No. 19-2116

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Commonwealth of Pennsylvania,
Plaintiff-Appellee,
v.
Navient Corp., and Navient Solutions LLC,
Defendants-Appellants.

On Appeal from the United States District Court Court
for the Middle District of Pennsylvania
Hon. Robert D. Mariani
Case No. 3:17-cv-01814-RDM

Brief of Amicus Curiae Consumer Financial Protection Bureau in Support of Plaintiff-Appellee

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QUESTION PRESENTED

In January 2017, the Consumer Financial Protection Bureau (CFPB or Bureau) filed a complaint against Navient Corp. (and two other defendants) alleging violations of the Consumer Financial Protection Act (CFPA). Section 1042 of the CFPA, 12 U.S.C. § 5552, permits states to enforce the CFPA as well, and in October 2017, Pennsylvania filed its complaint against Navient Corp. (and one other defendant). This amicus brief addresses one of the questions that this Court certified for review in this interlocutory appeal: Whether Pennsylvania may bring a parallel enforcement action under the CFPA after the Bureau has filed suit?

INTEREST OF AMICUS CURIAE

The Bureau, an agency of the United States, files this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

This case presents a question concerning the proper interpretation of section 1042 of the CFPA, 12 U.S.C. § 5552, a section of the Bureau's enabling statute.[1] That section authorizes states to enforce the CFPA,

[1] Henceforth, section 1042 of the CFPA will be referred to as § 5552.

including its prohibition of unfair, deceptive, or abusive acts or practices committed by those who offer or provide consumer financial products or services. State enforcement of the CFPA is an important complement to the Bureau's own enforcement efforts. The Bureau respectfully submits this amicus brief to assist the Court in its interpretation of § 5552.

STATEMENT

A. Statutory Background

Section 5552 authorizes "the attorney general (or the equivalent thereof) of any State" to bring a "civil action ... to enforce provisions of [the CFPA] or regulations issued under [the CFPA]." § 5552(a)(1). Among other things, § 5552 authorizes states to enforce the CFPA's prohibition against unfair, deceptive, or abusive acts or practices committed by covered persons or service providers. *See* 12 U.S.C. § 5536(a)(1)(B).[2]

Section 5552(a)(2)(A) limits the states' authority: states may not enforce provisions of the CFPA against national banks or federal

[2] A "covered person" includes any person who offers or provides a consumer financial product or service. 12 U.S.C. § 5481(6). A "service provider" means "any person that provides a material service to a covered person in connection with the offering or provision" of a consumer financial product or service. *Id.* § 5481(26).

savings associations. (States may, however, bring enforcement actions against those entities to enforce certain Bureau regulations. § 5552(a)(2)(B).)

Although § 5552 authorizes a state to bring an action to enforce the CFPA, it requires the state to notify the Bureau before it files a CFPA claim. § 5552(b)(1). (If prior notice is not practicable, the state shall instead provide notice "immediately upon instituting" the action. § 5552(b)(1)(B).) As part of this notice requirement, the state must provide the Bureau with a copy of the complaint and a description of the action. § 5552(b)(1)(A). It must also describe, at a minimum, the parties to the state's action, the alleged facts underlying the proceeding, and whether there may be a need to coordinate the state's prosecution so as to avoid interfering with any action, including any rulemaking, undertaken by the Bureau. § 5552(b)(1)(C).

Section 5552(b)(2) then provides that the Bureau may intervene in the state's action as party, may remove the action to federal court (if it was originally brought in state court), may be heard on all matters arising in the action, and may appeal any order or judgment issued by the court to the same extent as any other party. Section 5552(c)

requires the Bureau to issue regulations regarding the states' obligation to notify the Bureau regarding CFPA enforcement actions, and the Bureau has done so. *See* 12 C.F.R. Part 1082. Among other things, those regulations describe the contents of the notice that a state must provide to the Bureau.

