UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

DARNELL E. WILLIAMS and YESSENIA M. TAVERAS, Plaintiffs, *v.* ELISABETH P. DEVOS in her official capacity as Secretary of the United States Department of Education, Defendant.	Civil Action No. 16-11949

BRIEF OF AMICUS CURIAE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS (LEAVE TO FILE GRANTED ON JUNE 28, 2017)

The Commonwealth of Massachusetts (the "Commonwealth") submits this amicus curiae brief in support of Plaintiffs' Opposition to the Motion to Dismiss filed by Defendant Secretary DeVos.

As the Commonwealth's chief law enforcement agency, the Office of Attorney General Maura Healey (the "AGO") has been at the forefront of efforts to hold Corinthian Colleges, Inc. ("Corinthian") accountable for defrauding its students. The AGO has actively pursued all available remedies for Massachusetts borrowers, including making a substantial showing to the U.S. Department of Education (Defendant DeVos and the Department are collectively referred to herein as "Education") regarding Corinthian's violations of Massachusetts law through a student loan discharge application, known as a "defense to repayment" application, submitted on November 30, 2015 (the "DTR Application"). Furthermore, the Commonwealth secured a

judgment against Corinthian in Massachusetts Superior Court on June 6, 2016. The Court entered findings and an order of judgment on August 1, 2016, which are publicly available and which the AGO submitted to Education. *See* The Massachusetts Superior Court's Findings and Order of Judgment, Attachment 1 to the Declaration of Jennifer Snow ("Snow Decl.") (attached hereto at Exhibit A). In that order of judgment, the Superior Court found Corinthian liable for violating the Massachusetts Consumer Protection Act, M.G.L. c. 93A (the "Massachusetts Consumer Protection Act"). Yet, despite Education having ample evidence of wide-ranging fraud at Corinthian campuses in Massachusetts, it continues to certify student loan debts as legally enforceable for purposes of involuntary collection.

The AGO's submission of the DTR Application to Education has become relevant to the present case. Plaintiffs, who allege that their student loans for schools operated by Corinthian should not be eligible for collection, have pointed to the AGO's submission as a basis for arguing that Corinthian student loan debts are not valid; Education has responded by claiming that it need not consider a group discharge request from the AGO, and that the AGO's submission is irrelevant to the claims of the named Plaintiffs. The Commonwealth submits this amicus brief to address these issues: the DTR Application did address the named Plaintiffs, and, regardless of whether Education must consider a group discharge request from the AGO, it does need to consider the evidence supporting that request when certifying debt as legally enforceable. When this evidence is considered, it becomes clear that Education had an insufficient basis to certify the loans of the named Plaintiffs as legally enforceable debts for purposes of involuntary collection. Furthermore, this improper certification is a final agency action subject to judicial review.

I. The AGO Submitted Information Regarding the Plaintiffs in the DTR Application

Defendant stated in her reply brief on the motion to dismiss this case that "Plaintiffs do not allege that the Massachusetts AG's submission contained any specific information about them or the violations of state law that they claim Everest committed with respect to them." Def.'s Reply at 12. While it is technically true that the Plaintiffs did not specifically allege this,[1] that is because they lack access to the DTR Application, which would allow them to do so. Education, however, knows or should know that the Plaintiffs *are* referenced in the DTR Application.

As part of the DTR Application, the AGO submitted an exhibit that identified the students on whose behalf the AGO made the request. The AGO requested that Education "provide a swift, wholesale, and automatic discharge . . . for each of Corinthian's [Massachusetts] students," including the students specifically listed in the exhibit. This exhibit identified both Plaintiff Taveras and Plaintiff Williams, as well as thousands of other students, including for each the campus attended, the program, date of enrollment, date of graduation, and contact information.[2] *See* Attachment 2 to Snow Decl. The AGO explicitly informed Education that it was seeking loan discharge for the named Plaintiffs.

II. The DTR Application Demonstrates that Education Should Not Have Certified the Loans as "Legally Enforceable" for Purposes of Involuntary Collection

The AGO's DTR Application provided wide-ranging evidence of the systematic unfair and deceptive acts and practices that Corinthian committed in Massachusetts. Through

[1] However, Plaintiffs did allege that "the Attorney General of Massachusetts has applied to the Department of Education for a 'borrower defense' on [Plaintiff]'s behalf" as to each named Plaintiff. First Amended Complaint ¶¶ 64, 75.

