

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**RANDI WEINGARTEN**, *in her official capacity as  
President of the American Federation of Teachers, AFL-  
CIO,*

**AMERICAN FEDERATION OF TEACHERS, AFL-  
CIO,**

**CYNTHIA MILLER,**

**CRYSTAL ADAMS,**

**CONNIE WAKEFIELD,**

**DEBORAH BAKER,**

**JANELLE MENZEL**

**KELLY FINLAW,**

**GLORIA NOLAN, and**

**MICHAEL GIAMBONA,**

Plaintiffs,

v.

**ELISABETH DEVOS**, *in her official capacity as the  
Secretary of the United States Department of  
Education, and*

**UNITED STATES DEPARTMENT OF  
EDUCATION,**

Defendants.

Civil Action No.  
1:19-cv-02056  
(DLF)

**BRIEF FOR THE STATES OF  
NORTH CAROLINA, CALIFORNIA, COLORADO, CONNECTICUT,  
DELAWARE, IDAHO, ILLINOIS, KENTUCKY, MAINE, MARYLAND,  
MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW  
MEXICO, OREGON, VERMONT, VIRGINIA, WASHINGTON,  
WISCONSIN, AND THE DISTRICT OF COLUMBIA  
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS**

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## **INTERESTS IN THE CASE**

Under Local Civil Rule 7(o)(1), the States of North Carolina, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Vermont, Washington and Wisconsin; the Commonwealths of Kentucky, Massachusetts, and Virginia; and the District of Columbia (hereinafter “Amici States”) respectfully submit this amicus curiae brief in support of the Plaintiffs’ position.

We are the chief law enforcement officers in our states charged with protecting consumers — including student borrowers — from unfair and deceptive acts and practices. We routinely field complaints from borrowers about their student debt, including complaints from consumers about problems with their student loan servicers or the Department of Education (the “Department”). And, when necessary, we have brought consumer protection actions against student loan servicers, student debt adjusters, and abusive for-profit schools.

The Public Service Loan Forgiveness (“PSLF”) statute, 20 U.S.C. § 1087e(m), has offered direct and indirect gains for our states. Many of our state employees are eligible for, or are actively pursuing, PSLF as a means of managing their student debt. The promise of PSLF has allowed our states to attract and retain talent, especially for teachers and professional occupations. Private-sector salaries far outpace what our states can offer to teachers and

professionals. Because Defendants and their agent servicers are implementing PSLF in a way that makes it an empty promise — available to less than one percent of applicants — our states will lose this advantage.

In addition, the citizens of our states will be harmed. Many borrowers who planned their lives based on Defendants' promises now face unexpected debt and tightened budgets. Other borrowers still hold out hope that they can receive PSLF relief. At best, they face hours of lost time, dealing with Defendants' byzantine and unaccountable bureaucracy. We submit this amicus brief to highlight the harms Defendants' actions are causing to our states and our people.

## **INTRODUCTION**

In 2007, Congress and the President made public servants a promise: devote ten full years of your career to public service — all while paying your federal student loans — and the remainder of your federal student loan debt will be erased. Now, after millions of Americans have shaped their lives and careers to fit this financial lifeline, virtually all applicants have been denied. Numerous investigations, audits, and the stories of thousands reveal that borrowers pursuing PSLF were either misled, misprocessed, or left without any decision on their cases. Many of these borrowers passed on higher-paying opportunities to spend their careers in public service. They now face

the prospect of having the relief they relied upon delayed or altogether foreclosed.

Plaintiffs brought this case against Defendants alleging that pervasive errors in administering the PSLF program directly resulted in their denials. Defendants have moved to dismiss some, but not all, of the Plaintiffs' claims. In essence, Defendants contend that this Court lacks jurisdiction to hear any claims that involve Defendants or their agents providing false information about the PSLF program. The Amici States ask this Court to reject Defendants' request for a sweeping order of dismissal and instead closely review the specific allegations and relief requested by Plaintiffs in their Complaint.

