.

(c) Financial and economic literacy

Each program described in subsection (b) shall include making available financial and economic education materials for a borrower who has rehabilitated a loan.

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34 C.F.R. § 682.405

§ 682.405 Loan rehabilitation agreement.

(a) General.

(1) A guaranty agency that has a basic program agreement must enter into a loan rehabilitation agreement with the Secretary. The guaranty agency must establish a loan rehabilitation program for all borrowers with an enforceable promissory note for the purpose of rehabilitating defaulted loans, except for loans for which a judgment has been obtained, loans on which a default claim was filed under § 682.412, and loans on which the borrower has been convicted of, or has pled nolo contendere or guilty to, a crime involving fraud in obtaining title IV, HEA program assistance, so that the loan may be purchased, if practicable, by an eligible lender and removed from default status.

(2) A loan is considered to be rehabilitated only after—

(i) The borrower has made and the guaranty agency has received nine of the ten qualifying payments required under a monthly repayment agreement.

(A) A qualifying payment is—

(1) Made voluntarily;

(2) In the full amount required; and

(3) Received within 20 days of the due date for the payment, and

(B) All nine payments are received within a 10-month period that begins with the month in which the first required due date falls and ends with the ninth consecutive calendar month following that month, and

(ii) The loan has been sold to an eligible lender.

(3)(i) If a borrower's loan is being collected by administrative wage garnishment while the borrower is also making monthly payments on the same loan under a loan rehabilitation agreement, the guaranty agency must continue collecting the loan by administrative wage garnishment until the borrower makes five qualifying monthly payments under the rehabilitation agreement, unless the guaranty agency is otherwise precluded from doing so under § 682.410(b)(9).

(ii) After the borrower makes the fifth qualifying monthly payment, the guaranty agency must, unless otherwise directed by the borrower, suspend the garnishment order issued to the borrower's employer.

(iii) A borrower may only obtain the benefit of a suspension of administrative wage garnishment while also attempting to rehabilitate a defaulted loan once.

(4) After the loan has been rehabilitated, the borrower regains all benefits of the program, including any remaining deferment eligibility under section 428(b)(1)(M) of the Act, from the date of the rehabilitation. Effective for any loan that is rehabilitated on

or after August 14, 2008, the borrower cannot rehabilitate the loan again if the loan returns to default status following the rehabilitation.

(b) Terms of agreement. In the loan rehabilitation agreement, the guaranty agency agrees to ensure that its loan rehabilitation program meets the following requirements at all times:

(1) A borrower may request rehabilitation of the borrower's defaulted loan held by the guaranty agency. In order to be eligible for rehabilitation of the loan, the borrower must voluntarily make at least 9 of the 10 payments required under a monthly repayment agreement.

(i) Each payment must be—

(A) Made voluntarily;

(B) For the full amount required;

(C) Received within 20 days of the due date for the payment; and

(D) Reasonable and affordable.

(ii) All 9 payments must be received within a 10-month period that begins with the month in which the first required due date falls and ends with the ninth consecutive calendar month following that month.

(iii) The guaranty agency initially considers the borrower's reasonable and affordable payment amount to be an amount equal to 15 percent of the

amount by which the borrower's Adjusted Gross Income (AGI) exceeds 150 percent of the poverty guideline amount applicable to the borrower's family size and State, divided by 12, except that if this amount is less than $5, the borrower's monthly rehabilitation payment is $5.

(iv) The guaranty agency or its agents may calculate the payment amount based on information provided orally by the borrower or the borrower's representative and provide the borrower with a rehabilitation agreement using that amount. The guaranty agency must request documentation from the borrower to confirm the borrower's AGI and family size. If the borrower does not provide the guaranty agency or its agents with any documentation requested by the guaranty agency to calculate or confirm the reasonable and affordable payment amount, within a reasonable time deadline set by the guaranty agency or its agent, the rehabilitation agreement provided is null and void.

(v) The reasonable and affordable payment amount calculated under this section must not be—

(A) A required minimum loan payment amount (e.g., $50) if the agency determines that a smaller amount is reasonable and affordable;

(B) A percentage of the borrower's total loan balance; or

(C) Based on other criteria unrelated to the borrower's total financial circumstances.

(vi) Within 15 business days of its determination of the borrower's loan rehabilitation payment amount, the guaranty agency must provide the borrower with a written rehabilitation agreement which includes the borrower's payment amount calculated under paragraph (b)(1)(iii), a prominent statement that the borrower may object orally or in writing to the payment amount, with the method and timeframe for raising such an objection, and an explanation of any other terms and conditions applicable to the required series of payments that must be made before the borrower's account can be considered for repurchase by an eligible lender (i.e., rehabilitated). To accept the agreement, the borrower must sign and return the agreement or accept the agreement electronically under a process provided by the agency. The agency may not impose any other conditions unrelated to the amount or timing of the rehabilitation payments in the rehabilitation agreement. The written rehabilitation agreement must inform the borrower—

(A) Of the effects of having the loans rehabilitated (e.g., removal of the record of default from the borrower's credit history and return to normal repayment);

(B) Of the amount of any collection costs to be added to the unpaid principal of the loan when the loan is sold to an eligible lender, which may not exceed 18.5 percent of the unpaid principal and accrued interest on the loan at the time of the sale; and

(C) That the rehabilitation agreement is null and void if the borrower fails to provide the documentation required to confirm the monthly payment calculated under paragraph (b)(1)(iii) of this section.

(vii) If the borrower objects to the monthly payment amount determined under paragraph (b)(1)(iii) of this section, the guaranty agency or its agents must recalculate the payment amount based solely on information provided on a form approved by the Secretary and, if requested, supporting documentation from the borrower and other sources, and must consider—

(A) The borrower's, and if applicable, the spouse's current disposable income, including public assistance payments, and other income received by the borrower and the spouse, such as welfare benefits, Social Security benefits, Supplemental Security Income, and workers' compensation. Spousal income is not considered if the spouse does not contribute to the borrower's household income;

(B) Family size as defined in § 682.215(a)(3); and

(C) Reasonable and necessary expenses, which include—

(1) Food;

(2) Housing;

(3) Utilities;

(4) Basic communication expenses;

(5) Necessary medical and dental costs;

(6) Necessary insurance costs;

(7) Transportation costs;

(8) Dependent care and other work-related expenses;

(9) Legally required child and spousal support;

(10) Other title IV and non-title IV student loan payments; and

(11) Other expenses approved by the Secretary.

(viii) The guaranty agency must provide the borrower with a new written rehabilitation agreement confirming the borrower's recalculated reasonable and affordable payment amount within the timeframe specified in paragraph (b)(1)(vii) of this section. To accept the agreement, the borrower must sign and return the agreement or accept the agreement electronically under a process provided by the agency.

(ix) The agency must include any payment made under § 682.401(b)(1) in determining whether the 9 out of 10 payments required under paragraph (b)(1) of this section have been made.

(x) A borrower may request that the monthly payment amount be adjusted due to a change in the borrower's total financial circumstances only upon providing the documentation specified in paragraph (b)(1)(vii) of this section.

(xi) During the rehabilitation period, the guaranty agency must limit contact with the borrower on the loan being rehabilitated to collection activities that are required by law or regulation and to communications that support the rehabilitation.

(2) For the purposes of this section, payment in the full amount required means payment of an amount that is reasonable and affordable, based on the borrower's total financial circumstances, as agreed to by the borrower and the agency. Voluntary payments are those made directly by the borrower and do not include payments obtained by Federal offset, garnishment, income or asset execution, or after a judgment has been entered on a loan. A guaranty agency must attempt to secure a lender to purchase the loan at the end of the 9- or 10-month payment period as applicable.

(3) Upon the sale of a rehabilitated loan to an eligible lender—

(i) The guaranty agency must, within 45 days of the sale—

(A) Provide notice to the prior holder of such sale, and

(B) Request that any consumer reporting agency to which the default was reported remove the record of default from the borrower's credit history.

(ii) The prior holder of the loan must, within 30 days of receiving the notification from the guaranty agency, request that any consumer reporting agency

to which the default claim payment or other equivalent record was reported remove such record from the borrower's credit history.

(4) An eligible lender purchasing a rehabilitated loan must establish a repayment schedule that meets the same requirements that are applicable to other FFEL Program loans of the same loan type as the rehabilitated loan and must permit the borrower to choose any statutorily available repayment plan for that loan type. The lender must treat the first payment made under the nine payments as the first payment under the applicable maximum repayment term, as defined under § 682.209(a) or (h). For Consolidation loans, the maximum repayment term is based on the balance outstanding at the time of loan rehabilitation.

(c) A guaranty agency must make available financial and economic education materials, including debt management information, to any borrower who has rehabilitated a defaulted loan in accordance with paragraph (a)(2) of this section.

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34 C.F.R. § 682.410

§ 682.410 Fiscal, administrative, and enforcement requirements.

(a) Fiscal requirements—

(1) Reserve fund assets. A guaranty agency shall establish and maintain a reserve fund to be used

solely for its activities as a guaranty agency under the FFEL Program ("guaranty activities"). The guaranty agency shall credit to the reserve fund—

(i) The total amount of insurance premiums and Federal default fees collected;

(ii) Funds received from a State for the agency's guaranty activities, including matching funds under section 422(a) of the Act;

(iii) Federal advances obtained under sections 422(a) and (c) of the Act;

(iv) Federal payments for default, bankruptcy, death, disability, closed schools, and false certification claims;

(v) Supplemental preclaims assistance payments;

(vi) Transitional support payments received under section 458(a) of the Act;

(vii) Funds collected by the guaranty agency on FFEL Program loans on which a claim has been paid;

(viii) Investment earnings on the reserve fund; and

(ix) Other funds received by the guaranty agency from any source for the agency's guaranty activities.

(2) Uses of reserve fund assets. A guaranty agency may use the assets of the reserve fund established under paragraph (a)(1) of this section to pay only—

(i) Insurance claims;

(ii) Costs that are reasonable, as defined under § 682.410(a)(11)(iii), and that are ordinary and necessary for the agency to fulfill its responsibilities under the HEA, including costs of collecting loans, providing default aversion assistance, monitoring enrollment and repayment status, and carrying out any other guaranty activities. Those costs must be—

(A) Allocable to the FFEL Program;

(B) Not higher than the agency would incur under established policies, regulations, and procedures that apply to any comparable non-Federal activities of the guaranty agency;

(C) Not included as a cost or used to meet cost sharing or matching requirements of any other federally supported activity, except as specifically provided by Federal law;

(D) Net of all applicable credits; and

(E) Documented in accordance with applicable legal and accounting standards;

(iii) The Secretary's equitable share of collections;

(iv) Federal advances and other funds owed to the Secretary;

(v) Reinsurance fees;

(vi) Insurance premiums and Federal default fees related to cancelled loans;

(vii) Borrower refunds, including those arising out of student or other borrower claims and defenses;

(viii)(A) The repayment, on or after December 29, 1993, of amounts credited under paragraphs (a)(1)(ii) or (a)(1)(ix) of this section, if the agency provides the Secretary 30 days prior notice of the repayment and demonstrates that—

(1) These amounts were originally received by the agency under appropriate contemporaneous documentation specifying that receipt was on a temporary basis only;

(2) The objective for which these amounts were originally received by the agency has been fully achieved; and

(3) Repayment of these amounts would not cause the agency to fail to comply with the minimum reserve levels provided by paragraph (a)(10) of this section, except that the Secretary may, for good cause, provide written permission for a payment that meets the other requirements of this paragraph (a)(2)(ix)(A).

(B) The repayment, prior to December 29, 1993, of amounts credited under paragraphs (a)(1)(ii) or (a)(1)(ix) of this section, if the agency demonstrates that—

(1) These amounts were originally received by the agency under appropriate contemporaneous documentation that receipt was on a temporary basis only; and

(2) The objective for which these amounts were originally received by the agency has been fully achieved.