[2] Plaintiff Taveras enrolled on October 28, 2010 in the Medical Assisting Program at Corinthian's Everest Chelsea campus. Plaintiff Williams enrolled on March 29, 2011 in the Massage Therapy in Corinthian's Everest Chelsea campus.

placement rate audits, the AGO showed that Corinthian repeatedly inflated its placement rates. These inflated placement rates were broadly marketed, both online and in person, as well as provided to its accreditor. Furthermore, the AGO submitted evidence that Corinthian often rushed and pressured students into uninformed and ill-advised enrollment decisions. This evidence, compiled in the course of the AGO's investigation and submitted to Education, shows that Corinthian engaged in a pattern and practice of unfair and deceptive conduct in violation of Massachusetts law. *See generally* Letter from Attorney General Maura Healey to Secretary Arne Duncan and Special Master Joseph Smith (Nov. 30, 2015), available at http://www.mass.gov/ago/docs/press/2015/ag-ltr-sec-duncan-11-30-15.pdf.

Defendant stated in her reply brief that she "was not required to consider the letter from the Massachusetts Attorney General to be a 'Borrower Defense Claim' by the Plaintiffs." Def.'s Reply at 12; *see also id.* ("At the time of the submission, Education did not recognize or have a process in place to accept or review group discharge applications, and it was not – and is not – legally required to do so."). This leaves the impression that Education is unable to consider group discharges and that the AGO's DTR Application is therefore irrelevant to the present litigation. Neither proposition is true.

First, Education undoubtedly can consider group applications for student loan discharge and has done so in the past. The agency previously announced an automatic group discharge for all borrowers who attended American Career Institute campuses in Massachusetts following a group borrower defense to repayment application from the AGO. *See American Career Institute Borrowers to Receive Automatic Group Relief for Federal Student Loans*, Department of Education Press Release (January 13, 2017), available at https://www.ed.gov/news/press-releases/american-career-institute-borrowers-receive-automatic-group-relief-federal-student-

loans. Furthermore, Education has issued regulations allowing for group discharges in certain instances, *see* 81 FR 76080 (November 1, 2016), demonstrating that automatic group discharges are not statutorily barred.[3] Group discharges serve a valuable function in ensuring complete relief for all students, rather than limiting relief to those students able to submit a defense to repayment application. Almost inevitably, large numbers of students will not individually submit such applications.[4]

Second, even if Education refuses to consider or process the AGO's DTR Application as a group discharge, it cannot ignore the evidence contained within it. The question before the Court is not whether Education had to consider a group discharge application, but instead whether it can continue certifying debts for involuntary collection when there is significant evidence and a binding court judgment that the debts were incurred as a result of violations of the Massachusetts Consumer Protection Act.

A. Education Should Not Certify a Borrower's Student Loan Debt as "Legally Enforceable" When It Knows that There Are Valid Defenses to Repayment

1. A Debt Is Not "Legally Enforceable" If a Valid Defense to Repayment Exists

As set forth by both sides, Education's reference of debt to the Department of the Treasury ("Treasury") for purposes of the Treasury Offset Program is governed by the Debt Collection Improvement Act ("DCIA"), 31 U.S.C. § 3701, *et seq.*, and the implementing regulations established by Education and Treasury. Before referring any debt for involuntary

[3] Section 455(h) of the Higher Education Act of 1965, as amended, 20 U.S.C. 1087e(h), authorizes the Secretary of Education to specify in regulation which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a Direct Loan. Education has since announced that it will delays these changes to the regulations. *See* 82 FR 27621 (June 16, 2017).

[4] Even after extensive outreach, Education had received only around 82,000 Corinthian borrower defense applications as of October 2016, even though it had reached out to more than 280,000 borrowers at Corinthian's Everest and WyoTech campuses alone. *Federal Student Aid Enforcement Office Report on Borrower Defense* (Oct. 28, 2016), available at https://www2.ed.gov/documents/press-releases/borrower-defense-report.pdf.

collection, Education must determine that the debt is "legally enforceable." 31 U.S.C. § 3720A. Education must then certify legal enforceability, and other attributes of the debt, to Treasury at the time of referral. *Id.* Title 26 U.S.C. § 6402(d) imposes a duty upon the Secretary of the Treasury to honor requests from other Federal agencies for these offsets. The term "legally enforceable" is not defined in either statute. *See Grider v. Cavazos*, 911 F.2d 1158, 1161 (5th Cir. 1990).