B. The facts and proceedings below

1. *CFPB v. Navient*

The Bureau filed its complaint against Navient in January 2017. *CFPB v. Navient Corp.*, No. 3:17-cv-00101-RDM (M.D. Pa. filed Jan. 18, 2017). The complaint names Navient Corp., Navient Solutions, Inc. (Navient), and Pioneer Credit Recovery, Inc. (Pioneer), as defendants. It alleges that Navient is the largest student loan servicer in the United States. *Id.* ECF 1 at 2.[3] According to the complaint, "Navient has failed to perform its core duties in the servicing of student loans, violating Federal consumer financial laws as well as the trust that borrowers place in the company." *Id.* The Bureau's complaint has eleven counts,

[3] Documents filed in the Bureau's case against Navient are referred to as "CFPB ECF xx."

and eight of them allege CFPA violations.[4] Counts I and II challenge as unfair and abusive Navient's practice of steering borrowers experiencing long-term financial hardship into "forbearance" rather than adequately advising them about "income-driven repayment plans."[5] *Id.* at 50-52. In particular, the Bureau's complaint alleges that Navient's compensation policies for its service representatives create incentives for them to encourage borrowers to accept forbearance without adequately considering income-driven repayment. *Id.* at 18. Counts III and IV challenge as unfair and deceptive the manner in which Navient notified borrowers who were participating in income-driven repayment plans of the annual recertification process that those

[4] The Bureau's complaint also includes two counts alleging violations of the Fair Debt Collection Practices Act and one count alleging a violation of Regulation V, which implements the Fair Credit Reporting Act.

[5] When student-loan borrowers are experiencing financial hardship, they have the right to request assistance or change their repayment plan. The assistance that is available includes "forbearance," which is a temporary, short-term postponement of payment. CFPB ECF 1 at 14. According to the Bureau's complaint, forbearance is typically suitable only for borrowers experiencing hardship that is temporary or short-term because it may involve significant costs. *Id.* A repayment option that is available includes an "income-driven repayment plan." In such a plan, payments are based on the borrower's income and family size. An income-driven repayment plan is usually a better option for borrowers whose financial hardship is not temporary or short-term. *Id.* at 12-15.

plans require. *Id.* at 53-56. Count V alleges that Navient made misrepresentations regarding the requirements that borrowers would have to meet if they wanted to have a cosigner released. *Id.* at 56-57. Count VI alleged that Navient had engaged in unfair acts or practices by failing to implement processes to prevent payment processing errors. *Id.* at 57-59. And Counts VII and VIII challenge misrepresentations (by Navient's debt collector, Pioneer) regarding the effect of completing a rehabilitation program.[6] *Id.* at 59-61.

The district court denied Navient's motion to dismiss the complaint. CFPB ECF 57. Discovery is ongoing in the Bureau's case, and dispositive motions are scheduled to be filed in March 2020.

2. *Commonwealth of Pennsylvania v. Navient*

Pennsylvania filed its complaint against Navient in this case in October 2017, nine months after the Bureau. *Pennsylvania v. Navient Corp.*, No. 3:17-cv-01814-RDM (M.D. Pa. filed Oct. 5, 2017) (Joint Appendix (Appx.) 104.) Four of its nine counts allege violations of the CFPA, and challenge conduct that the Bureau also challenged. (The

[6] The rehabilitation program allows borrowers who have defaulted on their student loans to get out of default status if they make a certain number of on-time payments. CFPB ECF 1 at 44.

other five counts allege violations of Pennsylvania's Consumer Protection Law.) Count III alleges that Navient engaged in unfair acts and practices, in violation of the CFPA, by steering borrowers who had long-term financial hardship into forbearance arrangements without explaining to them alternative repayment plans. Appx. 153-155. Count V alleges that Navient violated the CFPA by engaging in unfair and deceptive acts and practices in connection with the notification it provided to borrowers who were participating in income-driven repayment plans regarding the required annual recertification. Appx. 157-159. Count VII alleges that Navient made misrepresentations to borrowers who had cosigners regarding to the requirements for obtaining a cosigner release. Appx. 161-162. And Count IX alleges that Navient engaged in unfair acts and practices in connection with repeated errors in processing borrowers' payments. Appx. 163-164.

On December 5, 2017, Navient filed a motion to dismiss every count of Pennsylvania's complaint. *Pennsylvania v. Navient*, *supra*, ECF 16.[7] With respect to the four CFPA counts, Navient argued that,

[7] Documents filed in Pennsylvania's case against Navient (that are not included in the Joint Appendix) are referred to as "Pa. ECF xx."

because they are "copycat" counts (Navient's term for counts that are similar to counts in the Bureau's complaint), they are not authorized by the CFPA because they would render the consultation requirement of § 5552(b) surplusage and thwart its purpose. Pa. ECF 24 at 10-14.