(ix) Any other costs or payments ordinary and necessary to perform functions directly related to the agency's responsibilities under the HEA and for their proper and efficient administration;

(x) Notwithstanding any other provision of this section, any other payment that was allowed by law or regulation at the time it was made, if the agency acted in good faith when it made the payment or the agency would otherwise be unfairly prejudiced by the nonallowability of the payment at a later time; and

(xi) Any other amounts authorized or directed by the Secretary.

(3) Accounting basis. Except as approved by the Secretary, a guaranty agency shall credit the items listed in paragraph (a)(1) of this section to its reserve fund upon their receipt, without any deferral for accounting purposes, and shall deduct the items listed in paragraph (a)(2) of this section from its reserve fund upon their payment, without any accrual for accounting purposes.

(4) Accounting records.

(i) The accounting records of a guaranty agency must reflect the correct amount of sources and uses of funds under paragraph (a) of this section.

(ii) A guaranty agency may reverse prior credits to its reserve fund if—

(A) The agency gives the Secretary prior notice setting forth a detailed justification for the action;

(B) The Secretary determines that such credits were made erroneously and in good faith; and

(C) The Secretary determines that the action would not unfairly prejudice other parties.

(iii) A guaranty agency shall correct any other errors in its accounting or reporting as soon as practicable after the errors become known to the agency.

(iv) If a general reconstruction of a guaranty agency's historical accounting records is necessary to make a change under paragraphs (a)(4)(ii) and (a)(4)(iii) of this section or any other retroactive change to its accounting records, the agency may make this reconstruction only upon prior approval by the Secretary and without any deduction from its reserve fund for the cost of the reconstruction.

(5) Investments. The guaranty agency shall exercise the level of care required of a fiduciary charged with the duty of investing the money of others when it invests the assets of the reserve fund described in paragraph (a)(1) of this section. It may invest these assets only in low-risk securities, such as obligations issued or guaranteed by the United States or a State.

(6) Development of assets.

(i) If the guaranty agency uses in a substantial way for purposes other than the agency's guaranty activities any funds required to be credited to the reserve fund under paragraph (a)(1) of this section or any assets derived from the reserve fund to develop an asset of any kind and does not in good faith allocate a portion of the cost of developing and maintaining the developed asset to funds other than the reserve fund, the Secretary may require the agency to—

(A) Correct this allocation under paragraph (a)(4)(iii) of this section; or

(B) Correct the recorded ownership of the asset under paragraph (a)(4)(iii) of this section so that—

(1) If, in a transaction with an unrelated third party, the agency sells or otherwise derives revenue from uses of the asset that are unrelated to the agency's guaranty activities, the agency promptly shall deposit into the reserve fund described in paragraph (a)(1) of this section a percentage of the sale proceeds or revenue equal to the fair percentage of the total development cost of the asset paid with the reserve fund monies or provided by assets derived from the reserve fund; or

(2) If the agency otherwise converts the asset, in whole or in part, to a use unrelated to its guaranty activities, the agency promptly shall deposit into the reserve fund described in paragraph (a)(1) of this section a fair percentage of the fair market value or,

in the case of a temporary conversion, the rental value of the portion of the asset employed for the unrelated use.

(ii) If the agency uses funds or assets described in paragraph (a)(6)(i) of this section in the manner described in that paragraph and makes a cost and maintenance allocation erroneously and in good faith, it shall correct the allocation under paragraph (a)(4)(iii) of this section.

(7) Third-party claims. If the guaranty agency has any claim against any other party to recover funds or other assets for the reserve fund, the claim is the property of the United States.

(8) Related-party transactions. All transactions between a guaranty agency and a related organization or other person that involve funds required to be credited to the agency's reserve fund under paragraph (a)(1) of this section or assets derived from the reserve fund must be on terms that are not less advantageous to the reserve fund than would have been negotiated on an arm's-length basis by unrelated parties.

(9) Scope of definition. The provisions of this § 682.410(a) define reserve funds and assets for purposes of sections 422 and 428 of the Act. These provisions do not, however, affect the Secretary's authority to use all funds and assets of the agency pursuant to section 428(c)(9)(F)(vi) of the Act.

(10) Minimum reserve fund level. The guaranty agency must maintain a current minimum reserve level of not less than —

(i) .5 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1993;

(ii) .7 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1994;

(iii) .9 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1995; and

(iv) 1.1 percent of the amount of loans outstanding, for each fiscal year of the agency that begins on or after January 1, 1996.

(11) Definitions. For purposes of this section—

(i) Reserve fund level means—

(A) The total of reserve fund assets as defined in paragraph (a)(1) of this section;

(B) Minus the total amount of the reserve fund assets used in accordance with paragraphs (a)(2) and (a)(3) of this section; and

(ii) Amount of loans outstanding means—

(A) The sum of—

(1) The original principal amount of all loans guaranteed by the agency; and

(2) The original principal amount of any loans on which the guarantee was transferred to the agency from another guarantor, excluding loan guarantees transferred to another agency pursuant to a plan of the Secretary in response to the insolvency of the agency;

(B) Minus the original principal amount of all loans on which—

(1) The loan guarantee was cancelled;

(2) The loan guarantee was transferred to another agency;

(3) Payment in full has been made by the borrower;

(4) Reinsurance coverage has been lost and cannot be regained; and

(5) The agency paid claims.

(iii) Reasonable cost means a cost that, in its nature and amount, does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The burden of proof is upon the guaranty agency, as a fiduciary under its agreements with the Secretary, to establish that costs are reasonable. In determining reasonableness of a given cost, consideration must be given to—

(A) Whether the cost is of a type generally recognized as ordinary and necessary for the proper and efficient performance and administration of the guaranty agency's responsibilities under the HEA;

(B) The restraints or requirements imposed by factors such as sound business practices, arms-length bargaining, Federal, State, and other laws and regulations, and the terms and conditions of the guaranty agency's agreements with the Secretary; and

(C) Market prices of comparable goods or services.

(b) Administrative requirements—

(1) Independent audits. The guaranty agency shall arrange for an independent financial and compliance audit of the agency's FFEL program as follows:

(i) [Reserved by 79 FR 76105]

(ii) A guaranty agency must conduct an audit in accordance with 31 U.S.C. 7502 and 2 CFR part 200, subpart F—Audit Requirements.[2] If a nonprofit guaranty agency meets the criteria in 2 CFR part 200, subpart F—Audit Requirements to have a program specific audit, and chooses that option, the program-specific audit must meet the following requirements:

(2) Collection charges. Whether or not provided for in the borrower's promissory note and subject to any limitation on the amount of those costs in that note, the guaranty agency shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim. These costs may

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[2] None of the other regulations in 2 CFR part 200 apply to lenders. Only those requirements in subpart F—Audit Requirements, apply to lenders, as required under the Single Audit Act Amendments of 1996 (31 U.S.C. Chapter 75).

include, but are not limited to, all attorney's fees, collection agency charges, and court costs. Except as provided in §§ 682.401(b)(18)(i) and 682.405(b)(1)(iv)(B), the amount charged a borrower must equal the lesser of—

(i) The amount the same borrower would be charged for the cost of collection under the formula in 34 CFR 30.60; or

(ii) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

(3) Interest charged by guaranty agencies. The guaranty agency shall charge the borrower interest on the amount owed by the borrower after the capitalization required under paragraph (b)(4) of this section has occurred at a rate that is the greater of—

(i) The rate established by the terms of the borrower's original promissory note;

(ii) In the case of a loan for which a judgment has been obtained, the rate provided for by State law.

(4) Capitalization of unpaid interest. The guaranty agency shall capitalize any unpaid interest due the lender from the borrower at the time the agency pays a default claim to the lender.

(5) Reports to consumer reporting agencies.

(i) After the completion of the procedures in paragraph (b)(5)(ii) of this section, the guaranty agency shall, after it has paid a default claim, report promptly, but not less than sixty days after completion of the

procedures in paragraph (b)(6)(ii) of this section, and on a regular basis, to all nationwide consumer reporting agencies—

(A) The total amount of loans made to the borrower and the remaining balance of those loans;

(B) The date of default;

(C) Information concerning collection of the loan, including the repayment status of the loan;

(D) Any changes or corrections in the information reported by the agency that result from information received after the initial report; and

(E) The date the loan is fully repaid by or on behalf of the borrower or discharged by reason of the borrower's death, bankruptcy, total and permanent disability, or closed school or false certification.

(ii) The guaranty agency, after it pays a default claim on a loan but before it reports the default to a consumer reporting agency or assesses collection costs against a borrower, shall, within the timeframe specified in paragraph (b)(6)(ii) of this section, provide the borrower with—

(A) Written notice that meets the requirements of paragraph (b)(5)(vi) of this section regarding the proposed actions;

(B) An opportunity to inspect and copy agency records pertaining to the loan obligation;

(C) An opportunity for an administrative review of the legal enforceability or past-due status of the loan obligation; and

(D) An opportunity to enter into a repayment agreement on terms satisfactory to the agency.

(iii) The procedures set forth in 34 CFR 30.20-30.33 (administrative offset) satisfy the requirements of paragraph (b)(5)(ii) of this section.

(iv)(A) In response to a request submitted by a borrower, after the deadlines established under agency rules, for access to records, an administrative review, or for an opportunity to enter into a repayment agreement, the agency shall provide the requested relief but may continue reporting the debt to consumer reporting agencies until it determines that the borrower has demonstrated that the loan obligation is not legally enforceable or that alternative repayment arrangements satisfactory to the agency have been made with the borrower.

(B) The deadline established by the agency for requesting administrative review under paragraph (b)(5)(ii)(C) of this section must allow the borrower at least 60 days from the date the notice described in paragraph (b)(5)(ii)(A) of this section is sent to request that review.

(v) An agency may not permit an employee, official, or agent to conduct the administrative review required under this paragraph if that individual is—

(A) Employed in an organizational component of the agency or its agent that is charged with collection of loan obligations; or

(B) Compensated on the basis of collections on loan obligations.

(vi) The notice sent by the agency under paragraph (b)(5)(ii)(A) of this section must—

(A) Advise the borrower that the agency has paid a default claim filed by the lender and has taken assignment of the loan;

(B) Identify the lender that made the loan and the school for attendance at which the loan was made;

(C) State the outstanding principal, accrued interest, and any other charges then owing on the loan;

(D) Demand that the borrower immediately begin repayment of the loan;

(E) Explain the rate of interest that will accrue on the loan, that all costs incurred to collect the loan will be charged to the borrower, the authority for assessing these costs, and the manner in which the agency will calculate the amount of these costs;

(F) Notify the borrower that the agency will report the default to all nationwide consumer reporting agencies to the detriment of the borrower's credit rating;

(G) Explain the opportunities available to the borrower under agency rules to request access to the

agency's records on the loan, to request an administrative review of the legal enforceability or past-due status of the loan, and to reach an agreement on repayment terms satisfactory to the agency to prevent the agency from reporting the loan as defaulted to consumer reporting agencies and provide deadlines and method for requesting this relief;

(H) Unless the agency uses a separate notice to advise the borrower regarding other proposed enforcement actions, describe specifically any other enforcement action, such as offset against Federal or state income tax refunds or wage garnishment that the agency intends to use to collect the debt, and explain the procedures available to the borrower prior to those other enforcement actions for access to records, for an administrative review, or for agreement to alternative repayment terms;

(I) Describe the grounds on which the borrower may object that the loan obligation as stated in the notice is not a legally enforceable debt owed by the borrower;

(J) Describe any appeal rights available to the borrower from an adverse decision on administrative review of the loan obligation;

(K) Describe any right to judicial review of an adverse decision by the agency regarding the legal enforceability or past-due status of the loan obligation;

(L) Describe the collection actions that the agency may take in the future if those presently proposed do not result in repayment of the loan obligation, including the filing of a lawsuit against the borrower by the agency and assignment of the loan to the Secretary for the filing of a lawsuit against the borrower by the Federal Government; and

(M) Inform the borrower of the options that are available to the borrower to remove the loan from default, including an explanation of the fees and conditions associated with each option.