### **ARGUMENT**

#### **I. THE DEFENDANTS' FAILED ADMINISTRATION OF THE PUBLIC SERVICE LOAN FORGIVENESS PROGRAM HAS DEPRIVED BORROWERS OF THE BENEFITS OF THIS CRITICAL PROGRAM.**

##### **A. PSLF Was Designed to Help Students Afford to Pursue Careers in Public Service.**

PSLF affords borrowers who work for 10 years in a qualifying public service job the opportunity to have the remaining balances of their federal direct student loans forgiven. 20 U.S.C. § 1087e(m). In creating the PSLF program, Congress recognized that students with significant amounts of debt were often priced out of public-service careers because lower-paying public

service jobs could not cover their student loan payments. In debate before passage, Senator Kennedy summed up the promise of the PSLF program, offering the example of a schoolteacher:

The annual salary in my State of Massachusetts for a teacher is \$35,241. The average loan debt is \$18,169....

These individuals want to give something back to the community, and we find out they want to be a schoolteacher. So if they are \$18,000 in debt, how are they going to be able to pay that off?

...[I]f they teach for 10 years, then we forgive the remainder of their debt, which is over \$8,000.

153 Cong. Rec. S9535 (daily ed. July 19, 2007) (statement of Sen. Kennedy).

The program was designed to solve a problem: “For many heavily indebted graduates, pursuing public service careers as teachers, social workers, legal aid attorneys or a host of others becomes out of the question.” *Id.* at S9539 (statement of Sen. Harkin). PSLF was designed to seize upon students’ “idealism” by allowing them “to pursue a career in public service and be able to take those jobs ... often at lower pay ...” while also “relieving themselves of the huge burden of debt they face.” 153 Cong. Rec. S11,245 (daily ed. Sept. 7, 2007) (statement of Sen. Brown).

There were no signs, in the text of the statute or in Congressional debate, that the PSLF program was designed to benefit only a few hundred people or have only a minimal impact. Even opponents of PSLF, when



offering an amendment to strike the loan forgiveness provisions, emphasized the program's breadth and impact on spending. "Let me show how broad this program is," Senator Sessions explained, then listing fifteen types of jobs that would grant loan forgiveness. "That is a big deal," Senator Sessions opined. 153 Cong. Rec. S9557 (daily ed. July 19, 2007) (statement of Sen. Sessions).

Borrowers must meet several qualifications to have their loans forgiven under the PSLF program:

- As a threshold issue, their federal student loans must be Direct Loans – as opposed to loans under the discontinued Federal Family Education Loan ("FFEL") program. 20 U.S.C. § 1087e(m)(1); 34 C.F.R. § 685.219(c)(1)(iii).
- Borrowers must have made 120 payments while on a qualifying repayment plan and while employed full time in a qualifying public service job. 20 U.S.C. § 1087e(m)(1)(A)-(B); 34 C.F.R. § 685.219(c)(1)(iii).<sup>1</sup>
- Borrowers must not be in default on their Direct Loans and must be employed in an approved public service job at the time loan

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<sup>1</sup> Qualifying repayment plans include the Standard Repayment Plan or any of the Income-Driven Repayment (IDR) plans. 20 U.S.C. § 1087e(m)(1)(A); 34 C.F.R. § 685.219(c)(1)(iv). Months during which loans are in forbearance do not count towards the 120 qualifying payments.

forgiveness is granted. 20 U.S.C. § 1087e(m)(1); 34 C.F.R. § 685.219(c)(1)(i)-(ii).

Congress tasked the Department of Education with ensuring that the Program is properly implemented and administered to ensure that borrowers who are willing to commit themselves to serving the public will be able to benefit from the PSLF program's promised assistance.

**B. Borrowers Experience Recurring Problems with PSLF.**

Over one million public servants have planned their careers around access to the potential benefits of PSLF. As of June 2019, over 1.13 million borrowers, with nearly \$102 billion in outstanding student loans, have submitted documentation indicating their intent to apply for PSLF in the future. U.S. Office of Fed. Student Aid, *June 2019 PSLF Report*, [studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data](https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data).

