No. 15-861

IN THE

Supreme Court of the United States

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

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

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER UNITED STUDENT AID FUNDS, INC.'S PETITION FOR A WRIT OF CERTIORARI

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Amicus curiae National Council of Higher Education Loan Programs, Inc., doing business as National Council of Higher Education Resources ("NCHER"), respectfully submits this brief in support of Petitioner United Student Aid Funds, Inc.'s Petition for a Writ of Certiorari.[1]

INTEREST OF *AMICUS CURIAE*

NCHER is an association of student loan servicers, guaranty agencies, lenders, schools, secondary markets, private collection agencies, and others that administer federal, state and private student loan and grant programs. Twenty-seven of NCHER's members are student loan guaranty agencies subject to the statutory and regulatory provisions at issue in this case. Those statutory and regulatory provisions authorize guaranty agencies to assess collection costs on defaulted loans issued under the Federal Family Education Loan ("FFEL") Program. The FFEL Program currently involves approximately 18 million borrowers and over $363 billion in outstanding indebtedness.[2]

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[1] The parties have consented to the filing of this brief, in written consents they filed with the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief.

NCHER's counsel is the sole author of this brief, and NCHER provided all funds for the preparation and submission of this brief. Petitioner United Student Aid Funds, Inc. is one of NCHER's members, but neither Petitioner's counsel nor any other party's counsel authored any part of this brief, and no party or party's counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] *See Federal Student Aid Portfolio Summary*, https://studentaid.ed.gov/sa/about/data-center/student/portfolio (follow "Federal Student Aid Portfolio Summary" hyperlink under "Federal Student Loan Portfolio") (last visited February 1, 2016).

The decision below directly affects NCHER's guaranty agency members[3] by giving deference to a recent Department of Education ("DOE") pronouncement that retroactively prohibits the assessment of collection costs on a defaulted FFEL loan if (a) the borrower obtained a "rehabilitation" agreement within sixty days after being given notice of his or her opportunity to enter into a "repayment" agreement, and (b) the borrower subsequently complied with the rehabilitation agreement. DOE's pronouncement conflicts with the applicable statutory and regulatory provisions; conflicts with Office of Management and Budget ("OMB") criteria for compliance audits of FFEL Program participants; conflicts with industry practices in which DOE knowingly acquiesced for years; has no basis in any prior DOE interpretation; and was not issued until seven months after the parties made their oral arguments to the Court of Appeals.[4] As recognized by Judge Easterbrook, the Court of Appeals'

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[3] The decision below may also have a significant effect on many of NCHER's other members that are not guaranty agencies. For years, those members have been purchasing rehabilitated loans that include collection costs from guaranty agencies. If the Court of Appeals' decision is allowed to stand, purchasers of rehabilitated loans and parties that consolidate such loans (including, in some cases, DOE) may be forced to unravel and recalculate years of prior payments to exclude the collection costs and to reverse the effects those collection costs had on interest accrual, interest payments and principal payments.

[4] DOE's pronouncement was first set forth in an *amicus curiae* brief filed by the United States in response to an invitation from the Court of Appeals. Brief for the United States as *Amicus Curiae* in Support of the Appellant and Reversal, *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633 (7th Cir.), *reh'g denied*, 807 F.3d 839 (7th Cir. 2015) (No. 14–1806), ECF No. 34. Seven weeks later, after Petitioner demonstrated that the United States' *amicus curiae* brief asserted an interpretation never before

decision to give deference to DOE's recent pronouncement

> has set the stage for a conclusion that conduct, in compliance with agency advice when undertaken (and consistent with the district judge's view of the regulations' text), is now a federal felony and the basis of severe penalties in light of the Department's revised interpretation announced while the case was on appeal.

Bible v. United Student Aid Funds, Inc., 807 F.3d 839, 841-42 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc). In short, under the Court of Appeals' decision, NCHER members may now be prosecuted and held liable for doing what the applicable statutes, the applicable regulations, OMB and DOE itself permitted them to do. NCHER therefore has a strong interest in the issues before the Court.

NCHER is also an appropriate *amicus curiae* because it can bring to the attention of the Court relevant matter that may not be in the possession of the parties. As an association of almost one hundred participants in the federal student loan program, NCHER has extensive knowledge of the federal government's past application of the statutory and regulatory provisions governing the assessment of collection costs on defaulted FFEL loans. Based on its

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suggested or disclosed by DOE, DOE re-issued the pronouncement in the form of a "Dear Colleague" letter. Dear Colleague Letter GEN-15-14, July 10, 2015, *Subject: Repayment Agreements and Liability for Collection Costs on Federal Family Education Loan Program (FFELP) Loans*, https://www.ifap.ed.gov/dpcletters/GEN1514.html (last visited February 1, 2016).

knowledge of industry practices and discussions with industry participants, NCHER is aware that DOE knowingly acquiesced for years in the practice of assessing the same collection costs that DOE has recently, and retroactively, declared to be illegal.