(vii) As part of the guaranty agency's response to a borrower who appeals an adverse decision resulting from the agency's administrative review of the loan obligation, the agency must provide the borrower with information on the availability of the Student Loan Ombudsman's office.

(6) Collection efforts on defaulted loans.

(i) A guaranty agency must engage in reasonable and documented collection activities on a loan on which it pays a default claim filed by a lender. For a non-paying borrower, the agency must perform at least one activity every 180 days to collect the debt, locate the borrower (if necessary), or determine if the borrower has the means to repay the debt.

(ii) Within 45 days after paying a lender's default claim, the agency must send a notice to the borrower that contains the information described in paragraph (b)(5)(ii) of this section. During this time period, the

agency also must notify the borrower, either in the notice containing the information described in paragraph (b)(5)(ii) of this section, or in a separate notice, that if he or she does not make repayment arrangements acceptable to the agency, the agency will promptly initiate procedures to collect the debt. The agency's notification to the borrower must state that the agency may administratively garnish the borrower's wages, file a civil suit to compel repayment, offset the borrower's State and Federal income tax refunds and other payments made by the Federal Government to the borrower, assign the loan to the Secretary in accordance with § 682.409, and take other lawful collection means to collect the debt, at the discretion of the agency. The agency's notification must include a statement that borrowers may have certain legal rights in the collection of debts, and that borrowers may wish to contact counselors or lawyers regarding those rights.

(iii) Within a reasonable time after all of the information described in paragraph (b)(6)(ii) of this section has been sent, the agency must send at least one notice informing the borrower that the default has been reported to all nationwide consumer reporting agencies and that the borrower's credit rating may thereby have been damaged.

(iv) The agency must send a notice informing the borrower of the options that are available to remove the loan from default, including an explanation of the fees and conditions associated with each option. This notice must be sent within a reasonable time after

the end of the period for requesting an administrative review as specified in paragraph (b)(5)(iv)(B) of this section or, if the borrower has requested an administrative review, within a reasonable time following the conclusion of the administrative review.

(v) A guaranty agency must attempt an annual Federal offset against all eligible borrowers. If an agency initiates proceedings to offset a borrower's State or Federal income tax refunds and other payments made by the Federal Government to the borrower, it may not initiate those proceedings sooner than 60 days after sending the notice described in paragraph (b)(5)(ii)(A) of this section.

(vi) A guaranty agency must initiate administrative wage garnishment proceedings against all eligible borrowers, except as provided in paragraph (b)(6)(vii) of this section, by following the procedures described in paragraph (b)(9) of this section.

(vii) A guaranty agency may file a civil suit against a borrower to compel repayment only if the borrower has no wages that can be garnished under paragraph (b)(9) of this section, or the agency determines that the borrower has sufficient attachable assets or income that is not subject to administrative wage garnishment that can be used to repay the debt, and the use of litigation would be more effective in collection of the debt.

(7) Special conditions for agency payment of a claim.

(i) A guaranty agency may adopt a policy under which it pays a claim to a lender on a loan under the condition described in § 682.404(b)(3)(ii).

(ii) Upon the payment of a claim under a policy described in paragraph (b)(7)(i) of this section, the guaranty agency shall—

(A) Perform the loan servicing functions required of a lender under § 682.208, except that the agency is not required to follow the consumer reporting agency reporting requirements of that section;

(B) Perform the functions of the lender during the repayment period of the loan, as required under § 682.209;

(C) If the borrower is delinquent in repaying the loan at the time the agency pays a claim thereon to the lender or becomes delinquent while the agency holds the loan, exercise due diligence in accordance with § 682.411 in attempting to collect the loan from the borrower and any endorser or co-maker; and

(D) After the date of default on the loan, if any, comply with paragraph (b)(6) of this section with respect to collection activities on the loan, with the date of default treated as the claim payment date for purposes of those paragraphs.

(8) Preemption of State law. The provisions of paragraphs (b)(2), (5), and (6) of this section preempt any State law, including State statutes, regulations,

or rules, that would conflict with or hinder satisfaction of the requirements of these provisions.

(9) Administrative garnishment.

(i) If a guaranty agency decides to garnish the disposable pay of a borrower who is not making payments on a loan held by the agency, on which the Secretary has paid a reinsurance claim, it must do so in accordance with the following procedures:

(A) At least 30 days before the initiation of garnishment proceedings, the guaranty agency must mail to the borrower's last known address, a written notice described in paragraph (b)(9)(i)(B) of this section.

(B) The notice must describe—

(1) The nature and amount of the debt;

(2) The intention of the agency to collect the debt through deductions from disposable pay;

(3) An explanation of the borrower's rights;

(4) The deadlines by which a borrower must exercise those rights; and

(5) The consequences of failure to exercise those rights in a timely manner.

(C) The guaranty agency must offer the borrower an opportunity to inspect and copy agency records related to the debt.

(D) The guaranty agency must offer the borrower an opportunity to enter into a written repayment agreement with the agency under terms agreeable to the agency.

(E)(1) The guaranty agency must offer the borrower an opportunity for a hearing in accordance with paragraphs (b)(9)(i)(F) through (J) of this section and other guidance provided by the Secretary, for any objection regarding the existence, amount, or enforceability of the debt, and any objection that withholding from the borrower's disposable pay in the amount or at the rate proposed in the notice would cause financial hardship to the borrower.

(2) The borrower must request a hearing in writing. At the borrower's option, the hearing may be oral or written. The time and location of the hearing is established by the guaranty agency. An oral hearing may, at the borrower's option, be conducted either in-person or by telephone conference. The agency notifies the borrower of the process for arranging the time and location of an oral hearing. All telephonic charges are the responsibility of the agency. All travel expenses incurred by the borrower in connection with an in-person oral hearing are the responsibility of the borrower.

(F)(1) If the borrower submits a written request for a hearing on the existence, amount, or enforceability of the debt—

(i) The guaranty agency must provide evidence of the existence of the debt. If the agency provides

evidence of the existence of the debt, the borrower must prove by the preponderance of the evidence that no debt exists, the debt is not enforceable under applicable law, the amount the guaranty agency claims the borrower owes is incorrect, including that any amount of collection costs assessed to the borrower exceeds the limits established under § 682.410(b)(2), or the debt is not delinquent; and

(ii) The borrower may raise any of the objections described in paragraph (b)(9)(i)(F)(1)(i) of this section not raised in the written request, but must do so before a hearing is completed. For purposes of this paragraph, a hearing is completed when the record is closed and the hearing official notifies the parties that no additional evidence or objections will be accepted.

(2) If the borrower submits a written request for a hearing on an objection that withholding in the amount or at the rate that the agency proposed in its notice would cause financial hardship to the borrower and the borrower's spouse and dependents—

(i) The borrower bears the burden of proving the claim of financial hardship by a preponderance of the credible evidence by providing credible documentation that the amount of wages proposed in the notice would leave the borrower unable to meet basic living expenses of the borrower, the borrower's spouse, and the borrower's dependents. The documentation must show the amount of the costs incurred for basic living

expenses and the income available from any source to meet those expenses;

(ii) The borrower's claim of financial hardship must be evaluated by comparing the amounts that the borrower proves are being incurred for basic living expenses against the amounts spent for basic living expenses by families of the same size as the borrower's. For the purposes of this section, the standards published by the Internal Revenue Service under26 U.S.C. 7122(d)(2) (the "Collection Financial Standards") establish the average amounts spent for basic living expenses for families of the same size as the borrower's family;

(iii) The amount that the borrower proves is incurred for a type of basic living expense is considered to be reasonable to the extent that the amount does not exceed the amount spent for that expense by families of the same size according to the Collection Financial Standards. If the borrower claims an amount for any basic living expense that exceeds the amount in the Collection Financial Standards, the borrower must prove that the amount claimed is reasonable and necessary;

(iv) If the borrower's objection to the rate or amount proposed in the notice is upheld in part, the garnishment must be ordered at a lesser rate or amount, that is determined will allow the borrower to meet basic living expenses proven to be reasonable and necessary. If this financial hardship determination is made after a garnishment order is already in effect,

the guaranty agency must notify the borrower's employer of any change required by the determination in the amount to be withheld or the rate of withholding under that order; and

(v) A determination by a hearing official that financial hardship would result from garnishment is effective for a period not longer than six months after the date of the finding. After this period, the guaranty agency may require the borrower to submit current information regarding the borrower's family income and living expenses. If the borrower fails to submit current information within 30 days of this request, or the guaranty agency concludes from a review of the available evidence that garnishment should now begin or the rate or the amount of an outstanding withholding should be increased, the guaranty agency must notify the borrower and provide the borrower with an opportunity to contest the determination and obtain a hearing on the objection under the procedures in paragraph (b)(9)(i) of this section.

(G) If the borrower's written request for a hearing is received by the guaranty agency on or before the 30th day following the date of the notice described in paragraph (b)(9)(i)(B) of this section, the guaranty agency may not issue a withholding order until the borrower has been provided the requested hearing and a decision has been rendered. The guaranty agency must provide a hearing to the borrower in sufficient time to permit a decision, in accordance with the procedures that the agency may prescribe, to be rendered within 60 days.

(H) If the borrower's written request for a hearing is received by the guaranty agency after the 30th day following the date of the notice described in paragraph (b)(9)(i)(B) of this section, the guaranty agency must provide a hearing to the borrower in sufficient time that a decision, in accordance with the procedures that the agency may prescribe, may be rendered within 60 days, but may not delay issuance of a withholding order unless the agency determines that the delay in filing the request was caused by factors over which the borrower had no control, or the agency receives information that the agency believes justifies a delay or cancellation of the withholding order. If a decision is not rendered within 60 days following receipt of a borrower's written request for a hearing, the guaranty agency must suspend the order beginning on the 61st day after the hearing request was received until a hearing is provided and a decision is rendered.

(I) The hearing official appointed by the agency to conduct the hearing may be any qualified individual, including an administrative law judge. Under no circumstance may the hearing official be under the supervision or control of the head of the guaranty agency or of a third-party servicer or collection contractor employed by the agency. Payment of compensation by the guaranty agency, third-party servicer, or collection contractor employed by the agency to the hearing official for service as a hearing official does not constitute impermissible supervision or control under this paragraph. The guaranty agency must

ensure that, except as needed to arrange for administrative matters pertaining to the hearing, including the type of hearing requested by the borrower, the time, place, and manner of conducting an oral hearing, and post-hearing matters such as issuance of a hearing decision, all oral communications between the hearing official and any representative of the guaranty agency or with the borrower are made within the hearing of the other party, and that copies of any written communication with either party are promptly provided to the other party. This paragraph does not preclude a hearing in the absence of one of the parties if the borrower is given proper notice of the hearing, both parties have agreed on the time, place, and manner of the hearing, and one of the parties fails to attend.

(J) The hearing official must conduct any hearing as an informal proceeding, require witnesses in an oral hearing to testify under oath or affirmation, and maintain a summary record of any hearing. The hearing official must issue a final written decision at the earliest practicable date, but not later than 60 days after the guaranty agency's receipt of the borrower's hearing request. However—

(1) The borrower may request an extension of that deadline for a reasonable period, as determined by the hearing official, for the purpose of submitting additional evidence or raising a new objection described in paragraph (b)(9)(i)(F)(1)(ii) of this section; and

(2) The agency may request, and the hearing official must grant, a reasonable extension of time sufficient to enable the guaranty agency to evaluate and respond to any such additional evidence or any objections raised pursuant to paragraph (b)(9)(i)(F)(1)(ii) of this section.

(K) An employer served with a garnishment order from the guaranty agency with respect to a borrower whose wages are not then subject to a withholding order of any kind must deduct and pay to the agency from a borrower's disposable pay an amount that does not exceed the smallest of—

(1) The amount specified in the guaranty agency order;

(2) The amount permitted by section 488A(a)(1) of the Act, which is 15 percent of the borrower's disposable pay; or

(3) The amount permitted by 15 U.S.C. 1673(a)(2), which is the amount by which the borrower's disposable pay exceeds 30 times the minimum wage.