On December 17, 2018, the district court issued its Memorandum Opinion denying Navient's motion. Pa. ECF 47, *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529 (M.D. Pa. 2018) (Appx. 23). As to Navient's arguments regarding the CFPA claims, the court described them as "creative" but not convincing: "Following Navient's position would require the Court to accept an amalgam of tenuous postulates regarding several provisions of the CFPA and a strained reading of the plain text of the statute." Appx. 44. First, the court noted that § 5552 contains no specific bar on concurrent state enforcement. It then held that there was also no implicit bar. As to the consultation requirement of § 5552(b), the court disagreed that concurrent enforcement would render that requirement surplusage. Instead, the court pointed out that § 5552 requires a state to describe any need to coordinate with the Bureau "so as not to interfere with any action … undertaken by the Bureau." § 5552(b)(1)(C)(iii). This contemplates that the Bureau might

already have its own "action," *i.e.*, a court action, underway, and that there might be a need to coordinate the state court action with the Bureau's. Appx. 46.

The court also explained that, when Congress wants to preclude a state from bringing an action concurrent with an action that the Bureau is already pursuing, it knows how to do so, and does so directly. The court discussed 12 U.S.C. § 5538, which authorizes both the Bureau and the states to enforce certain rules, but which specifically provides that, if the Bureau has brought an enforcement action, no state may bring an action during the pendency of the Bureau's action. The court observed that there was no similar restriction in § 5552, and it refused to infer one. Appx. 49-51.

Navient moved to certify the denial of its motion to dismiss. Pa. ECF 53. The district court granted that motion and certified three issues to this Court. Pa. ECF 71 (Appx. 21). It also stayed all further proceedings. Pa. ECF 74. Navient thereafter petitioned this Court for interlocutory review. On April 30, 2019, this Court entered an order certifying only two issues for review, including "whether the Commonwealth of Pennsylvania may bring a parallel enforcement

action under the Consumer Financial Protection Act after the Consumer Financial Protection Bureau has filed suit." *Commonwealth of Pennsylvania v. Navient Corp.*, No. 19-8005 (3d Cir. Apr. 30, 2019) (Appx. 1).[8]

SUMMARY OF ARGUMENT

Even a cursory examination of § 5552 shows both that it authorizes states to enforce the CFPA's prohibition against unfair, deceptive, or abusive acts or practices, and that it does not prohibit states from bringing claims that are parallel to claims already brought by the Bureau. Indeed, when Congress wants to prohibit such parallel claims, it does so explicitly, and there are many examples of statutes containing such prohibitions. Congress included no such prohibition in the CFPA.

Nor does § 5552 implicitly forbid parallel claims. Navient argues otherwise, based on § 5552(b)(1), which requires a state to notify the Bureau when it brings an action enforcing the CFPA, and, among other

[8] This Court also certified the following issue: "Whether the Higher Education Act preempts the Commonwealth's loan-servicing claims under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL)." Appx. 1-2.

things, to inform the Bureau if its believes its "prosecution" may interfere with any action that the Bureau is undertaking. This is where Navient repeats the arguments that the district court describes as "creative," but "not convinc[ing]," and as "an amalgam of tenuous postulates." Appx. 44. Navient contends that, if a state's action is in parallel with one brought by the Bureau, there is no need for a notice because the Bureau already knows about the defendant's conduct. Of course the Bureau knows about the defendant's conduct, but it may be unaware of the state's action, and that is the purpose of the notice. Navient also argues that "there is no conceivable way" a parallel state action could interfere with the Bureau's action. Defendants-Appellants Opening Brief (Navient Br.) at 48It is not hard to conceive of ways in which a state's parallel action could interfere with the Bureau's. But even where there is no interference, § 5552(b)(1) still serves a valuable purpose.

Second, Navient relies on § 5552(b)(2)(A), which permits the Bureau to intervene in an action brought by a state. It argues that the Bureau would have no need to intervene in a state action that is parallel to one the Bureau has brought. In fact, there are reasons why

the Bureau might want to intervene in a parallel state action, but what Navient ignores is that § 5552(b)(2)(A) is permissive – there is nothing in the provision that requires the Bureau to intervene, and certainly nothing that precludes parallel actions.

Navient argues that state claims in parallel with claims brought by the Bureau waste judicial resources. To conserve judicial resources, Fed. R. Civ. P. 42 permits the consolidation of lawsuits, or parts of lawsuits, that involve common questions of law or fact. The Bureau sought such a consolidation here, but Navient opposed.