Treasury defines "legally enforceable" in regulations implementing the Treasury Offset Program in the following way:

> Legally enforceable refers to a characteristic of a debt and means there has been a final agency determination that the debt, in the amount stated, is due, and there are no legal bars to collection by offset. Debts that are not legally enforceable for purposes of this section include, but are not limited to, debts subject to the automatic stay in bankruptcy proceedings or debts covered by a statute that prohibits collection of such debt by offset. For example, if a delinquent debt is the subject of a pending administrative review process required by statute or regulation, and if collection action during the review process is prohibited, the debt is not considered legally enforceable for purposes of this section. Nothing in this section is intended to define whether a debt is legally enforceable for purposes other than offset under this section.

31 C.F.R. § 285.5. There are relatively few cases interpreting the term "legally enforceable" under the relevant statutes. Those courts that have examined the issue generally state that "legally enforceable" means a party could go to court and obtain a judgment. *See Ingram v. Cuomo*, 51 F. Supp. 2d 667, 672 (M.D.N.C. 1999); *Hurst v. United States Dep't of Educ.*, 695 F. Supp. 1137, 1139 (D. Kan. 1988), *aff'd*, 901 F.2d 836 (10th Cir. 1990). Under this test, which the Commonwealth believes is a reasonable interpretation of the statute, valid defenses would render a loan legally unenforceable because they would prevent a party from going to court and obtaining a judgment.

Thus, debts incurred as a result of fraud are likely not "legally enforceable" because fraud is a defense to contract.[5] In a case brought against the former Secretary of Education alleging an improper involuntary collection, the Eighth Circuit noted that "[t]he statute of limitation [defense] can be differentiated from events which would extinguish the underlying obligation, such as . . . successful assertion of defenses such as fraud in the inducement . . . ." *Thomas v. Bennett*, 856 F.2d 1165, 1169 (8th Cir. 1988); *see also Ibrahim v. U.S.*, 112 Fed. Cl. 333, 337 (2013) (refusing to dismiss claim of borrower that Education improperly certified debt as legally enforceable for purposes of involuntary collections where plaintiff alleged that loan was taken out by another individual who stole his identity).

Indeed, Education itself agrees that valid state law claims against the educational institution, such as fraud or a c. 93A violation, render a student loan unenforceable, even absent a state court judgment against the institution. Student loan borrowers are explicitly allowed to assert in a defense against repayment to Education "any act or omission of the school attended by the student that *would give rise to a cause of action* against the school under applicable State law." 34 C.F.R. § 685.206(c) (emphasis added). When a borrower has administratively challenged the validity of the debt, Education may not collect via the Treasury Offset Program until it "considers any evidence presented by such [borrower] and determines that an amount of such debt is … legally enforceable." 31 U.S.C. § 3720A(b)(3). As Education notes, it "allows debtors to challenge certification at *any time*, even after the time period in 31 U.S.C. §

[5] By contrast, there is case law holding that debt which has run the relevant statute of limitations may still be legally enforceable, for the running of a "statute of limitations merely bars the assertion of a particular remedy outlined in the statute and does not extinguish the underlying claim." *Roberts v. Bennett*, 709 F. Supp. 222, 224 (N.D. Ga. 1989). *See also Midland Funding v. Johnson*, 581 U.S. __ , 2017 WL 2039159 at * 4 (2017) (submitting a claim in bankruptcy that was obviously time barred does not violate the Fair Debt Collections Practices Act, 15 U.S.C. § 1692 *et seq.*, because a statute of limitations defense does not extinguish the underlying claim under the relevant state law).

3720A(b)(2) has expired."[6] Def.'s Reply at 5. Any successful defense to repayment would present a "legal bar" to collection and render such debt legally unenforceable. *See* 34 C.F.R. § 685.206(c)(2) ("If the borrower's defense against repayment is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay."). And, as set forth below, if Education has *actual* knowledge of valid state law defenses to a debt, as it does here, a borrower's failure to assert them administratively is irrelevant.