(L) If a borrower's pay is subject to more than one garnishment order—

(1) Unless other Federal law requires a different priority, the employer must pay the agency the amount calculated under paragraph (b)(9)(i)(K) of this section before the employer complies with any later garnishment orders, except a family support withholding order;

(2) If an employer is withholding from a borrower's pay based on a garnishment order served on the employer before the guaranty agency's order, or if a withholding order for family support is served on an employer at any time, the employer must comply with the agency's garnishment order by withholding an amount that is the lesser of—

(i) The amount specified in the guaranty agency order; or

(ii) The amount calculated under paragraph (b)(9)(i)(L)(3) of this section less the amount or amounts withheld under the garnishment order or orders that have priority over the agency's order; and

(3) The cumulative withholding for all garnishment orders issued by guaranty agencies may not exceed, for an individual borrower, the amount permitted by 15 U.S.C. 1673, which is the lesser of 25 percent of the borrower's disposable pay or the amount by which the borrower's disposable pay exceeds 30 times the minimum wage. If a borrower owes debts to one or more guaranty agencies, each agency may issue a garnishment order to enforce each of those debts, but no single agency may order a total amount exceeding 15 percent of the disposable pay of a borrower to be withheld. The employer must honor these orders as provided in paragraphs (b)(9)(i)(L)(1) and (2) of this section.

(M) Notwithstanding paragraphs (b)(9)(i)(K) and (L) of this section, an employer may withhold and pay a

greater amount than required under the order if the borrower gives the employer written consent.

(N) A borrower may, at any time, raise an objection to the amount or the rate of withholding specified in the guaranty agency's order to the borrower's employer on the ground of financial hardship. However, the guaranty agency is not required to consider such an objection and provide the borrower with a hearing until at least six months after the agency issued the most recent garnishment order, either one for which the borrower did not request a hearing or one that was issued after a hardship-related hearing determination. The agency may provide a hearing in extraordinary circumstances earlier than six months if the borrower's request for review shows that the borrower's financial circumstances have substantially changed after the garnishment notice because of an event such as injury, divorce, or catastrophic illness.

(O) A garnishment order is effective until the guaranty agency rescinds the order or the agency has fully recovered the amounts owed by the borrower, including interest, late fees, and collections costs. If an employer is unable to honor a garnishment order because the amount available for garnishment is insufficient to pay any portion of the amount stated in the order, the employer must notify the agency and comply with the order when sufficient disposable pay is available. Upon full recovery of the debt, the agency must send the borrower's employer notification to stop wage withholding.

(P) The guaranty agency must sue any employer for any amount that the employer, after receipt of the withholding order provided by the agency under paragraph (b)(9)(i)(R) of this section, fails to withhold from wages owed and payable to an employee under the employer's normal pay and disbursement cycle.

(Q) The guaranty agency may not garnish the wages of a borrower whom it knows has been involuntarily separated from employment until the borrower has been reemployed continuously for at least 12 months. The borrower has the burden of informing the guaranty agency of the circumstances surrounding the borrower's involuntary separation from employment.

(R) Unless the guaranty agency receives information that the agency believes justifies a delay or cancellation of the withholding order, it must send a withholding order to the employer within 20 days after the borrower fails to make a timely request for a hearing, or, if a timely request for a hearing is made by the borrower, within 20 days after a final decision is made by the agency to proceed with garnishment.

(S) The notice given to the employer under paragraph (b)(9)(i)(R) of this section must contain only the information as may be necessary for the employer to comply with the withholding order and to ensure proper credit for payments received. At a minimum, the notice given to the employer includes the borrower's name, address, and Social Security Number, as well as instructions for withholding and information as to where the employer must send payments.

(T)(1) A guaranty agency may use a third-party servicer or collection contractor to perform administrative activities associated with administrative wage garnishment, but may not allow such a party to conduct required hearings or to determine that a withholding order is to be issued. Subject to the limitations of paragraphs (b)(9)(i)(T)(2) and (3) of this section, administrative activities associated with administrative wage garnishment may include but are not limited to—

(i) Identifying to the agency suitable candidates for wage garnishment pursuant to agency standards;

(ii) Obtaining employment information for the purposes of garnishment;

(iii) Sending candidates selected for garnishment by the agency notices prescribed by the agency;

(iv) Negotiating alternative repayment arrangements with borrowers;

(v) Responding to inquiries from notified borrowers;

(vi) Receiving garnishment payments on behalf of the agency;

(vii) Arranging for the retention of hearing officials and for the conduct of hearings on behalf of the agency;

(viii) Providing information to borrowers or hearing officials on the process or conduct of hearings; and

(ix) Sending garnishment orders and other communications to employers on behalf of the agency.

(2) Only an authorized official of the agency may determine that an individual withholding order is to be issued. The guarantor must record the official's determination for each order it issues, including any order which it causes to be prepared or mailed by a third-party servicer or collection contractor. The guarantor must evidence the official's approval, either by including the official's signature on the order or, if the agency uses a form of withholding order that does not provide for execution by signature, by retaining in the agency's records the identity of the approving official, the date of the approval, the amount or rate of the order, the name and address of the employer to whom the order was issued, and the debt for which the order was issued.

(3) The withholding order must identify the guaranty agency as the holder of the debt, as the issuer of the order, and as the sole party legally authorized to issue the withholding order. If a guaranty agency uses a third-party servicer or collection contractor to prepare and mail a withholding order that includes the name of the servicer or contractor that prepared or mailed the order, the guaranty agency must also ensure that the order contains no captions or representations that the servicer or contractor is the party that issued, or was empowered by Federal law or by the agency to issue, the withholding order.

(U) As specified in section 488A(a)(8) of the Act, the borrower may seek judicial relief, including punitive damages, if the employer discharges, refuses to employ, or takes disciplinary action against the borrower due to the issuance of a withholding order.

(V) A guaranty agency is required to suspend a garnishment order when the agency receives a borrower's fifth qualifying payment under a loan rehabilitation agreement with the agency, unless otherwise directed by the borrower, in accordance with § 682.405(a)(3).

(ii) For purposes of paragraph (b)(9) of this section—

(A) "Borrower" includes all endorsers on a loan;

(B) "Day" means calendar day;

(C) "Disposable pay" means that part of a borrower's compensation for personal services, whether or not denominated as wages from an employer, that remains after the deduction of health insurance premiums and any amounts required by law to be withheld, and includes, but is not limited to, salary, bonuses, commissions, or vacation pay. "Amounts required by law to be withheld" include amounts for deductions such as Social Security taxes and withholding taxes, but do not include any amount withheld under a court order or other withholding order. All references to an amount of disposable pay refer to disposable pay calculated for a single week;

(D) "Employer" means a person or entity that employs the services of another and that pays the latter's wages or salary and includes, but is not limited to, State and local governments, but does not include an agency of the Federal Government;

(E) "Financial hardship" means an inability to meet basic living expenses for goods and services necessary for the survival of the borrower and the borrower's spouse and dependents;

(F) "Garnishment" means the process of withholding amounts from an employee's disposable pay and paying those amounts to a creditor in satisfaction of a withholding order; and

(G) "Withholding order" means any order for withholding or garnishment of pay issued by the guaranty agency and may also be referred to as "wage garnishment order" or "garnishment order."

(10) Conflicts of interest.

(i) A guaranty agency shall maintain and enforce written standards of conduct governing the performance of its employees, officers, directors, trustees, and agents engaged in the selection, award, and administration of contracts or agreements. The standards of conduct must, at a minimum, require disclosure of financial or other interests and must mandate disinterested decision-making. The standards must provide for appropriate disciplinary actions to be applied for violations of the standards by employees, officers, directors, trustees, or agents of

the guaranty agency, and must include provisions to—

(A) Prohibit any employee, officer, director, trustee, or agent from participating in the selection, award, or decision-making related to the administration of a contract or agreement supported by the reserve fund described in paragraph (a) of this section, if that participation would create a conflict of interest. Such a conflict would arise if the employee, officer, director, trustee, or agent, or any member of his or her immediate family, his or her partner, or an organization that employs or is about to employ any of those parties has a financial or ownership interest in the organization selected for an award or would benefit from the decision made in the administration of the contract or agreement. The prohibitions described in this paragraph do not apply to employees of a State agency covered by codes of conduct established under State law;

(B) Ensure sufficient separation of responsibility and authority between its lender claims processing as a guaranty agency and its lending or loan servicing activities, or both, within the guaranty agency or between that agency and one or more affiliates, including independence in direct reporting requirements and such management and systems controls as may be necessary to demonstrate, in the independent audit required under § 682.410(b)(1), that claims filed by another arm of the guaranty agency or by an affiliate of that agency receive no more favorable treatment than that accorded the claims filed by a

lender or servicer that is not an affiliate or part of the guaranty agency; and

(C) Prohibit the employees, officers, directors, trustees, and agents of the guaranty agency, his or her partner, or any member of his or her immediate family, from soliciting or accepting gratuities, favors, or anything of monetary value from contractors or parties to agreements, except that nominal and unsolicited gratuities, favors, or items may be accepted.

(ii) Guaranty agency restructuring. If the Secretary determines that action is necessary to protect the Federal fiscal interest because of an agency's failure to meet the requirements of § 682.410(b)(10)(i), the Secretary may require the agency to comply with any additional measures that the Secretary believes are appropriate, including the total divestiture of the agency's non-FFEL functions and the agency's interests in any affiliated organization.

(c) Enforcement requirements. A guaranty agency shall take such measures and establish such controls as are necessary to ensure its vigorous enforcement of all Federal, State, and guaranty agency requirements, including agreements, applicable to its loan guarantee program, including, at a minimum, the following:

(1) Conducting comprehensive biennial on-site program reviews, using statistically valid techniques to calculate liabilities to the Secretary that each review indicates may exist, of at least—

(i)(A) Each participating lender whose dollar volume of FFEL loans held by the lender and guaranteed by the agency in the preceding year—

(1) Equaled or exceeded two percent of the total of all loans guaranteed by the agency;

(2) Was one of the ten largest lenders whose loans were guaranteed by the agency; or

(3) Equaled or exceeded $10 million in the most recent fiscal year;

(B) Each lender described in section 435(d)(1)(D) or (J) of the Act that is located in any State in which the agency is the principal guarantor and, at the option of each guaranty agency, the Student Loan Marketing Association; and

(C) Each school that participated in the guaranty agency's program, located in a State for which the guaranty agency is the principal guaranty agency, that has a cohort default rate, as described in subpart M of 34 CFR part 668, that includes FFEL Program loans, for either of the 2 immediately preceding fiscal years, as defined in 34 CFR 668.182, that exceeds 20 percent, unless the school is under a mandate from the Secretary under subpart M of 34 CFR part 668 to take specific default reduction measures or if the total dollar amount of loans entering repayment in each fiscal year on which the cohort default rate of over 20 percent is based does not exceed $100,000; or

(ii) The schools and lenders selected by the agency as an alternative to the reviews required by paragraphs (c)(1)(i)(A)-(C) of this section if the Secretary approves the agency's proposed alternative selection methodology.

(2) Demanding prompt repayment by the responsible parties to lenders, borrowers, the agency, or the Secretary, as appropriate, of all funds found in those reviews to be owed by the participants with regard to loans guaranteed by the agency, whether or not the agency holds the loans, and monitoring the implementation by participants of corrective actions, including these repayments, required by the agency as a result of those reviews.

(3) Referring to the Secretary for further enforcement action any case in which repayment of funds to the Secretary is not made in full within 60 days of the date of the agency's written demand to the school, lender, or other party for payment, together with all supporting documentation, any correspondence, and any other documentation submitted by that party regarding the repayment.

(4) Undertaking or arranging with State or local law enforcement agencies for the prompt and thorough investigation of all allegations and indications of criminal or other programmatic misconduct by its program participants, including violations of Federal law or regulations.