Borrowers working towards PSLF have accepted lower-paying jobs to preserve their eligibility for this life-changing benefit. According to Department data, nearly two-thirds of borrowers on an income-driven repayment plan pursuing PSLF had annual salaries of less than \$50,000. *See* Consumer Fin. Prot. Bureau, *Staying on Track While Giving Back* 21 (June

2017), [files.consumerfinance.gov/f/documents/201706\\_cfpb\\_PSLF-midyear-report.pdf](https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf) (cited in Pls.' Compl. ¶ 3).<sup>2</sup>

When frustrated borrowers uncover their PSLF problems, they regularly seek help from consumer regulators. For example, 10 percent of the complaints made to the CFPB about student loan issues in 2017 directly concerned PSLF. *Id.* at 12-13. Another 21 percent of the complaints asserted problems with Income-Driven Repayment (IDR) enrollment or recertification, which could negatively impact a borrower's PSLF progress. *Id.*

The improper denial of PSLF has tangible effects on our citizens and our communities. Borrowers will have to continue to delay major life events like buying a home, getting married, or starting a family. Furthermore, as the problems with the administration of PSLF become better-known, it will discourage future student loan borrowers from pursuing the program, limiting Amici States' ability to attract employees who have essentially been priced out of public service.

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<sup>2</sup> Like Defendants, *see* Defs.' Mem. at 5, n. 1, the Amici States draw factual support from public-record documents that are cited in Plaintiffs' Complaint.

**C. Defendants' Failures to Ensure that Borrowers Receive Accurate Information and to Follow the Law Have Resulted in Less than One Percent of Applicants Receiving PSLF.**

Thus far, PSLF has been virtually inaccessible to the borrowers who have applied. The first PSLF borrowers became eligible for forgiveness in October 2017. Since then, 90,962 people have applied for loan discharge pursuant to PSLF, but only 845 people have received it. *See June 2019 PSLF Report*.<sup>3</sup> Less than one percent of PSLF applicants have received relief.

The extremely low success rate for PSLF applicants is the result of pervasive errors and mismanagement by the Department and its agent servicers. These errors break down into several categories, demonstrated by the allegations in Plaintiffs' complaint and by the patterns of borrower complaints in the public reports incorporated in Plaintiffs' complaint.

**1. Inaccurate record-keeping**

Many borrowers report that Defendants did not keep accurate records of their progress towards PSLF. The Department and its servicers routinely miscounted PSLF borrowers' qualifying payments. *Staying on Track* at 39. Further, borrowers who sought Income-Driven Repayment suffered delays in

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<sup>3</sup> In 2018, Congress passed the Temporary Expanded Public Service Loan Forgiveness program to address one narrow PSLF eligibility problem, but TEPSLF has been plagued with a similarly low approval rate. According to the Department, just over 4 percent of the 17,466 TEPSLF requests have been granted. *See June 2019 PSLF Report*.

enrollment that resulted in borrowers losing the chance to make qualifying payments. *Id.* at 39-40. After the Department transferred potential PSLF applicants to a dedicated PSLF servicer, the borrowers saw inaccurate payment histories in the new servicer's records. *Id.* at 40-41.

These issues have been identified by states in their enforcement efforts and are at the core of lawsuits filed by the Massachusetts Attorney General and the New York Attorney General against the Pennsylvania Higher Education Assistance Authority ("PHEAA"), the dedicated PSLF servicer. *See Commonwealth of Massachusetts v. Pennsylvania Higher Education Assistance Agency*, No. 1784-CV-02682 (Suffolk County Super. Ct., Aug. 23, 2017); *State of New York v. Pennsylvania Higher Education Assistance Agency*, Case No. 1:19-cv-09155 (S.D.N.Y., Oct. 3, 2019).