Finally, Navient raises two constitutional arguments it did not raise below, and then invokes the canon of constitutional avoidance as grounds for interpreting § 5552 as prohibiting parallel state enforcement actions. That canon only applies if there are two plausible interpretations of a statute, and that is not the situation here because Navient's interpretation of § 5552 is not plausible. Moreover, Navient waived its constitutional arguments by failing to raise them below. In any event, there is no merit to Navient's arguments, which, if accepted, would render unconstitutional the state-enforcement provisions in dozens of federal statutes.

ARGUMENT

SECTION 5552 OF THE CFPA PERMITS STATES TO BRING CLAIMS SIMILAR TO CLAIMS ALREADY BROUGHT BY THE BUREAU

A. When Congress wants to prohibit parallel state law enforcement actions, it does so specifically, and it did not do so in § 5552

Section 5552 affirmatively authorizes states to bring claims enforcing the CFPA. Nothing in that section prohibits such actions merely because, as happened here, they are similar to claims that the Bureau has also brought. Section 5552 does impose a limit on states' authority – a state may not bring an action to enforce provisions of the CFPA against a national bank or a federal savings association – but no provision of the CFPA prohibits what Navient refers to as "copycat claims." So, just as it did before the district court, Navient asks this Court to infer such a bar. As explained below, there is no merit to any of Navient's arguments. Moreover, such an inference would be particularly inappropriate because when Congress wants to preclude parallel state and federal claims with respect to a statute both can enforce, it does so specifically, not by inference.

Indeed, Congress did so in the very same statute that included the CFPA. *See* CFPA § 1097, Pub. L. No. 111-203 (2010). Section 1097

amended § 626 of the Omnibus Appropriations Act of 2009, Pub. L. 111-8 (codified as amended at 12 U.S.C. § 5538).[9] Section 5538 requires the Bureau to prescribe rules prohibiting misrepresentations in advertisements for mortgage loans.[10] It authorizes the Bureau, the Federal Trade Commission (FTC), and state attorneys general to bring civil actions to enforce those rules. But § 5538, unlike § 5552, specifically prohibits a state from bringing an action if federal enforcement has already commenced:

> Whenever a civil action or an administrative action has been instituted by or on behalf of the [Bureau] or the [FTC] for violation of any provision of law or rule described in paragraph (1), no State may, during the pendency of such action … institute a civil action under that paragraph against any defendant named in the complaint in such action for violation of any law or rule as alleged in such complaint.

§ 5538(b)(6). The 111th Congress, which enacted the CFPA, also included a similar provision in the Restore Online Shoppers' Confidence Act of 2010, Pub. L. 111-345; *see* 15 U.S.C. § 8405 (authorizing state

[9] Henceforth, section 626 of the Omnibus Appropriations Act of 2009, as amended, will be referred to as § 5538.

[10] The rules referred to in § 5538 have been promulgated and are codified at 12 C.F.R. Part 1014.

enforcement, but forbidding states from commencing action during the pendency of an action by the FTC).

Indeed, there is similar language in a wide variety of other recent statutes, authorizing enforcement actions by states, but specifically restricting those actions once a federal agency has acted. *See*, *e.g.*, 15 U.S.C. § 45b (Consumer Review Fairness Act of 2016); 15 U.S.C. § 45c (Better Online Ticket Sales Act of 2016); 15 U.S.C. § 7804 (Sports Agent Responsibility and Trust Act of 2004); 15 U.S.C. § 7706 (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003); 15 U.S.C. § 6504 (Children's Online Privacy Protection Act of 1998); 15 U.S.C. § 1679h (Credit Repair Organizations Act of 1996); 15 U.S.C. § 6103 (Telemarketing and Consumer Fraud and Abuse Protection Act of 1994); 15 U.S.C. § 5712 (Telephone Disclosure and Dispute Resolution Act of 1992); 47 U.S.C. § 227 (Telephone Consumer Protection Act of 1991);15 U.S.C. § 1681s (Fair Credit Reporting Act of 1970); 15 U.S.C. § 2073 (Consumer Product Safety Act); 21 U.S.C. § 337 (Federal Food, Drug, and Cosmetic Act).

Congress has also enacted other statutes that, like the CFPA, do not forbid state enforcement actions during the pendency of a parallel

federal action. *See*, *e.g.*, 15 U.S.C. § 6309 (authorizing both the United States and the states to enforce the Professional Boxing Safety Act of 1996, without any limit on state actions); 49 U.S.C. § 32709 (authorizing both the United States and states to enforce the odometer tampering provisions of the Motor Vehicle Information and Cost Savings Act, without limit on state actions); 7 U.S.C. § 13a-2 (permitting states to enforce provisions of the Commodity Exchange Act without any limit based on the pendency of federal enforcement); 12 U.S.C. 2607 (same with respect to the Real Estate Settlement Procedures Act); 15 U.S.C. § 1640 (same with respect to the Truth in Lending Act); 49 U.S.C. § 14711 (same with respect to the Motor Carrier Safety Act).