(5) Promptly referring to appropriate State and local regulatory agencies and to nationally recognized

accrediting agencies and associations for investigation information received by the guaranty agency that may affect the retention or renewal of the license or accreditation of a program participant.

(6) Promptly reporting all of the allegations and indications of misconduct having a substantial basis in fact, and the scope, progress, and results of the agency's investigations thereof to the Secretary.

(7) Referring appropriate cases to State or local authorities for criminal prosecution or civil litigation.

(8) Promptly notifying the Secretary of—

(i) Any action it takes affecting the FFEL program eligibility of a participating lender or title IV eligibility of a school;

(ii) Information it receives regarding an action affecting the FFEL program eligibility of a participating lender or title IV eligibility of a school taken by a nationally recognized accrediting agency, association, or a State licensing agency;

(iii) Any judicial or administrative proceeding relating to the enforceability of FFEL loans guaranteed by the agency or in which tuition obligations of a school's students are directly at issue, other than a proceeding relating to a single borrower or student; and

(iv) Any petition for relief in bankruptcy, application for receivership, or corporate dissolution proceeding

brought by or against a school or lender participating in its loan guarantee program.

(9) Cooperating with all program reviews, investigations, and audits conducted by the Secretary relating to the agency's loan guarantee program.

(10) Taking prompt action to protect the rights of borrowers and the Federal fiscal interest respecting loans that the agency has guaranteed when the agency learns that a school that participated in the FFEL Program or a holder of loans participating in the program is experiencing problems that threaten the solvency of the school or holder, including—

(i) Conducting on-site program reviews;

(ii) Providing training and technical assistance, if appropriate;

(iii) Filing a proof of claim with a bankruptcy court for recovery of any funds due the agency and any refunds due to borrowers on FFEL loans that it has guaranteed when the agency learns that a school has filed a bankruptcy petition;

(iv) Promptly notifying the Secretary that the agency has determined that a school or holder of loans is experiencing potential solvency problems; and

(v) Promptly notifying the Secretary of the results of any actions taken by the agency to protect Federal funds involving such a school or holder.

2015 WL 3403631 (C.A.7) (Appellate Brief)
United States Court of Appeals, Seventh Circuit

Bryana BIBLE, Plaintiff-Appellant,
v.
UNITED STUDENT AID FUNDS, INC.,
Defendant-Appellee.

No. 14-1806.
May 21, 2015.

On Appeal from the United States District Court for the Southern District of Indiana the Honorable Tanya Walton Pratt
(Case No. 1:13-cv-575-TWP-TAB)

Brief for the United States as Amicus Curiae in Support of the Appellant and Reversal

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***IV STATEMENT OF INTEREST**

The Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended at 20 U.S.C. §§ 1001 *et seq.*) was enacted to "assist in making available the benefits of postsecondary education to eligible students" by establishing a set of federal student loan and grant programs. 20 U.S.C. § 1070(a). Congress delegated authority to the Secretary of Education (Secretary or Department) "to carry out programs to achieve the purposes of" the Act, *Id.* § 1070(b), and, as pertinent here, to "prescribe such regulations as may be necessary to carry out the purposes [of the Federal Family Education Loan Program]." *Id.* § 1082(a)(1). The United States therefore has a significant interest in the proper construction of the Higher Education Act and the Secretary's implementing regulations.

***1** The Court invited the Secretary to submit an *amicus curiae* brief in this matter to address "whether and under what circumstances the Higher Education Act, as amended, and its regulations allow a guaranty agency participating in the Federal Family Education Loan Program to assess collection costs against a first-time defaulted borrower who (1) timely

enters into a rehabilitation agreement with the guarantor upon receiving notice that the guarantor has paid a default claim and (2) complies with that agreement." As explained below, the district court erred in holding that a guaranty agency is permitted to assess collection costs in the circumstances presented here. The court also erred in concluding that the Higher Education Act preempts state-law breach-of-contract claims that are premised on violations of the Act.

STATEMENT

I. Statutory and Regulatory Scheme.[1]

A. *Federal Family Education Loan Program.*

Title IV of the Higher Education Act establishes the Federal Family Education Loan Program, which encourages lenders to make funds available to students who might not otherwise be able to finance postsecondary education. Under the program, lenders receive a guarantee from a state or private nonprofit guaranty agency that the loans will be repaid if borrowers default. ***2** 20 U.S.C. § 1078(b). That guarantee is reinsured by the Department, which

[1] The Court requested that we address the statutes and regulations in effect during the period June 12, 2006 through July 29, 2013. Except where otherwise indicated, citations are to the versions of the Higher Education Act and its implementing regulations in effect during that period.

serves as the ultimate guarantor on each loan. *Id.* § 1078(b)(1), (c)(1)(A). In general, a student loan borrower must begin making monthly installment payments on her student loan within a specified period after graduating from an institution of higher learning. 20 U.S.C. § 1078(b)(7). If the borrower fails to make a required payment, the loan is deemed "delinquent." 34 C.F.R. § 682.411(b)(1). Once the loan is delinquent, the lender must take certain measures—known as "due diligence"—to demand that the borrower repay the loan. 20 U.S.C. § 1085(f); 34 C.F.R. § 682.411(a).

If the borrower remains delinquent for 270 days, the loan is considered to be in "default." 20 U.S.C. § 1085(*l*); 34 C.F.R. § 682.200(a)(3)(b)(1). After that 270th day of delinquency, the lender may file a default claim with the guaranty agency, which may, where the lender has exercised the required "due diligence," pay the claim and acquire the loan from the lender. 34 C.F.R. § 682.406(a)(1), (5). The guarantor is then entitled to receive reimbursement from the government for paying the lender's default claim. 20 U.S.C. § 1078(c)(1)(A); 34 C.F.R. § 682.406(a).

The guarantor is required to "engage in reasonable and documented collection activities" on a loan for which it has paid a default claim. 34 C.F.R. § 682.410(b)(6)(i). Within forty-five days after paying a lender's default claim, *Id.* § 682.410(b)(6)(ii), "but before it reports the default to a consumer reporting agency or assesses collection costs against a borrower," § 682.410(b)(5)(ii), the ***3** guarantor must, *inter*

alia, provide the borrower with written notice that it has paid the default claim and inform the borrower of her rights to: request access to the guarantor's records; seek administrative review of the legal enforceability or past-due status of the loan; and an "opportunity enter into a repayment agreement on terms satisfactory to the agency." *Id.* §§ 682.410(b)(5)(ii)(A)-(D); 682.410(b)(5)(iv)(B); 682.410(b)(5)(vi). The guarantor must allow the borrower at least sixty days to exercise these options. *Id.* § 682.410(b)(5)(iv(B).

A rehabilitation agreement is a specific type of satisfactory repayment agreement. When a borrower has defaulted on a loan, the Higher Education Act requires a guarantor to offer the borrower an opportunity to have the defaulted loan "rehabilitated." 20 U.S.C. § 1078-6(a); 34 C.F.R. § 682.405(a)(1). Through rehabilitation, the loan's default status may be cured if the borrower voluntarily makes nine installment payments "under a monthly repayment agreement" over a ten-month period, after which the guarantor may sell the loan to a Federal Family Education Loan Program lender or assign it to the Department. 20 U.S.C. § 1078-6(a); 34 C.F.R. § 682.405(a)(2(i). Neither the guaranty agency nor the Department may "demand from a borrower as monthly payment amounts * * * more than is reasonable and affordable based upon the borrower's total financial circumstances." 20 U.S.C. § 1078-6(a)(1)(B). After a loan has been rehabilitated, the borrower regains all of the benefits of the student loan program, 34 C.F.R. § 682.405(a)(3), and the guarantor must ***4** request the removal of the

record of default from the borrower's credit history. *Id.* § 682.405(b)(3)(i)(B).

B. *Collection Costs Under The Federal Family Education Loan Program.*

1. At all times pertinent here, 20 U.S.C. § 1091a(b)(1) has required a borrower who has defaulted on a loan to pay "reasonable collection costs." The Higher Education Act does not define the term "reasonable collection costs," but the Department, acting pursuant to Congress's express delegation of rulemaking authority (20 U.S.C. § 1082(a)(1)) has clarified which collection costs are "reasonable collection costs." The Department's regulations generally provide that when a guarantor has paid a default claim, it is required to charge the borrower "an amount equal to the reasonable costs incurred by the agency in collecting [the] loan." 34 C.F.R. § 682.410(b)(2).[2] These costs must equal the lesser of the amount the borrower would be charged as calculated under 34 C.F.R. § 30.60,[3] or the amount the

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[2] Such costs "may include, but are not limited to, all attorney's fees, collection agency charges, and court costs." 34 C.F.R. § 682.410(b)(2).

[3] 34 C.F.R. § 30.60 provides a non-exhaustive list of the costs the Department may impose on delinquent debtors and sets forth the procedures for calculating such costs if the Department uses a collection agency to collect a debt on a contingent fee basis.

Department would assess the same borrower if the Department held the loan. *Id.* § 682.410(b)(2)(i)-(ii).

With respect to borrowers who enter into loan rehabilitation agreements under the Higher Education Act's default reduction program, the Act provides ***5** that when a guaranty agency has secured all of the nine required payments and sells the loan to a lender, the guarantor "may, in order to defray collection costs * * * charge to the borrower an amount not to exceed 18.5 percent of the outstanding principal and interest at the time of the loan sale." 20 U.S.C. § 1078-6(a)(1)(D)(i)(II)(aa).[4] The Department's regulations in turn provide that the written rehabilitation agreement must inform the borrower of the amount of any collection costs that may be added to the unpaid loan principal at the time the loan is sold to an eligible lender, which "may not exceed 18.5 percent of the unpaid principal and accrued interest on the loan at the time of the sale." 34 C.F.R. § 682.405(b)(1)(vi).

As originally enacted, 20 U.S.C. § 1078-6(a) (1986) contained no provision addressing whether and in what amount a guarantor could charge a defaulted borrower collection costs. *See* Pub. L. No. 99-498, § 402(a), 100 Stat. 1394 (Oct. 17, 1986). Section 1078-6(a) was amended three times during the relevant time frame of the dispute in this case (June 12, 2006

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[4] Effective July 1, 2014, the statute was amended to lower the percentage from 18.5 percent to 16 percent. Pub. L. No. 113-67, § 501(1), 127 Stat. 1187 (Dec. 2, 2013).

to July 29, 2013); however, those amendments do not change the substance of the statute as it relates to the issue in dispute. For instance:

- Effective July 1, 2006, the section was amended to reduce from twelve to nine the number of consecutive payments payments [sic] needed to qualify a loan for rehabilitation and to permit the guarantor to charge the borrower collection ***6** costs not to exceed 18.5 percent of the outstanding principal and interest at the time of sale of the rehabilitated loan. Pub. L. No. 109-171, § 8014(h), 120 Stat. 171 (Feb. 8, 2006).

- In 2008, provisions were added establishing credit bureau reporting requirements regarding rehabilitated loans and limiting the number of times a borrower could rehabilitate a loan. Pub. L. No. 110-315, § 426, 122 Stat. 3235 (Aug. 14, 2008).

- In 2009, provisions were added that permit a guarantor that is unable due to adverse market conditions to sell the loan, to assign the loan to the Department, and providing that the Department, upon assignment, was to reimburse the guarantor in the amount of those collection costs charged at the time of assignment, not to exceed 18.5 percent of the outstanding balance, and to direct the guarantor to deposit that payment into the guarantor's operating fund. Pub. L. No. 111-39, § 402(d)(1), 123 Stat. 1941 (July 1, 2009).