## **2. Failure to provide accurate information**

Many borrowers report that Defendants did not provide accurate information about PSLF. Borrowers were not informed that consolidation would cause them to lose any previous qualifying PSLF payments. *Staying on Track* at 38. Borrowers waited months for responses from Defendants' servicer agents about how to complete the Employment Certification Form required to certify fulfillment of the PSLF program's substantive requirements. *Id.* at 37. Borrowers spent years making payments on loans,

believing they were making progress toward PSLF relief, before their servicers explained that their loans did not qualify for PSLF. *Id.* at 29-30.

As this Court has previously ruled, the Department also improperly changed its definition of qualifying public service employment after borrowers began working towards forgiveness under the PSLF program. The Court overturned the new definition and vacated the Department's denials of the plaintiff borrowers' loan forgiveness applications. *Am. Bar Ass'n v. U.S. Dep't of Educ.*, 370 F. Supp. 3d 1 (D.D.C. Feb. 22, 2019).

### **3. Steering borrowers to ineligible repayment plans**

Many borrowers who planned to apply for PSLF, like Plaintiffs here, complain that Defendants' agents steered them into taking actions that would make them ineligible for relief. Borrowers complain that after they told their servicers that they are pursuing PSLF, the servicers nonetheless enrolled them into a non-qualifying repayment plan; the servicers never told the borrowers that the repayment plan would make the borrowers ineligible for PSLF. *Staying on Track* at 33-34.

Servicers also automatically placed working graduate students' loans into deferment — an action that eliminates borrowers' ability to make qualifying PSLF payments — even when the student borrowers instructed the servicers that they wanted to maintain their current loan status and continue making qualifying PSLF payments. *Id.* at 34-35. The State of New

York's lawsuit alleges that PSLF borrowers were improperly steered into forbearances, robbing them of months of qualifying payments.

#### **4. Failure to provide reasons for denial**

Finally, borrowers complain that Defendants fail to provide an explanation for why they have denied PSLF requests. For example, when borrowers submit an Employment Certification Form, many times they receive insufficient information to understand the reason why the form was denied or how to cure any errors. *Id.* at 37. As a result, borrowers have little recourse for addressing any deficiencies or otherwise appealing the denial.

#### **D. Government Reports Have Found Mass Confusion about PSLF Within the Department and Among Borrowers.**

Numerous reports have attributed these problems, at least in part, to informational issues of which the Department was aware. For example, in September 2018, the Government Accountability Office ("GAO") quoted PHEAA officials and frontline customer service staff as saying that "borrowers were frequently confused by program requirements related to qualifying loans, employment, repayment plans, and payments." U.S. Gov't Accountability Office, GAO-18-547, *Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers* 13 (Sept. 2018) (cited in Pls.' Compl. ¶ 8). According to the GAO, the Department knew that the servicer's internal PSLF guidance was

inaccurate. *Id.* at 17. The GAO wrote that the Department “reviewed sections of [the PSLF] processing handbook and identified” passages where it did “not accurately reflect PSLF requirements” and could result in borrower “certification requests being improperly approved or denied.” *Id.*

The GAO ultimately concluded that the Department “has not provided the PSLF servicer with a comprehensive source of guidance and instructions on how to operate the program.” *Id.* at 24. The GAO acknowledged that this failure by the Department created “risk that the PSLF servicer may improperly approve or deny borrowers’ certification requests and forgiveness applications.” *Id.*

These failures to instruct contributed to hundreds of thousands of people falsely believing that they were on a path to obtain PSLF. The GAO report found that 370,000 borrowers indicated they were pursuing PSLF, but had according to Department records failed to make any payment that qualified them for PSLF relief. *Id.* at 12. These 370,000 potential applicants were not on track — despite believing that they were — because they were not on a qualifying repayment plan, were in deferment or forbearance, were in a grace period, or recently consolidated their loans. *Id.* Numerous borrowers complain that they are in exactly the situation described in Plaintiffs’ allegations for Count IV of their Complaint. They believed that



they were making payments for years towards PSLF, only to eventually discover that they were not in a qualifying loan. *Staying on Track* at 29-30.