So when Congress wants to authorize state enforcement of a federal law but wants to limit so-called "copycat" claims, it does so specifically. It did not do so when it enacted § 5552.

B. Congress did not implicitly prohibit parallel federal and state actions to enforce the CFPA

Congress authorized states to enforce the CFPA, but did not include any language prohibiting them from bringing actions parallel to actions brought by the Bureau. So Navient attempts to find an implicit

prohibition. Three of its arguments are based on § 5552(b)(1), and one is based on § 5552(b)(2). All four arguments fail.

1. The notice provisions of § 5552(b)(1) do not bar parallel enforcement

a. Section 5552(b)(1) requires that, when a state initiates "any action in a court or other administrative or regulatory proceeding" to enforce the CFPA, it must provide the Bureau with "notice," consisting of a copy of the complaint, the identities of the parties, and the alleged facts underlying the proceeding. § 5552(b)(1)(A), (C). There is an additional notice requirement: the state must describe "whether there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action, including any rulemaking, undertaken by the Bureau, a prudential regulator, or another Federal agency." § 5552(b)(1)(C)(iii). Navient refers to § 5552(b)(1) as a "limitation" on a state's authority to enforce the CFPA, a limitation that, Navient contends, somehow precludes a state from bringing an enforcement action that is in parallel with an action brought by the Bureau. Navient Br. at 47, 48. According to Navient, this section limits states so that the only actions they may bring are those that involve facts and legal theories "(i) about which the CFPB might not have been []aware, or (ii)

which, at the very least, are not already subject to a pending CFPB lawsuit." Navient Br. at 47.

The premise of this argument – that § 5552(b)(1) imposes a limit on state actions – is incorrect. By its terms, § 5552(b)(1) is not a limitation at all, it is merely a notice requirement – if a state wants to bring an action to enforce the CFPA, it must provide the Bureau with certain information regarding that action. And providing this notice is not even a prerequisite to the filing of the action because the state may submit its notice to the Bureau after filing its complaint "[i]f prior notice is not practicable." § 5552(b)(1)(B).

b. Navient next claims to have identified "the purpose" of the consultation requirement of § 5552(b)(1), Navient Br. at 47, 49, and it contends that, if a state brings an enforcement action parallel to one brought by the Bureau, that purpose would be frustrated. Navient takes a tail-wagging-the-dog approach to identifying the purpose of § 5552(b)(1). It finds the purpose of the entire paragraph in one of its subparagraphs: § 5552(b)(1)(C)(iii), which, once again, requires a state initiating an action to inform the Bureau whether it believes its action will "interfere with any action, including any rulemaking, undertaken

by the Bureau." According to Navient, "there is no conceivable way in which the filing of a copycat lawsuit would interfere with the CFPB's action." Navient Br. at 48. Thus, it argues, when a state files an action that is in parallel with one the Bureau has brought, the state would have nothing to say with respect to § 5552(b)(1)(C)(iii), and § 5552(b)(1) would therefore serve no purpose. From this, Navient concludes that § 5552(b)(1) forbids parallel state lawsuits. This argument cannot withstand scrutiny.

Even assuming Navient's dubious premise – that a state enforcement action will never conflict with one that the Bureau has brought[11] – § 5552(b)(1) still serves a purpose. It requires a state to provide the Bureau with a variety of information, and § 5552(b)(1)(C)(iii) identifies just one piece of that information. The Bureau may use the information obtained pursuant to § 5552(b)(1) to determine whether the state has additional facts that may be relevant to the Bureau's case, whether the state has developed new legal

[11] In fact, it is not hard to conceive of ways in which a parallel state action could interfere with the Bureau's action. For example, there could be conflicting discovery schedules, the cases could involve conflicting legal theories, and a state action could interfere with the Bureau's attempts to settle its litigation.

theories, or whether it has uncovered particular discovery strategies. The Bureau may use the information to identify additional victims of the alleged wrongdoing, to decide whether to intervene in the state's action, or to determine whether to drop counts from its own complaint if it believes the issues will be adequately addressed by the state. And, if the Bureau believes that an enforcement action brought by a state might interfere with an action brought by the Bureau, the Bureau may use the information to coordinate with the state to limit interference.