The Department's regulations implementing § 1078-6(a), published at 34 C.F.R. § 682.405, were also amended several times during the relevant time period to conform to the statutory changes. *See* 71 Fed. Reg. 45666, 45677 (Aug. 9, 2006); 73 Fed. Reg. 63232, 63254 (Oct. 23, 2008); 74 Fed. Reg. 55972, 55973 (Oct. 29, 2009).[5]

***7** 2. The Department interprets its regulations to provide an exception with regard to collection costs charged when a borrower promptly enters into a loan repayment agreement after the borrower has been notified by the guarantor that it has paid a default claim. After a guaranty agency notifies a borrower that it has paid a default claim on a loan, "but before it * * * assesses collection costs against [the] borrower," § 682.410(b)(5)(ii), it must, among other things, "allow the borrower at least 60 days from the date the notice * * * is sent to request [administrative] review," § 682.410(b)(5)(iv)(B), and "provide the borrower with * * * [a]n opportunity to enter into a repayment agreement satisfactory to the agency." *Id.* § 682.410(b)(5)(ii)(D); *see also id.* § 682.410(b)(5)(vi)(G).

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[5] 34 C.F.R. § 682.405 was again amended on November 1, 2013. Among numerous other changes, the regulation was revised to require that the rehabilitation agreement disclose the amount of "any" collection costs to be added to the unpaid principal of the loan when the loan is sold to an eligible lender, rather than "the collection costs to be added." 34 C.F.R. § 682.405(b)(1)(vi)(B); *see* 78 Fed. Reg. 65768, 65815, 65816 (Nov. 1. 2013).

The terms of repayment agreements are generally within the discretion of the guarantor.

However, 20 U.S.C. § 1078-6 and 34 C.F.R. § 682.405 require the guarantor to accept, and enter into, a particular kind of repayment agreement—a rehabilitation agreement that can qualify the borrower to have the default status of the loan cured and the loan sold to a lender (or assigned to the Secretary) and thereby regain all benefits previously available on the loan.[6] *See* 20 U.S.C. § 1078-6(a)(1)(A), (C), (4); 34 C.F.R. § 682.405(a)(1), (3). The repayment arrangements available to a borrower therefore necessarily include a ***8** rehabilitation agreement. Indeed, subsection (a) of the statutory authorization for rehabilitation, 20 U.S.C. § 1078-6, is entitled "[o]ther repayment incentives." 20 U.S.C. § 1078-6(a). Further, subsection (a)(4) refers to the borrower "mak[ing] scheduled repayments" on a loan going through rehabilitation. *Id.* § 1078-6(a)(4). Moreover, the Department's regulations governing rehabilitation refer to the rehabilitation agreement as a monthly "repayment agreement." 34 C.F.R. § 682.405(b)(1) (A "borrower must voluntarily make at least nine of the ten payments required under a monthly *repayment agreement*.") (emphasis added). Thus, if a defaulted borrower enters into a repayment agreement with a guaranty agency within the sixty-day period after the

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[6] Such benefits include choice of repayment plans, deferment eligibility, and loan forgiveness for qualifying service. 20 U.S.C. §§ 1078(b)(1)(M), (b)(9); 1078-10; 1078-11; 1078-12.

guarantor gives the borrower notice that it has paid a default claim, and complies with that agreement, the guarantor is not required or permitted to charge collection costs to the borrower.

II. Factual and Procedural Background.

On June 12, 2006, plaintiff Bryana Bible signed a Federal Stafford Loan Master Promissory Note that contains the terms of the loan, which incorporate provisions of the Higher Education Act and its implementing regulations.[7] Citibank was the private lender, and defendant United Student Aid Funds, Inc. ***9** (USA Funds) guaranteed the loan. S.A. 2;[8] App. 121. The loan agreement specified that, in the event of default, Bible would be obligated to pay "reasonable collection costs." App. 121, 122.

In 2012, Bible defaulted on the loan, Citibank made a claim on the guarantee, and USA Funds paid the default claim and took assignment of the loan. S.A. 2. On April 12, 2012, defendant notified Bible that it had paid the default claim (App. 131), and offered her several "options for resolving [her] loan debt," including an opportunity to enter into a loan rehabilitation agreement. App. 133. The notice advised Bible that the loan rehabilitation requirements

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[7] The promissory note is a form that is required by the Higher Education Act to be used for loans made under the Federal Family Education Loan Program. 20 U.S.C. § 1082(m)(1)(D).

[8] "S.A." refers to Appellant's Short Appendix.

included "making at least nine, on-time, monthly payments during a 10-month period," and that "[a]s part of [her] eligibility for loan rehabilitation," she would be "assessed collection costs at a reduced rate of 18.5% of the outstanding balance" of the loan. *Id.* On April 27, 2012, defendant sent Bible the forms necessary for her to complete an application to rehabilitate her loan. *Id.* at 136-40. Bible promptly entered into a rehabilitation agreement on April 30, 2012, and alleges (and defendant does not dispute) that she complied with the repayment terms of the agreement. *Id.* at 9. Defendant subsequently assessed collection costs against Bible in the amount of $4,547.44. *Id.* at 142.

***10** Bible filed suit against USA Funds in the Southern District of Indiana, alleging state-law breach-of-contract claims and federal Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961 *et seq.*) claims. Bible's complaint alleged that her loan agreement incorporates the requirements of the Higher Education Act, which does not permit collection costs if a borrower promptly enters into and satisfies a rehabilitation agreement. App. 1-2. The district court disagreed and dismissed the lawsuit for failure to state a claim. S.A. 1-18. The court found Bible's claims to be "essentially disguised as claims for violations of the Higher Education Act" and therefore preempted by the Act. *Id.* at 8, 9. The court also held that Bible's claims failed on the merits, opining that the Higher Education Act not only permits, but "explicitly require[s]" imposition of collection costs,

even if the borrower enters into a rehabilitation agreement. *Id.* at 16. In so ruling, the court declined to defer to arguments made in a brief filed by the Secretary of Education as intervenor in *Educ. Credit Mgmt. Corp.* v. *Barnes*, 318 B.R. 482 (S.D. Ind. 2004), stating that "a legal brief is not binding or persuasive authority." S.A. 17.

SUMMARY OF ARGUMENT

The Higher Education Act provides that student loan defaulters must pay the "reasonable collection costs" incurred to collect the loan. 20 U.S.C. § 1091a(b)(1). Acting pursuant to its delegated rule-making authority, the Department of Education has promulgated regulations establishing which costs are "reasonable collection costs." 34 C.F.R. § 682.410. The regulations ***11** require a guaranty agency, after it pays a default claim and takes an assignment of a loan, to send an initial notice to the defaulting borrower. In that notice, the guarantor must give the borrower at least sixty days to exercise any of several options to resolve her loan debt, including entering into a repayment agreement with the guarantor. The Department interprets these regulations to provide an exception to the requirement to charge collection costs when a borrower promptly enters into a loan repayment agreement (including a rehabilitation agreement) within this sixty-day period after the borrower has been notified by the guarantor that it has paid a default claim. Thus, the Department interprets the Higher Education Act's provision that

collection costs must be "reasonable" to mean that guarantors may not assess such costs on a borrower who promptly enters into a rehabilitation agreement and follows through with that agreement. That interpretation is a permissible construction of the statute and the Department's implementing regulations. The district court therefore erred in holding that collection costs must be imposed under the circumstances presented here.

The district court also erred in concluding that the Higher Education Act preempts state-law breach-of-contract claims that are premised on violations of the Act. As this Court explained in *Wigod* v. *Wells Fargo Bank, N.A.*, 673 F.3d 547, 581 (7th Cir. 2012), "[t]he absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law." Bible's ***12** breach-of-contract claim can succeed only if she is correct that USA Funds violated the Higher Education Act. There is no basis for concluding that her claim conflicts with the federal statute.

ARGUMENT

I. The Higher Education Act And The Secretary's Regulations Do Not Allow A Guaranty Agency To Assess Collection Costs Against A First-Time Defaulted Borrower Who Timely Enters Into A Rehabilitation Agreement And Fully Complies With That Agreement.

The Higher Education Act does not define "reasonable collection costs." Congress "explicitly left a gap for the agency to fill," *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), by delegating to the Secretary authority to elucidate 20 U.S.C. § 1091a(b)(1) by "prescrib[ing] such regulations as may be necessary to carry out the [Act's] purposes." *Id.* § 1082(a)(1). The Secretary exercised that delegated authority by issuing 34 C.F.R. § 682.410, "which establishes the basic rules for the assessment of collection costs against borrowers who have defaulted on their student loans," and which costs are "reasonable collection costs." *See Black* v. *Educ. Credit Mgmt. Corp.*, 459 F.3d 796, 800 (7th Cir. 2006). The Department's reasonable interpretation of the Act is entitled to substantial deference. *See Chevron*, 467 U.S. at 843-44. And the agency's interpretation of its regulations is "controlling" unless plainly erroneous or inconsistent with the regulations. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

1. The Department interprets the requirement in 34 C.F.R. § 682.410(b)(2) that a guaranty agency

assess collection costs to be subject to ***13** the conditions in paragraph (b)(5), which require a guaranty agency to perform certain tasks "after it pays a default claim on a loan but before it reports the default to a consumer reporting agency or assesses collection costs against a borrower." 34 C.F.R. § 682.410(b)(5)(ii). Most notably here, the guarantor must provide the borrower written notice explaining the nature of the debt, and the options to obtain an independent administrative review and "to reach an agreement on repayment terms satisfactory to the agency to prevent the agency from reporting the loan as defaulted to consumer reporting agencies." *Id.* § 682.410(b)(5)(vi)(G). If the borrower does not promptly make "repayment arrangements," the regulations require the guaranty agency to then "initiate procedures to collect the debt," which may include offset of federal income tax refunds, administrative wage garnishment, and litigation. 34 C.F.R. § 682.410(b)(6)(ii). Such protracted collection efforts are much more costly for the guarantor than simply arranging repayment terms when the borrower promptly responds to the initial notice. Thus, the Department has consistently taken the position that costs may only be assessed on a borrower if she does not enter into a repayment agreement—of which a rehabilitation agreement is simply one form—in a timely manner and comply fully with the agreement, because failure to timely agree to voluntarily repay requires the guarantor to incur these collection costs.

Indeed, that is the reason for requiring notice of the repayment opportunity "before" the guarantor "assesses collection costs against a ***14** borrower." *Id.* § 682.410(b)(5)(ii). As the Department explained its position in a 1997 letter to a guaranty agency, § 682.410(b)(5)(ii)(D) "provides the borrower an opportunity to enter into a satisfactory repayment agreement before the agency either reports the default to a credit bureau or assesses collection costs against a borrower as required in § 682.410(b)(2)." Letter from Ronald E. Streets, Program Specialist, Policy Dev. Div., Student Financial Assistance Programs, U.S. Dep't of Educ., to Phillip Cervin, Ass't Vice President, Collections, Texas Guaranteed Student Loan Corp. (July 28, 1997) ("Streets Letter.").[9] The agency explained that the regulation's reference to repayment terms that are "'satisfactory to the agency * * * ' does not require that the loan be paid in full." *Id.* To the contrary, the regulation "provides the agency with discretion in establishing a satisfactory repayment agreement with the borrower." *Id.* "If the agency obtains a signed repayment agreement from the borrower within the 60-day period [following notice that a default claim has been paid], and the borrower begins to make payments, the agency is not required to assess the borrower collection costs. Collection costs related to the default would be assessed

[9] A copy of the Streets Letter is included in the attached addendum.

only if the borrower failed to continue to make payments required by the repayment agreement." *Id.*

The Department later reiterated and elaborated upon those views in defending a challenge to the validity of the collection costs regulations. The ***15** government explained that "[t]he regulations [34 C.F.R. § 682.410(b)(5)] therefore direct guarantors to charge collection costs *only* to those debtors who cause the guarantor to incur collection costs by failing to agree promptly to repay voluntarily. The Department follows the same procedure when it takes assignment of defaulted loans from guarantors." Brief of Secretary of Educ. at 22 (filed Mar. 14, 2002), *Educ. Credit Mgmt. Corp.* v. *Barnes*, 318 B.R. 482 (S.D. Ind. 2004) (App. 55) [hereinafter "Sec'y's *Barnes* Br."] Thus, the regulations "ensure that charges are imposed only on those debtors who fail to cooperate and thereby cause the guarantor to incur collections costs." *Id.* at 23 (App. 56).[10] Such costs are "reasonable collection costs" for which the defaulted borrower bears responsibility.