SUMMARY OF ARGUMENT

Compelling reasons exist for the Court to grant the Petition for a Writ of Certiorari. The majority below concluded that this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997), required them to give deference to and accept DOE's recent pronouncement as a valid interpretation of its regulations. DOE's pronouncement, however, could "impose potentially massive liability . . . for conduct that occurred well before that interpretation was announced." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). And affording deference to DOE's pronouncement "would result in precisely the kind of 'unfair surprise' against which [this Court's] cases have long warned." *Id., citing Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007), *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 158 (1991), and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). The unfair surprise results from the fact that the governing statutes, the governing regulations, the DOE-mandated loan documents, and the OMB's audit criteria authorize the assessment of collection costs on *all* defaulted loans subject to rehabilitation agreements, and DOE knowingly acquiesced for years in the assessment of such costs, regardless of when the rehabilitation agreements were executed. This Court should therefore grant the Petition for a Writ of Certiorari, and decide whether *Auer* requires deference to an agency pronouncement that, under the guise of "interpretation," imposes a

retroactive ban on conduct that was permitted by statute, regulation and the agency's prior acquiescence.

The need for this clarification of *Auer* extends far beyond its application to the particular agency pronouncement at issue in this case. The clarification is also necessary to provide a measure of certainty and stability to the entire FFEL Program. Under the Court of Appeals' expansive view of *Auer*, DOE would have almost unfettered ability to retroactively change the rules that govern the hundreds of organizations and millions of borrowers that participate in the FFEL Program every day. NCHER's members and all other participants in the federal student loan program should be given clear judicial guidance on when *Auer* requires deference to an agency pronouncement. This would benefit all participants in the $363 billion FFEL Program, including the 18 million borrowers who are subject to DOE's rules.

ARGUMENT

I. NCHER's Members Have A Compelling Need For This Court To Address The Appropriate Scope Of *Auer* Deference

The three-way split decision below demonstrates an ongoing problem that *Auer* poses for NCHER's members, and why this Court should now address the appropriate scope of *Auer* deference. One member of the panel below concluded that DOE's recent pronouncement was a proper interpretation of its regulations, *Bible*, 799 F.3d 633 at 645-50, while the dissenting member concluded that DOE's pronouncement was completely unreasonable and contrary to the regulations, *Id.* at 663-76. The third, deciding panel member concluded that both of his colleagues had

"plausible readings of [a] complex and ambiguous regulatory scheme," and that it was therefore appropriate to accept DOE's newly-issued interpretation pursuant to *Auer*. *Id.* at 661-63. Thus, even though he recognized that a "plausible reading" of the regulations would permit guaranty agencies to assess the collection costs at issue, the deciding panel member concluded that *Auer* required the court to accept an agency pronouncement that retroactively declared those cost assessments to be illegal. *Id.*

This application of *Auer*, if permitted to stand, would place NCHER's members in an untenable position. NCHER members are not only subject to the particular regulatory provisions at issue in this case, but also to dozens of other regulatory provisions that govern virtually every aspect of the nation's student loan programs. NCHER's members and the other participants in the student loan programs must apply those provisions on a daily basis in dealing with millions of borrowers and billions of dollars in loans. And they do so under the scrutiny of DOE, which conducts audits and program reviews of guaranty agencies and requires guaranty agencies to undergo annual financial and compliance audits of their FFEL programs, the results of which must be provided to DOE. 34 C.F.R. § 682.410(b)(1). To administer the FFEL Program effectively, NCHER's members need certainty in the rules they are required to follow. They need to know that DOE cannot acquiesce for years in the student loan industry's understanding and application of a regulation, and then, under the guise of "interpretation," unilaterally and retroactively declare that the industry has been violating the law.

II. The Higher Education Act, DOE's Regulations And DOE-Mandated Loan Documents All Authorize The Assessment Of Collection Costs On Defaulted Loans, Regardless Of Whether Or When The Loans Become Subject To Rehabilitation Agreements

The Higher Education Act ("HEA") states that "a borrower who has defaulted on a loan . . . *shall* be required to pay . . . reasonable collection costs." 20 U.S.C. § 1091a(b)(1) (2008) (emphasis added). The HEA also has specific provisions governing the charging of collection costs on rehabilitated loans. Specifically, when a guaranty agency sells a defaulted loan that has been rehabilitated, the HEA states that "the guaranty agency . . . may, in order to defray collection costs . . . charge to the borrower an amount not to exceed 18.5 percent of the outstanding principal and interest at the time of the loan sale."[5] 20 U.S.C.