Section 5552(b)(1)(C)(iii) requires a state to describe "*whether* there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action … undertaken by the Bureau." (Emphasis added.) Even assuming, as Navient does, that parallel enforcement actions will never interfere with one another, all this means is that the state would comply with § 5552(b)(1)(C)(iii) by informing the Bureau that the state did not believe its enforcement action would interfere with any action taken by the Bureau.

c. Navient next argues that parallel state enforcement actions are not authorized because, in its view, § 5552(b)(1)(C)(iii) is inapplicable if the Bureau has an ongoing court action. Navient Br. at 48-49. Navient

focuses on the requirement in § 5552(b)(1)(C)(iii) that the state indicate whether it believes there is a need to coordinate its prosecution "with any *action, including rulemaking,* undertaken by the Bureau." (Emphasis added.) Navient claims that "the statute's embedded reference to 'rulemaking' proceedings helps clarify [that] the intent of this provision is to protect ongoing regulatory proceedings – not civil litigation." Navient Br. at 48. According to Navient, because § 5552(b)(1)(C)(iii) does not apply when the Bureau has already initiated an enforcement action in court, states are forbidden from filing parallel court actions.

Even if Navient's strained interpretation were somehow correct – that the reference to "action" in § 5552(b)(1)(C)(iii) refers only to regulatory proceedings – all that this would suggest is that § 5552(b)(1)(C)(iii) only applies if the state believes there is a need to coordinate its enforcement action with a Bureau regulatory proceeding. As explained above, Navient's interpretation of § 5552(b)(1)(C)(iii) would mean that, if the Bureau were engaged in an enforcement action, the state could comply with § 5552(b)(1) merely by providing the Bureau with a copy of the complaint, a description of the action, the

identity of the parties, and a description of the alleged facts underlying the proceeding. But this interpretation would in no way preclude a state from bringing an enforcement action in parallel with an ongoing Bureau action.

In any event, Navient misinterprets § 5552(b)(1)(C)(iii). Navient contends that the phrase "including any rulemaking" limits the meaning of "any action." In fact, however, the word "including" "is frequently, if not generally used as a word of extension or enlargement rather than as one of limitation or enumeration." *T&N Ltd. Comm. of Equity Sec. Holders of Federal-Mogul Corp. v. Official Comm. of Unsecured Creditors (In re Fed. Mogul-Global, Inc.)*, 348 F.3d 390, 401 (3d Cir. 2003) (quoting *American Surety Co. v. Marotta*, 287 U.S. 513, 517 (1934)). And indeed, the word "action" is ordinarily used in connection with a judicial action. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). So Navient's interpretation of § 5552(b)(1)(C)(iii) is wrong – that section contemplates that a state may file a court action even when a Bureau enforcement action is ongoing.

2. The right to intervene provided by § 5552(b)(2) does not bar parallel state lawsuits

Finally, Navient attempts to infer a limitation on state enforcement actions from § 5552(b)(2)(A). Navient Br. at 50-51. That section provides that, if a state brings an action to enforce the CFPA, "the Bureau may intervene in any action as a party." Navient argues that the clause would serve no purpose if a state filed claims parallel to claims brought by the Bureau because in such a situation the Bureau would have no need to intervene. Navient also argues that intervention would "run headlong into … the longstanding bar against having a single party-plaintiff simultaneously maintain two actions against the same defendant(s)." Navient Br. at 50 (citing *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977)).

What Navient ignores is that there is nothing mandatory about § 5552(b)(2)(A). The section merely gives the Bureau an option – it *may* intervene in an action brought by a state. So there is nothing in the provision that limits states to bringing only those actions in which the Bureau would choose to intervene. Moreover, the provision does serve a purpose when a state files a parallel action because the Bureau might

choose to intervene in the state's action and dismiss its own, or move to consolidate the parallel action with its own.