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[10] The dispute in *Barnes* arose in bankruptcy court. Barnes defaulted on his student loan debt and filed for bankruptcy. The guarantor filed a claim for the student loan debt in bankruptcy court that included a claim for collection costs. The bankruptcy trustee challenged the constitutionality of 34 C.F.R. § 682.410(b)(2), and the district court subsequently withdrew the reference of the case to bankruptcy court. The Secretary intervened in the district court to defend the validity of the regulation.

2. The context in which the Department adopted regulations requiring guarantors to provide the borrower with notice and an opportunity to resolve the defaulted loan clarifies the intent behind the rules. The Higher Education Act requires guarantors and the Department, prior to reporting a loan as in default to consumer reporting agencies, to provide the borrower with notice that the loan will be reported as in default status "unless the borrower enters ***16** into repayment," but requires the default to be reported "if the borrower has not entered into repayment within a reasonable time." 20 U.S.C. § 1080a(c)(4). The Department adopted 34 C.F.R. § 682.410(b)(5) in 1992 to implement this requirement, providing that "before [the guarantor] reports the default to a credit bureau or assesses collection costs against a borrower" it must provide the borrower an opportunity to challenge the enforceability or past-due status of the loan and obtain an independent review of that challenge, access to the guarantor's records, and an opportunity to agree to voluntary repayment. *See* 57 Fed. Reg. 60280, 60355-56 (Dec. 18, 1992).

In publishing the final 1992 rule, the Department explained that "a guaranty agency should not have difficulty implementing this [notice and opportunity to resolve] requirement as it already provides an opportunity for review when it assigns a loan to the Secretary for participation in the Internal Revenue Service (IRS) offset process. The statute authorizing Federal agencies to collect debts by administrative offset also requires the agency to provide a debtor

with notice of a proposed offset and at least 60 days in which to present evidence regarding the debt." 57 Fed. Reg. at 60312. The Department had been authorized since 1984 to refer defaulted student loan debts to the Internal Revenue Service for collection by offset against tax overpayments owed to defaulted borrowers, 26 U.S.C. § 6402(d), 31 U.S.C. § 3720A, and in 1986 the Department adopted regulations to establish the procedures it would follow prior to making a referral for offset. *See* ***17** 51 Fed. Reg. 24095, 24099 (July 1, 1986); 34 C.F.R. § 30.33. These procedures included giving the defaulting borrower notice of the proposed offset and an opportunity to avoid offset by entering into a satisfactory repayment agreement for the debt. 34 C.F.R. § 30.33(b)(3)(iii).

When the Department adopted the offset rule, the Secretary made it clear that in order to collect by federal offset those defaulted, federally-reinsured loans held by guaranty agencies, the Department would use the guaranty agencies to send (on its behalf) the required pre-offset notices to borrowers, and to conduct the initial review if requested by the borrower, including providing the required opportunity for the borrower to avoid offset by making a timely agreement to repay the loan. *See* 51 Fed. Reg. at 24096 ("[T]he Secretary may provide an initial administrative review to a debtor by means of a review and initial determination by the guarantee agency that originally held the debtor's loan and now maintains records of that loan account. In such instances, the agency conducts the review in accordance with

the procedures established in § 30.33, and uses the same criteria as Department officials.").

The 1992 rule expressly provided that the guaranty agency would meet the new Federal Family Education Loan Program requirement by following the pre-offset rules. *See* 57 Fed. Reg. at 60356; 34 C.F.R. § 682.410(b)(5)(iii) ("The procedures set forth in 34 CFR 30.20-30.33 (administrative offset) satisfy the requirements of paragraph (b)(5)(ii) of this section"). Thus, by referencing the well-established and familiar refund offset procedure as a model for the new ***18** "notice and opportunity to resolve" rule for guaranty agencies, the Department intended the new rule to operate in the same manner as the refund offset rules—a borrower who entered into a satisfactory repayment agreement within the sixty-day period following the notice would avoid each of the adverse consequences threatened in the required notice—*i.e.*, the reporting of the loan as in default, the imposition of collection costs, and other enforcement actions, such as refund offset.

3. An understanding of the underlying basis for charging collection costs to defaulted student loan borrowers further supports the Department's interpretation of the Higher Education Act and its implementing regulations. Because the Department reinsures guarantors for their losses in paying default, guarantor claims against defaulted borrowers are federal claims. *See* 31 U.S.C. § 3720A(a) ("legally enforceable debt" includes "debt administered by a third party acting as an agent for the Federal

Government").[11] Federal agencies must assess a person who owes a debt "a charge to cover the cost of processing and handling a delinquent claim." *Id.* § 3717(e)(1).

The 1992 final rule that required guarantors to provide "notice and opportunity to resolve" also required the guarantor, for the first time, to charge collection costs. 34 CFR § 682.410(b)(2); *see* 57 Fed. Reg. at 60311-12, 60355. ***19** At the time the Department's collection-costs rule was issued in 1992, the Federal Claims Collection Standards, issued jointly by the former General Accounting Office and the Department of Justice, required federal agencies to calculate collection costs either as actually incurred on an individual loan or based "upon cost analyses establishing an average of actual additional costs incurred by the agency in processing and handling claims against other debtors *in similar stages of delinquency*." 4 C.F.R. § 102.13(d) (1984); *see also* 49 Fed. Reg. 8889 (March 9, 1984) (emphasis added).[12]

[11] A guaranty agency pays a default claim using funds from its "Federal Student Loan Reserve Fund"—the fund established pursuant to 20 U.S.C. § 1072a, which is "considered to be property of the United States." *Id.* § 1072a(e).

[12] The Federal Claims Collection Standards were recodified as amended at 31 C.F.R. §§ 901 *et seq.* in 2000. 65 Fed. Reg. 70390, 70405 (Nov. 22, 2000). The Federal Claims Collection Standards currently give agencies discretion in calculating administrative costs. *See* 31 C.F.R. § 901.9(c) ("The calculation of administrative costs should be based on actual costs incurred or *upon estimated costs as determined by the assessing agency*.") (emphasis added); 65 Fed. Reg. at 70394 ("Federal agencies

(Continued on following page)

The Department applied this directive by adopting 34 C.F.R. § 682.410(b)(2) and (5), which distinguish between defaulted borrowers who promptly agree to repay—within the sixty-day period immediately following the initial notice of the opportunity to dispute the debt and agree to repay—from those defaulters who do not immediately cooperate and for whom the guarantor would incur significant costs to pursue. *See also* Sec'y's *Barnes* Br. 23-24 (App. 56-57) ("All debtors who are charged collection costs pursuant to 34 C.F.R. § 682.410(b)(2) are in similar stages of delinquency * * * * [T]he rule requires guarantors to charge ***20** collection costs to those defaulters who have already defaulted, whose loan has been assigned to the guarantor based on that default, and *who fail to make satisfactory arrangements to repay within an initial grace period after an initial demand by the guarantor*.") (emphasis added). The Department's collection costs rules, which apply to its own collection efforts, are codified at 34 C.F.R. § 30.60.

Thus, in the Department's view, charging collection costs to a borrower like Bible, who promptly enters into and complies with a rehabilitation agreement, would be inconsistent with the Higher Education Act's requirement that collection costs must be

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should promulgate debt collection regulations tailored to specific agency program requirements."). In the exercise of its discretion, the Department has determined that similar collection costs should be charged against borrowers who are in similar stages of delinquency.

"reasonable." 20 U.S.C. § 1091a(b)(1). The Department interprets "reasonable" to mean that similar costs must be assessed to borrowers who are at similar stages of delinquency, and a borrower who promptly enters into a rehabilitation agreement is not similarly situated to one who does not.

4. Defendant USA Funds maintains, however, that a "rehabilitation agreement" is distinct from a "repayment agreement," and points out that the Higher Education Act and the Department's regulations clearly contemplate that collection costs may be assessed against a defaulted borrower who completes a rehabilitation agreement. *See* Appellee's Br. 9-12. But, as previously discussed, because rehabilitation consists of the borrower requesting rehabilitation and voluntarily making a series of installment payments pursuant to a "monthly repayment agreement" in the amount ***21** determined by the guarantor, a rehabilitation agreement is simply a specific form of a satisfactory repayment agreement. *See* 34 C.F.R. § 682.405(a)(2)(i) (A loan is considered to be "rehabilitated" after the borrower has voluntarily "made * * * nine of the ten payments required under a monthly *repayment agreement*.") (emphasis added).

The Department adopted 34 C.F.R. § 682.405 to implement the loan rehabilitation provisions of the Higher Education Act, 20 U.S.C. § 1078-6(a), in 1994. 59 Fed. Reg. 33334, 33355 (June 28, 1994). The 1994 regulations required that the guarantor explain to the borrower the terms of the rehabilitation agreement, including, as pertinent here, "the amount of the

collection costs to be added to the unpaid principal at the time of the sale * * * * [which] may not exceed 18.5 percent of the unpaid principal and accrued interest at the time of the sale." 34 C.F.R. § 682.405(b)(1)(iv) (1996). As explained in a 1994 "Dear Guaranty Agency Director" letter issued before the regulations were adopted, the Department had previously "provided policy guidance that authorized guaranty agencies to include all outstanding collection costs on the defaulted loan in the rehabilitated loan amount to be purchased." Dear Guaranty Agency Director Ltr. at 2 (March 29, 1994).[13] The proceeds of the sale of a loan to the new lender were treated as a recovery on the loan, and collection costs were included in the sale price and became part ***22** of the borrower's new outstanding balance. After several program participants expressed concern that "including a large amount of collection costs in the borrower's new loan debt would be a disincentive to a borrower attempting to resolve the default status on a loan through rehabilitation," the Department reconsidered its guidance. *Id.* The Department explained that it had "decided that[ ] strict application of the requirements [20 U.S.C. § 1091a(b)(1)] would frustrate the intent of" the changes to the rehabilitation program. *Id.* The Department "concluded that the amount of collection costs currently assessed borrowers as reasonable under 34 CFR 682.410(b)(2) is not reasonable when the borrower has shown the initiative to address the

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[13] A copy of this letter is included in the attached addendum.

default through [rehabilitation]." *Id.* Accordingly, collection costs would be capped at 18.5 percent of the outstanding principal and accrued interest "at the time the agency arranges the lender purchase to rehabilitate the loan." *Id.*

Nothing in the text or explanation of the 1994 regulations for the loan rehabilitation program suggested or implied that loan rehabilitation agreements were exempt from the general rules adopted in 1992 that allow the guarantor to charge collection costs only to borrowers who fail to enter into repayment agreements within the sixty-day period following the initial notice. The loan rehabilitation agreement with the borrower is clearly a "repayment agreement"—the borrower may request rehabilitation of her defaulted loan and the guarantor then must determine the loan repayment installment amounts; the ***23** borrower may contest those terms, but must agree to and actually make the payments in order to have the loan rehabilitated. 34 C.F.R § 682.405(b)(1)(vi).

As noted previously, the Higher Education Act did not address the charging of collection costs upon completion of the loan rehabilitation by the sale or assignment of the loan until 20 U.S.C. § 1078-6 was amended in 2006. At that time, the statute was amended to provide that the guarantor "may in order to defray collection costs, charge the borrower an amount not to exceed 18.5 percent of the outstanding principal and interest at the time of the loan sale, and retain such amount from the proceeds of the loan sale." Pub. L. No. 109-171, § 8014(h), 120 Stat. 171

(Feb. 8, 2006) (codified as amended at 20 U.S.C. § 1078-6(a)(1)(D)(i)(II)(aa)).