**II. THIS COURT SHOULD HOLD DEFENDANTS ACCOUNTABLE FOR THEIR FAILURES IN ADMINISTERING THE PSLF PROGRAM.**

Defendants argue that certain Plaintiffs' claims should be dismissed because those arguments are wholesale programmatic challenges or because certain Plaintiffs, after following the advice of Defendants and their agents, did not make 120 qualifying payments for PSLF or TEPSLF. *See* Defs.' Mem. at 18-25, 29-30. This argument would allow Defendants to escape the consequences of their actions.

While it is true that Plaintiffs allege that certain discrete errors have been repeated many times, that alone does not make their claim an impermissible programmatic challenge. Instead, it shows a grievous set of common errors demanding correction. Courts have cautioned against confusing repeated discrete injuries with impermissible programmatic attacks. *See Ramirez v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 7, 21 (D.D.C. 2018) ("Defendants confuse aggregation of similar, discrete purported injuries—claims that many people were injured in similar ways by the same type of agency action—for a broad programmatic attack.")

Here, in Counts III and V, Plaintiffs allege two specific ways in which they were improvidently denied PSLF or TEPSLF:

- First, the Department’s process “to identify and account for errors” in determining PSLF or TEPSLF eligibility was inadequate. Pls.’ Compl. ¶ 412.
- Second, the Department denied the borrowers’ applications without accounting for misrepresentations by a Title IV servicer about the borrower’s progress towards PSLF or TEPSLF. *Id.* ¶ 429.

It was neither Congress’s intention in enacting the PSLF statute, nor the Department’s policy when enacting PSLF regulations, to create a program that denies relief to 99 percent of applicants. There is also no valid policy justification to support a process that does not account for (or remedy) errors. It is not the borrowers’ fault that the problems are widespread, nor should it foreclose them from relief.

Defendants also argue that only Congress and the President, not the courts, may provide across-the-board relief to “improve wayward programs.” Defs.’ Mem. at 23. Defendants’ argument is in tension with the Administrative Procedure Act—which requires reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1)—and with precedent in which the courts have issued mandatory injunctions against federal agencies. For example, in *Adams v. Richardson*, the D.C. Circuit held that an agency failed to enforce the Civil Rights Act,

then affirmed this Court's injunction ordering the agency to commence enforcement proceedings against 116 school districts, demand explanations from an additional 85 school districts, and adopt an enforcement program for vocational and special schools. *Adams v. Richardson*, 480 F.2d 1159, 1161 (D.C. Cir. 1973). Furthermore, this argument mischaracterizes the Plaintiffs' claims as challenging the PSLF program itself, which they do not. Far from arguing that PSLF is a "wayward" program, the Plaintiffs appropriately argue that PSLF is a *critical* program, the administration of which is rife with discrete errors.

Defendants' argument is even more troubling when considered in light of their position on federal preemption. Defendants take the position that federal law preempts any state enforcement actions related to the servicing of federal student loans. *See, e.g., Interpretation: Federal Preemption and State Regulation of Federal Student Loan Programs*, 83 Fed. Reg. 10,619 (Mar. 12, 2018).<sup>4</sup> In short, Defendants argue that they are completely unaccountable in courts of law: any federal lawsuit challenging the Department's errors

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<sup>4</sup> Defendants' preemption argument has been repeatedly rejected by state courts. *See Mississippi v. Navient Corp.*, No. G2108-98203, Order (Hinds Cty. Ch. Ct., Aug. 15, 2019); *California v. Navient Corp.*, No. CGC-18-567732, Order Overruling Defendants' Demurrer (San Francisco Super. Ct., Dec. 20, 2018); *Massachusetts v. Pennsylvania Higher Educ. Assistance Agency*, No. 1784-CV-02682, Order (Super. Ct., Suffolk Cty., Mar. 1, 2018); *Washington v. Navient Corp.*, No. 17-2-01115-1 SEA, Transcript of Hearing on Defs.' Motion for Limited Dismissal (King Cty. Super. Ct., July 7, 2017).

should be dismissed as an impermissible programmatic challenge, while any state lawsuit against the Department or its servicers should be dismissed on grounds of federal preemption.