2. If Education Knows that a Valid Defense to Repayment Exists, It May Not Certify the Debt as "Legally Enforceable," Regardless of Whether the Debtor Has Asserted the Defense

Education may not certify debt as legally enforceable when it knows that the borrower has valid defenses to repayment, even absent the borrower raising a defense to repayment administratively. The DCIA requires that Education only certify legally enforceable debt, not that it certify all debt as legally enforceable absent a borrower's administrative challenge. *See* 31 U.S.C. § 3720A; *Kipple v. United States*, 105 Fed. Cl. 651, 656 (2012) (noting that Education must focus inquiry on whether there is a legal bar to collection, such as bankruptcy). While this distinction may be subtle, it matters; the mere failure of an individual to raise an administrative defense does not mean that the loan is legally enforceable. If Education *knows* that a borrower has a valid defense to repayment that would vitiate the debt, it may not certify that the debt is legally enforceable. In most cases, of course, Education would have no indication or reason to believe that a valid defense to repayment exists with respect to a particular student unless the student brought the defense to Education's attention. But as discussed below, Education has

[6] Though if Education has already requested that Treasury offset tax refunds, it will not rescind the request until the borrower has demonstrated that the debt is not legally enforceable. Defs.' Reply at 5 (citing Notice of Offset, Attachment 8 to Keller Decl.).

ample reason to know that Corinthian borrowers in Massachusetts have valid defenses to repayment, above all through the Order and Findings of the Massachusetts Superior Court that covers the Plaintiffs.

While we have not found a case in which a court has squarely considered the question whether Education's knowledge of a valid defense bars it from certifying debt as "legally enforceable," analogous provisions of other federal statutes make clear that Congress intended to prohibit collections activities under similar circumstances. For instance, the Fair Debt Collection Practices Act (the "FDCPA") makes it unlawful for a debt collector to make a "false representation regarding the character, amount, or legal status of any debt." 15 U.S.C. § 1692e. False representations around the character or legal status of any debt include sending a collection letter indicating that a certain debt is due and payable when the debt has actually been discharged in bankruptcy, *Randolph v. IMBS, Inc.*, 368 F.3d 726, 728 (7th Cir. 2004), or collection efforts targeted against a debtor's family member who was not legally liable, *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383 (D. Del. 1991). A false representation that a consumer owed a particular sum of money when he did not would also violate the FDCPA. *Dickman v. Kimball, Tirey & St. John, LLP*, 982 F.Supp.2d 1157, 1165–66 (S.D. Cal. 2013).

The Fair Credit Reporting Act similarly bans individuals from "furnish[ing] any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s-2. Thus, even when the creditor is simply reporting the information to a credit bureau, rather than actually trying to collect the debt, the creditor may not so do if the creditor has reasonable cause to believe the information is inaccurate.

Taken together, the statutory language of the DCIA and similar language in analogous provisions show a clear intent by Congress to limit involuntary collection efforts to debts that are clearly enforceable and not subject to valid defenses, regardless of whether the borrower has actually asserted them. Education should not certify to Treasury that debts are legally enforceable when it is *aware* that the borrowers have valid defenses to repayment. To hold otherwise would mean that Education could certify debts as legally enforceable even when it knew they were not, and could engage in involuntary collection against any borrower who failed to raise an administrative defense. Congress has never approved such activity in other settings, as shown above, and the DCIA's insistence on debt being "legally enforceable" shows that it did not do so in this context either.

B. The Evidence Submitted to Education Shows that Corinthian Borrowers in Massachusetts have Valid Defenses to Repayment

The AGO's DTR Application provided Education with evidence on the range of misconduct that Corinthian committed in Massachusetts. In the course of its review, the AGO obtained records from Corinthian, its accreditor, its successor, lenders, and other parties; reviewed over 650 surveys from former students; conducted over 900 employment verifications; and interviewed more than 100 former Corinthian employees and students. *See* Snow Decl. ¶ 5. The AGO's review showed that Corinthian inflated its placement rates and pressured students into enrolling. Fraudulent placement rates were widely disclosed to prospective students of unfair and deceptive conduct in violation of Massachusetts law. *See id.*

A key component of the findings in the AGO's DTR Application involved audits of the in-field job placement rates that Corinthian published for its Massachusetts campuses. The AGO audited these claimed placement rates for certain cohorts by verifying the underlying individual job placements with the alleged employers. Through this process, the AGO determined that

Corinthian had inflated its in-field job placement rates by falsifying jobs, counting jobs regardless of field, and counting temporary and unsustainable employment. Compounding this deception, student reports indicate that Corinthian's sales representatives routinely told prospective student in-field job placement rates that exceeded even the falsified written rates. *See id.* ¶ 6.