Further, because the right to intervene is an option, § 5552(b)(2)(A) would not run afoul of this Court's prior-pending-action rule. *See* 77 Fed. Reg. 39114 (June 29, 2012) ("the Bureau reserves the right to intervene or otherwise participate in any action where it may lawfully do so ….") That rule only applies if two actions involving the same defendant have been filed in the same federal court. *Walton*, 563 F.2d at 70. It has no application when the state's action is filed in a different court. (Navient does not limit its challenge to parallel actions filed in the same court.) Nor would the rule preclude the Bureau from intervening in a state's action even if the action were in the same court. As this Court has explained, the appropriate remedy for a prior pending action may consist of consolidating the actions, or of staying one of the actions. *Id.* at 71. The Bureau might well choose to intervene in a state's action if it believed that consolidation of the two actions, or a stay of the state's action, would help the prosecution of its case. Thus,

nothing in § 5552(b)(2)(A) precludes a state from filing an action that is parallel to an action already brought by the Bureau.[12]

C. Navient's concern regarding judicial resources does not justify dismissing Pennsylvania's complaint

Navient claims that parallel state and federal enforcement actions risk "wasted judicial resources and … inconsistent decisions." Navient Br. at 52. But this possibility does not mean that parallel actions are precluded – there are other ways in which wasted resources and inconsistent decisions can be avoided. In particular, Fed. R. Civ. P. 42 permits defendants to move a district court to consolidate lawsuits – or parts of lawsuits – into a single proceeding if they involve "common question[s] of law or fact."[13] This mechanism is available even for actions (unlike this action) that are filed in different districts, provided

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[12] Navient contends that *Navajo Nation v. Wells Fargo & Co.*, 344 F. Supp. 3d 1292 (D.N.M. 2018), "held that copycat claims are not permitted." Navient Br. at 52. In fact, that case dealt with issues of claim preclusion, not with whether a state could pursue CFPA claims parallel to claims brought by the Bureau. Indeed, the court held that "the CFPA does not specifically prohibit successive enforcement actions." *Navajo Nation*, 344 F. Supp. 3d at 1307.

[13] Navient's argument on this point is somewhat disingenuous because the Bureau sought to consolidate its case with Pennsylvania's pursuant to Fed. R. Civ. P. 42, but Navient opposed the Bureau's request. *See* CFPB ECF 81 at 14, 17.

one of the courts agrees to transfer its case to the other court. *See* 28 U.S.C. § 1404; 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2382 (3d ed. 2008) ("Actions pending in different districts may not be consolidated under Rule 42(a), but the possibility of consolidation may be a factor in persuading a court to transfer one of the actions to the district where the other is pending."). Indeed, even in the absence of a motion, courts may consolidate all or part of separate actions in order to conserve judicial resources and avoid conflicting judgments. *See* Fed. R. Civ. P. 42. Accordingly, Navient's supposed concerns over judicial resources does not justify the creation of a limitation on states' authority under § 5552, a limitation that Congress declined to create.

D. The canon of constitutional avoidance does not support Navient's interpretation

In a final attempt to support its faulty interpretation of § 5552, Navient contends that if § 5552 permits states to brings claims that are in parallel with claims brought by the Bureau, § 5552 would violate both the Take Care Clause of the Constitution, U.S. Const. art. II, § 3, and the Appointments Clause, *id.* § 2. Navient Br. at 53-56. Navient contends that § 5552 violates the Take Care Clause because, if "at least

50 different state attorneys general" can enforce the CFPA, then the President would "have no power to control the myriad litigation decisions that state attorneys general might make." Navient Br. at 54. And Navient argues that § 5552 would violate the Appointments Clause because the attorneys general who may enforce the CFPA "have not been appointed by the President, courts of law, or the head of a department." Navient Br. at 55. Navient's constitutional arguments are not grounds for adopting its implausible interpretation of § 5552. Moreover, Navient has not (and cannot) bring a freestanding constitutional challenge to § 5552. This Court should not, therefore, reach the arguments. If it does, however, it should reject them as meritless.

Navient invokes the canon of constitutional avoidance as grounds for interpreting § 5552 as prohibiting parallel enforcement actions. But constitutional avoidance – a tool of statutory interpretation – does not license this Court to depart from the clear text of the statute. Rather, the canon "is a tool for choosing between competing *plausible* interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises

serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added). But as explained above, Navient has not advanced a plausible interpretation of § 5552 that would bar parallel state enforcement actions.