In short, Defendants would block many student borrowers from having access to the courts, regardless of the merit of their grievances. The Amici States ask that this Court thoroughly examine the Plaintiffs' allegations to determine whether those Plaintiffs should have the opportunity to prove their case.

### CONCLUSION

For the forgoing reasons, the Amici States request that the Court deny Defendants' Motion to Dismiss.

Respectfully submitted this the 22nd day of November, 2019.

JOSHUA H. STEIN  
ATTORNEY GENERAL  
STATE OF NORTH CAROLINA

/s/ Matthew L. Liles  
Matthew L. Liles  
Assistant Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27602  
Telephone: (919) 716-6000  
N.C. State Bar No. 38315  
[mliles@ncdoj.gov](mailto:mliles@ncdoj.gov)

*Counsel for Amicus Curiae State of North  
Carolina and designee of Amici States*

*(Additional counsel listing continues on the next pages)*

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XAVIER BECERRA  
*Attorney General*  
*State of California*  
P.O. Box 944255  
Sacramento, CA 94244

PHIL WEISER  
*Attorney General*  
*State of Colorado*  
1300 Broadway, 10th Floor  
Denver, Colorado 80203

WILLIAM TONG  
*Attorney General*  
*State of Connecticut*  
55 Elm Street  
Hartford, CT 06106

KATHLEEN JENNINGS  
*Attorney General*  
*State of Delaware*  
820 North French Street  
Wilmington, DE 19801

KARL A. RACINE  
*Attorney General*  
*District of Columbia*  
441 4th Street, N.W.  
Washington, D.C. 20001

LAWRENCE G. WASDEN  
*Attorney General*  
*State of Idaho*  
P.O. Box 83720  
Boise, ID 83720

KWAME RAOUL  
*Attorney General*  
*State of Illinois*  
100 W. Randolph Street, 12th Fl.  
Chicago, IL 60601

ANDY BESHEAR  
*Attorney General*  
*Commonwealth of Kentucky*  
700 Capitol Avenue, Suite 118  
Frankfort, Kentucky 40601

AARON M. FREY  
*Attorney General*  
*State of Maine*  
6 State House Station  
Augusta, ME 04333

BRIAN E. FROSH  
*Attorney General*  
*State of Maryland*  
200 Saint Paul Place  
Baltimore, Maryland 21202

MAURA HEALEY  
*Attorney General*  
*Commonwealth of Massachusetts*  
One Ashburton Place  
Boston, MA 02108

DANA NESSEL  
*Attorney General*  
*State of Michigan*  
P.O. Box 30212  
Lansing, MI 48909

KEITH ELLISON  
*Attorney General*  
*State of Minnesota*  
102 State Capitol  
75 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul, MN 55155

AARON D. FORD  
*Attorney General*  
*State of Nevada*  
100 North Carson Street  
Carson City, Nevada 89701

- 18 -

HECTOR BALDERAS  
*Attorney General*  
*State of New Mexico*  
408 Galisteo Street  
Santa Fe, NM 87501

MARK R. HERRING  
*Attorney General*  
*Commonwealth of Virginia*  
202 North 9th Street  
Richmond, VA 23219

ELLEN F. ROSENBLUM  
*Attorney General*  
*State of Oregon*  
1162 Court Street N.E.  
Salem, OR 97301

ROBERT W. FERGUSON  
*Attorney General*  
*State of Washington*  
P.O. Box 40100  
Olympia, WA 98504

THOMAS J. DONOVAN, JR.  
*Attorney General*  
*State of Vermont*  
109 State Street  
Montpelier, VT 05609

JOSHUA L. KAUL  
*Attorney General*  
*State of Wisconsin*  
17 West Main Street  
P.O. Box 7857  
Madison, Wisconsin 53707-7857

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Electronically submitted this the 22nd day of November, 2019.

/s/ Matthew L. Liles

Matthew L. Liles

Assistant Attorney General

North Carolina Department of Justice

*Counsel for Amicus Curiae State of North  
Carolina and designee of Amici States*