The AGO's DTR Application also provided significant evidence regarding high-pressure sales tactics. The evidence submitted with the DTR Application shows that Corinthian often rushed and pressured students into uninformed and ill-advised enrollment decisions. In some cases, Corinthian even encouraged students to register for courses despite the fact that the students lacked the English language skills necessary to participate. Corinthian's sales representatives promised students a high-quality hands-on educational experience with professional instructors and small classes; placement in relevant externships; and assistance with job placement, resume writing, and interviewing. But once students had signed enrollment contracts and promissory notes, the evidence shows that Corinthian failed to provide the promised education or career services upon which the students were relying. Many students reported a dangerous, inadequate, and inappropriate learning environment. There were consistent student reports of cheating, on-campus violence, and drug use, as well as apathetic teachers and unresponsive administrators. *See id.* ¶ 7.

Indeed, Education has itself found that Corinthian's Massachusetts programs violated state law. Then Secretary of Education John King, Jr. joined Massachusetts Attorney General Maura Healey in Boston to announce Education's finding that Corinthian had defrauded its students. Education noted that Attorney General Healey's "office was instrumental in bringing forward evidence that Corinthian's two Everest Institute campuses in Massachusetts — Chelsea

and Brighton — misrepresented their job placement rates to enrolled and prospective students." *See U.S. Department of Education Announces Path for Debt Relief for Students at 91 Additional Corinthian Campuses*, Department of Education Press Release (March 25, 2016), available at https://www.ed.gov/news/press-releases/us-department-education-announces-path-debt-relief-students-91-additional-corinthian-campuses. In its joint release with the Massachusetts Attorney General, Secretary King noted that "[t]hrough these important partnerships with states' attorneys general, we are pleased to offer relief to Corinthian students who were defrauded." *See id.* While Education has not issued findings with respect to the Plaintiffs' cohorts, it found wide-ranging fraud with respect to the same programs for students who enrolled less than a year later.

Moreover, the Massachusetts Superior Court entered findings mirroring the conclusions of the AGO and Education. In a case brought by the AGO, the Court found Corinthian liable for violating the Massachusetts Consumer Protection Act and ordered it to pay restitution representing refunds of all costs paid by *all* graduates of the Everest MA's Dental Assistant, Medical Assistant, Medical Administrative Assistant, Medical Insurance Billing and Coding, and Massage Therapy programs who enrolled between July 1, 2007 and June 30, 2014. These programs comprise all programs offered by Corinthian in Massachusetts during this time period. Both of the named Plaintiffs graduated from relevant programs during the period covered by the judgment and thus are included in the Court's findings. *See* Attachments 1 and 2 to Snow Decl.

The Massachusetts Superior Court is the primary adjudicator of claims arising under the Massachusetts Consumer Protection Act and thus has acquired a significant expertise in interpreting the Act. The AGO is given explicit authority to bring any actions to enforce the Act in Superior Court. M.G.L. c. 93A, § 4. Both consumers and businesses may also bring actions in Superior Court. M.G.L., c. 93A, §§ 9, 11. In contrast, Education has little expertise or

experience in determining whether there has been a violation of the Massachusetts Consumer Protection Act. Education therefore should defer to the findings of the Massachusetts Superior Court that Plaintiffs were harmed by Corinthian's violation of state law.

The AGO, Education, and the Massachusetts Superior Court all have found that Corinthian published misleading employment statistics or otherwise defrauded Massachusetts students. The Massachusetts Superior Court entered findings regarding the Massachusetts Consumer Protection Act covering the named Plaintiffs, among others, while Education issued findings regarding students who enrolled in the same programs only a few months after the Plaintiffs. The findings of Education and the AGO, as underscored by the State Court judgment, demonstrate that Corinthian borrowers in Massachusetts have valid defenses to repayment. By the terms of the relevant statutes and regulations, Education may not certify debts as legally enforceable for purposes of involuntary collection when it knows, as it does here, that such valid defenses exist.

III. The Improper Certification of Debt as Legally Enforceable Is Subject to Court Review

Defendant argues that Plaintiffs are required to exhaust their administrative remedies prior to obtaining judicial review. Def.'s Memo at 21–23. Administrative exhaustion is not required in the present circumstances. Section 10(c) of the Administrative Procedure Act (the "APA") authorizes "judicial review" for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added). An agency decision is final if "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Darby v. Cisneros*, 509 U.S. 137, 144 (1993) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985)). As the Court noted, Section 10(c) of the APA, "by its very terms, has limited the availability of the

doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates." *Id.* at 146.