The legislative history indicates only that the amendment was "to codify the collection costs permissible for rehabilitated loans at up to 18.5 percent of the outstanding principal and interest of the loan." H.R. Rep. No. 109-276, 109th Cong. at 240 (Nov. 7, 2005). The costs that were permissible had already been established under Department regulations. Because the amendment simply "codified" the permissible costs, the amendment did not empower the guarantor to charge costs that were not already permitted under the regulations. Rather, the amendment should be read in in [sic] harmony with the Higher Education Act's pre-existing requirement that collection costs must be "reasonable," 20 U.S.C. § 1091a(b)(1), which the Department, in the exercise of its regulatory authority, has interpreted to exclude the assessment of collection ***24** costs on a borrower who promptly enters into a rehabilitation agreement, 34 C.F.R. § 682.410(b)(5)(ii).

In sum, the Department's regulations require a guaranty agency to charge defaulted borrowers collections costs. But before doing so, the guaranty agency must provide the borrower a sixty-day window of opportunity to dispute the debt, obtain a review of any objection, and agree to repay the debt on terms satisfactory to the guarantor. If the borrower agrees within that initial sixty-day period to repay the loan under terms satisfactory to the guarantor, the borrower cannot be charged collection costs unless the

borrower later fails to honor the agreement. The Department's interpretation of the Higher Education Act and its implementing regulations is reasonable and warrants deference.

II. The Higher Education Act Does Not Preempt Private State-Law Breach-Of-Contract Claims That Are Premised On Violations Of The Act.

The Court also invited the government to brief any of the other issues presented in this case, and we take that opportunity to make clear that the Higher Education Act does not preempt breach-of-contract claims that are premised on violations of the Act. Bible's state-law breach-of-contract claim is based on her allegations that the guaranty agency's imposition of collection costs were not authorized by the Higher Education Act, that the terms of the promissory note incorporated relevant provisions of the Act and its regulations, and that, therefore, she may enforce her rights under the note through a ***25** breach-of-contract action. In response, the guarantor argued that the Higher Education Act provides no private right of action against guaranty agencies, and that only the Department has authority to entertain and remedy any violations of the Act or regulations. *See* 20 U.S.C. § 1082(a)(2).

The district court agreed with the guarantor, reasoning that "[i]n order to decide the merits of Ms. Bible's claims, the Court would necessarily have to

interpret and apply the [Higher Education Act], not merely the language of [the promissory note]." S.A. 10. Because the Act does not authorize a private right of action, the court reasoned, Bible was foreclosed from "recharacteriz[ing]" her claim as a breach-of-contract claim. *Id.* The court concluded that Bible's claims "are preempted by the [Higher Education Act] and she has therefore failed to state a cause of action. *Id.* at 11.

But whether or not the Higher Education Act provides a private right of action for enforcement of its provisions is irrelevant to whether provisions of the Act can be made part of a binding contract between private parties. Indeed, Bible's promissory note explicitly states that the "terms of the [master promissory note] will be interpreted in accordance with applicable federal statutes and regulations, and the guarantor's policies." App. 122. Further, Bible's note contains, as have all Federal Family Education Loan Program promissory notes since 1994, the proviso that "[a]pplicable state law, except as ***26** preempted by federal law, may provide for certain borrower rights, remedies, and defenses in addition to those stated in this [master promissory note]."[14] *Id.* Except where the Act expressly preempts state law, the statute and implementing regulations preempt

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[14] As directed by the Higher Education Act, the Department has promulgated a form master promissory note for use in loans made under Federal Family Education Loan Program. 20 U.S.C. § 1082(m)(1)(D).

otherwise applicable state law only to the extent that the state law would "conflict with or hinder the satisfaction of the requirements" imposed on guaranty agencies and lenders to exercise due diligence in servicing and collecting federally-insured loans. *See* 34 C.F.R. §§ 682.410(b)(8), 682.411(o)); *see also* 55 Fed. Reg. 40120, 40121 (Oct. 1, 1990) (explaining limitations of Higher Education Act's preemption of state law).[15] Bible's state-law breach-of-contract claims pose no conflict with the Higher Education Act's statutory or regulatory requirements on guaranty agencies.

Indeed, this Court has rejected arguments similar to those urged here by USA Funds with respect to state-law claims raised by a lender participating in an analogous federal loan program, the Home Affordable Mortgage Program, which, like the Federal Family Education Loan Program, regulates lender ***27** conduct. *See Wigod* v. *Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012). In *Wigod*, the plaintiff alleged that the mortgage servicer had violated the federal mortgage program's requirements, which

[15] The government also recently filed a statement of interest in the Southern District of New York taking the position that the Higher Education Act and its regulations do not displace private state-law causes of action involving allegations of fraud and misrepresentation against student loan program participants, such as lenders, guarantors or postsecondary education institutions. *See* Statement of Interest of the United States, *Sanchez* v. *Asa College*, No. 1:14-cv-05006-JMF (S.D.N.Y.) (filed Jan. 23, 2015).

were incorporated into the loan-modification agreement. In defense, the mortgage servicer argued that plaintiff was improperly attempting "an 'end-run' on the lack of a private right of action under [the Home Affordable Mortgage Program] itself." *Id.* at 576. This Court disagreed, finding that plaintiff's breach-of-contract claim did not conflict with, but rather was wholly consistent with, federal law (*Id.* at 580):

> [W]e do not foresee any possibility that permitting suits such as [plaintiff's] will expose mortgage servicers to multiple and varied standards of conduct. So long as state laws do not impose substantive duties that go beyond [the Home Affordable Mortgage Program's] requirements, loan servicers need only comply with the federal program to avoid incurring state-law liability.

Similarly here, Bible's breach-of-contract claim can succeed only if she is correct that USA Funds violated the Higher Education Act. Accordingly, there is no basis for concluding that her claim conflicts with federal law. And as this Court further explained in *Wigod*, "[t]he absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law." *Id.* at 581.

*28 CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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MAY 2015

ADDENDUM

Table of Contents

Letter from Ronald E. Streets, Program Specialist, Policy Dev. Div., Student Financial Assistance Programs, U.S. Dep't of Educ., to Phillip Cervin, Ass't Vice President, Collections, Texas Guaranteed Student Loan Corp. (July 28, 1997)..1a

Dear Guaranty Agency Director Letter (March 29, 1994)..2a

[1a] UNITED STATES
DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

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WASHINGTON, D.C. 20202

JUL 28 1997

Mr. Phillip Cervin
Assistant Vice President
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Austin, Texas 78720-1725

Dear Mr. Cervin:

Thank you for your June 24, 1997 letter in which you request clarification regarding the Department of Education's (ED's) interpretation of §682.410(b)(2) of the regulations on the assessment of collection costs on defaulted Federal Family Education Loan (FFEL) program loans as it relates to §682.410(b)(5)(ii) of the regulations. Specifically, the Texas Guaranteed Student Loan Corporation (TGSLC) proposes to not assess collection costs to defaulted FFEL borrowers who enter into a satisfactory repayment agreement with TGSLC during the 60-day period following claim payment of a defaulted FFEL loan.

The Department agrees with your interpretation of 34 CFR 682.410(b)(5)(ii)(D) and its interaction with §682.410(b)(2)(i). This provision of the regulations provides the borrower an opportunity to enter into a satisfactory repayment agreement before the agency

either reports the default to a credit bureau or assesses collection costs against a borrower as required in §682.410(b)(2). You also are correct that "terms satisfactory to the agency . . . " does not require that the loan be paid in full and provides the agency with discretion in establishing a satisfactory repayment agreement with the borrower. If the agency obtains a signed repayment agreement from the borrower within the 60-day period, and the borrower begins to make payments, the agency is not required to assess the borrower collection costs. Collection costs related to the default would be assessed only if the borrower failed to continue to make payments required by the repayment agreement.

I trust this response satisfactorily addresses your concerns. Please contact me if I can be of further assistance.

Sincerely,

/s/ Ronald E. Streets
Ronald E. Streets
Program Specialist
Policy Development Division
Student Financial Assistance Programs

[2a] UNITED STATES
DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

[SEAL] 400 MARYLAND AVE., S.W.
WASHINGTON, D.C. 20202

March 29, 1994

Dear Guaranty Agency Director:

This letter provides policy guidance on an important default reduction measure implemented as a result of the 1992 Amendments to the HEA.

GUARANTY AGENCIES' INCLUSION OF COLLECTION COSTS IN REHABILITATED LOANS AND ELIGIBLE DEFAULTED LOANS PAID OFF THROUGH LOAN CONSOLIDATION UNDER 428C

Section 484A(b) of the Higher Education Act (HEA) requires a guaranty agency to assess a borrower who has defaulted on a Title IV student loan reasonable collection costs. For purposes of the Federal Family Education Loan (FFEL) Program, 34 CFR §682.410(b)(2), published on December 18, 1992, provided parameters for what constituted "reasonable" collection costs that would be charged to the borrower on loans for which the agency had paid a default claim. The discussion of this regulation in the preamble of the final rule stated that the collection cost amount to be charged would be a percentage of the principal and interest outstanding on the loan, that it could be calculated annually, and that it would be a flat rate assessed against all borrowers with defaulted loans held by the agency. 57 *Fed Reg*

60290, 60311, 60312 (Dec. 18, 1992) Implementation of the requirements of section 682.410(b)(2) of the regulations has resulted in the assessment of significant amounts of collection costs, sometimes as high as 43 percent of the outstanding principal and interest on the defaulted loan.

The Higher Education Amendments of 1992 amended the HEA to add expanded opportunities to allow defaulted borrowers to satisfactorily resolve their default status. Specifically, section 428F(a)(1)(A) of the HEA requires all guaranty agencies to enter into an agreement with the Secretary to "rehabilitate" a borrower's defaulted loan through the sale of the loan, if practicable, to an eligible lender following the borrower's payment of 12 consecutive reasonable and affordable monthly payments to the agency. Section 428C(a)(4) of the HEA also now provides that a defaulted loan would be eligible for consolidation after the borrower pays a series of consecutive reasonable and affordable monthly payments to the agency on the defaulted loan. These sections of the statute did not, however, provide specific guidance on the treatment of collection costs previously assessed the borrower on the defaulted loan.

[3a] Shortly after the guaranty agencies began implementation of these provisions of the HEA, the Department of Education (the Department) received several inquiries as to whether, absent specific guidance in the law, outstanding collection costs assessed a borrower on a defaulted loan could be included in the amount of the loan for which the agency arranged

the loan rehabilitation purchase or certified as the pay-off amount for consolidation after the borrower has successfully paid the required series of consecutive monthly-payments. The Department, in order to effect what it believes was Congressional intent to provide defaulted borrowers with a "fresh start," provided policy guidance that authorized guaranty agencies to include all outstanding collection costs on the defaulted loan in the rehabilitated loan amount to be purchased and the Consolidation loan pay-off amount. In many cases, the collection costs have increased significantly the amount of the new rehabilitated or consolidated loan.

After the Department issued this policy guidance, several program participants requested that the Department reconsider its guidance. The program participants expressed concern that including a large amount of collection costs in the borrower's new loan debt would be a disincentive to a borrower attempting to resolve the default status on a loan through rehabilitation and consolidation and would increase the likelihood that the borrower would default on the new increased loan debt.

After further consideration, the Department has decided that, strict application of the requirements of §484A(b) of the HEA would frustrate the intent of the changes to the rehabilitation and consolidation programs. In addition, we have concluded that the amount of the collection costs currently assessed borrowers as reasonable under 34 CFR 682.410(b)(2) is not reasonable when the borrower has shown the

initiative to address the default through one of these two programs. Therefore, the Department has decided to modify its earlier policy guidance to restrict the amount of collection costs that will be considered "reasonable" under these circumstances to be an amount that does not exceed 18.5 percent of the outstanding amount of principal and accrued interest on the loan at the time the agency arranges the lender purchase to rehabilitate the loan or certifies the pay-off amount to the consolidating lender. This percentage is consistent with the percentage a guaranty agency is allowed to retain under the loan rehabilitation program at the time of lender purchase.

[4a] I trust this information clarifies the Department's position in this area. Please contact us if you have further questions.

Sincerely yours,

/s/ Robert W. Evans

Robert W. Evans
Director, Division of Policy
Development and Member,
Direct Student Loan Task Force