In addition, Navient's arguments in no way depend upon the premise of the issue certified by this Court for interlocutory review: Pennsylvania's concurrent enforcement action. Instead, Navient's constitutional arguments would apply to any state enforcement of the CFPA, regardless of whether the Bureau has also brought an action against the same defendant advancing the same claims.[14] But it is not plausible to interpret § 5552 as prohibiting all state enforcement of the CFPA, as Navient conceded when it stated that "the CFPA unquestionably permits state attorneys general to file CFPA claims." Navient Br. at 25. Accordingly, the canon of constitutional avoidance, which again permits courts to choose between plausible interpretations to *avoid* constitutional issues, has no application to the interpretation of § 5552. Section 5552 (like the myriad other federal statutes that

[14] Indeed, the premise of Navient's challenge goes even further: to any provision in any federal law that permits states (and by logical extension, private parties) to enforce federal law.

permit state enforcement actions) is either constitutional, or it is not. But there is no plausible construction that would avoid the constitutional issues that Navient raises, and therefore the canon has no application.

This Court should not reach the constitutional issues Navient has raised. Navient has not brought a freestanding constitutional challenge to § 5552 in this Court. Nor could it because it did not raise such a challenge below. This Court "has consistently held that it will not consider issues that are raised for the first time on appeal." *Johnson v. Wynn's Extended Care, Inc.*, 635 Fed. Appx. 59, 60 (3d Cir. 2015) (quoting *Harris v. City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994)).[15]

In sum, because Navient has failed to advance a plausible interpretation of § 5552 that would avoid the constitutional issues it raises, and because it has otherwise waived the constitutional arguments it now raises, this Court need not – and indeed should not – address those arguments at all.

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[15] In addition, this Court's narrow order permitting interlocutory review specifically limited the appeal to two discrete issues, neither one of which involved a challenge to the constitutionality of the CFPA.

In any event, there is no merit to Navient's arguments regarding the constitutionality of § 5552, properly interpreted. Although the Bureau is not aware of any case addressing the applicability of the Take Care Clause or the Appointments Clause to § 5552, the core premise of Navient's argument – that a state bringing suit under § 5552 acts on behalf of the United States – is plainly incorrect. A state that brings suit under § 5552 is litigating on its own behalf, and its actions do not bind the United States. That the state's suit may also vindicate a federal interest in remedying and deterring unfair, deceptive, or abusive acts or practices by lenders does not change that fact. As the Fifth Circuit explained in rejecting a Take Care Clause challenge to the qui tam provisions of the federal False Claims Act (FCA), 31 U.S.C. §§ 3729 et seq., the Take Care Clause "does not require Congress to prescribe litigation by the Executive as the *exclusive* means of enforcing federal law." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (en banc) (emphasis in original).

For similar reasons, there is no merit to Navient's Appointments Clause challenge. The Appointments Clause specifies the permissible means of appointing "Officers of the United States" to public offices

"established by Law." U.S. Const. Art. II, § 2, Cl. 2. States that bring suit under § 5552 do not act on behalf of the United States, much less hold a United States office "established by Law." *Id.* Nor do they possess the practical indicia of federal officers, which include "tenure, duration, emolument, and duties." *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868). A state does not "occupy a 'continuing'" federal "position established by law"; the state is instead simply a litigant bringing suit to vindicate its own interests. *See Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (citation omitted).[16]

[16] Navient's reliance on *Morrison v. Olson*, 487 U.S. 654 (1988), is misplaced. The question in *Morrison* was whether an independent counsel was a principal or inferior officer for purposes of the Appointments Clause. Here, by contrast, the issue is not whether an officer of the United States is inferior or principal, but rather whether a state that brings suit under § 5552 is an officer at all. This case underscores the point: the Bureau's proceeding against Navient is being litigated by Bureau attorneys who are in no way bound by Pennsylvania's actions or litigation decisions. Thus, a state bringing suit under § 5552 is more aptly analogized, not to a federal attorney who represents the United States in litigation, but to a plaintiff who asserts a private right of action under a federal statute.

CONCLUSION

For the foregoing reasons, Pennsylvania may, pursuant to the CFPA, bring an enforcement action against Navient that is parallel to one brought by the Bureau.

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A. COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because it contains 6340 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in 14-point Century Schoolbook.

B. BAR MEMBERSHIP

All signatories to this brief are attorneys who work for a federal government agency.

C. IDENTICAL COMPLIANCE OF BRIEFS

I certify that the text of the electronically filed brief is identical to the text of the original copies that were sent on August 29, 2019, to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

D. PERFORMANCE OF VIRUS CHECK

I certify that on August 28, 2019, I performed a virus check on the electronically filed copy of this brief using Windows Defender Antivirus Version 1.301.12.0. No virus was detected.

E. SERVICE

I certify that on August 29, 2019, I filed the foregoing brief via the Court's electronic filing system. All parties will be served by the CM/ECF system.

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