Plaintiffs are therefore entitled to judicial review if (1) the decision is final — that is, Education "arrived at a definitive position on the issue that inflicts an actual, concrete injury," and (2) no statute or rule mandates they make use of further administrative remedies.

Education's decision to certify debts as legally enforceable is a "definitive position": once Education certifies, Treasury may withhold tax refunds or other government benefits. 26 U.S.C. § 6402(d); *see also* 31 C.F.R. § 285.5 ("legally enforceable . . . means there has been a *final agency determination* that the debt, in the amount stated, is due, and there are no legal bars to collection by offset") (emphasis added). Even if Education were to entertain a challenge to its certifications, it need not withdraw the certification to Treasury until the borrower convinced it the debt was not due. Def.'s Memo at 21 (citing Notice of Offset, Attachment 8 to Keller Decl.). Nor is there any statute or rule that *mandates* that borrowers make further use of administrative procedure before coming to court.

The Supreme Court unanimously held in *Darby* that administrative exhaustion was not required prior to judicial review where neither the statute nor the agency rules mandated exhaustion as a precondition to judicial review. 509 U.S. at 146. After an initial ruling by an Administrative Law Judge ("ALJ"), the *Darby* plaintiff failed to request review by a higher agency authority. The ALJ's decision then became final, which led the plaintiff to seek judicial review. The defendant argued that there was no jurisdiction because the plaintiff did not seek all available administrative remedies. *Id.* at 141–42. This argument lost: "it would be inconsistent with the plain language of § 10(c) for courts to require litigants to exhaust optional appeals . . . ."

Id. at 147. The Court reiterated in *Sims v. Apfel*, 530 U.S. 103, 107–08 (2000), that "issue exhaustion" is required only when a statute or regulation says so.

Like in *Darby*, every administrative review procedure set up by statute or regulation to challenge Education's certification of a debt as legally enforceable is entirely optional. *See, e.g.*, Def.'s Memo at 21 ("A debtor *may* object to offset and obtain an administrative review at any time . . . .") (emphasis added); 31 C.F.R. § 285.5(d)(6)(ii)(C) ("[T]he creditor agency" must make "a reasonable attempt to provide each debtor with: . . . An *opportunity* for a review within the creditor agency of the determination of indebtedness . . . .") (emphasis added); 31 U.S.C. § 3716(a)(2) ("The head of the agency may collect by administrative offset only after giving the debtor . . . an *opportunity* for a review within the agency of the decision of the agency related to the claim.") (emphasis added); § 3720A(b)(2) (requiring that agencies give people "at least 60 days to present evidence that all or part of such debt is not past-due or not legally enforceable"); 34 C.F.R. § 30.22. There is no statute or regulation mandating that borrowers make use of an administrative remedy.

The D.C. Circuit has faced almost the exact same issue facing this Court: whether a plaintiff must administratively exhaust her remedies prior to challenging an offset through the Treasury Offset Program. *See United States v. Hughes*, 813 F.3d 1007, 1009–10 (D.C. Cir. 2016). The D.C. Circuit applied *Darby* to the Treasury Offset Program and held that litigants need not exhaust available but non-mandatory procedures prior to bringing a court action. *Id.*

Moreover, many borrowers might not actually have any administrative remedies available to them. Defendant asserts that she "allows debtors to challenge certification at *any time*, even after the time period in 31 U.S.C. § 3720A(b)(2) has expired," even if they missed the deadlines set forth in their notices of offset. Def.'s Reply at 5. But rather than citing a regulation

or statute, she cites a form letter sent to one of the Plaintiffs informing him he had such a right. Perhaps Education would allow Plaintiffs or other similarly situated borrowers to submit an intra-agency challenge today. But without a regulation or statute guaranteeing them that right, Education could withdraw that privilege tomorrow.

Education's certification of debt as legally enforceable is thus open to challenge in court as it represents a final decision that subjects borrowers to concrete injury.

CONCLUSION

For the foregoing reasons, and for those set forth in Plaintiffs' Memorandum in Opposition, this Court should deny the Defendant's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Timothy Hoitink, hereby certify that this *Brief of Amicus Curiae Commonwealth of Massachusetts in Support of Plaintiffs' Opposition to Motion to Dismiss*, filed through the CM/ECF system, will be sent electronically to the below named registered participants identified on the Notice of Electronic Filing, and that paper copies will be sent to those indicated as non-registered participants, if any, on this date.

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