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[5] Rehabilitation of a defaulted loan enables the borrower to have the default removed from his or her credit report, and restores the borrower's eligibility for obtaining additional education loans. *See* 20 U.S.C. §§ 1078-6(a)(1)(C) & (a)(3) (2014); 34 C.F.R. §§ 682.405(a)(3) & 682.405(b)(3)(i)(B). A defaulted loan is rehabilitated once (a) the borrower makes nine of ten timely payments on the loan during a ten-month period, and (b) the loan has been re-sold to an eligible lender. *See* § 682.405(a)(2). For purposes of loan rehabilitation, the monthly payments must be set at an amount that is "reasonable and affordable based on the borrower's total financial circumstances." *See* 20 U.S.C. § 1078-6(a)(1)(B) (2014). As a result of this special payment rule, payments made pursuant to rehabilitation agreements often fall short of covering the continuing accrual of interest, and do not involve repayment of any principal or interest that had accrued prior to the rehabilitation agreement.

§ 1078-6(a)(1)(D) (2009).[6] The HEA further provides that, if the rehabilitated loan is transferred to DOE rather than to an eligible lender,[7] "the guaranty agency shall add to the principal and interest outstanding at the time of the assignment of such loan an amount equal to [the assessed collection costs]." 20 U.S.C. § 1078-6(a)(1)(E) (2014).

Pursuant to these statutory provisions, DOE has issued regulations that also recognize the guaranty agencies' right to assess collection costs on defaulted FFEL loans. Section 682.410 of DOE's regulations states that, "[w]hether or not provided for in the borrower's promissory note . . ., the guaranty agency shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim." 34 C.F.R. § 682.410(b)(2). A different regulation addresses the assessment of collection costs on those defaulted loans that are subject to rehabilitation agreements. This second regulation requires the guaranty agency to give the borrower a statement that explains the payment terms that must be satisfied to rehabilitate the loan and make it eligible for sale to an eligible lender. 34 C.F.R. § 682.405(b)(1)(vi). It further provides that the statement "must inform the borrower" of "the amount of any collection costs to be added to the unpaid principal of the loan when the

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[6] Effective July 1, 2014, the HEA was amended to reduce the rate of collection costs from 18.5 percent to 16 percent of the principal and interest outstanding. Joint Resolution, Pub. L. 113-67, § 501(2), 127 Stat. 1165, 1187 (2013)

[7] Beginning July 1, 2014, the HEA requires a rehabilitated loan to be assigned to the DOE if the guaranty agency has been unable to sell the loan to an eligible lender. 20 U.S.C. § 1078-6(a)(1)(A)(ii) (2014).

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

In addition to issuing its regulations on collection cost assessments, DOE has also required lenders and borrowers to use a standard Master Promissory Note ("MPN") drafted by the Department for all FFEL loans. Although the language of DOE's mandatory MPN has varied slightly over time, the provisions in Respondent's MPN are illustrative of the provisions that govern FFEL loans to millions of borrowers. Respondent's MPN states, in part:

> *If I do not make any payment* on any loan made under this MPN *when it is due, I will also pay reasonable collection costs*, including but not limited to attorney's fees, court costs, and other fees.
>
> * * *
>
> *If I default on any loans, I will pay reasonable collection fees and costs*, plus court costs and attorney fees.
>
> * * *
>
> *Payments* submitted by me or on my behalf *. . . may be applied first to charges and collection costs* that are due, then to accrued interest that has not been capitalized, and finally to the principal amount.
>
> * * *
>
> *If I default*, the guarantor may purchase my loans and capitalize all then-outstanding interest into a new principal balance, and *collection fees will become immediately due and payable*.

Bible v. United Student Aid Funds, Inc., No. 1:13-CV-00575-TWP, 2014 WL 1048807, at *6 (S.D. Ind. Mar. 14, 2014), *rev'd and remanded*, 799 F.3d 633 (7th Cir. 2015), *reh'g denied*, 807 F.3d 839 (7th Cir. 2015), reprinted in Petitioner United Student Aid Funds, Inc.'s Petition for a Writ of Certiorari, at Appendix p. 109-10 (emphasis added).

Thus, the governing statute, the applicable regulations, and the DOE-mandated MPN all authorize the assessment of collection costs when a borrower defaults on a FFEL loan. The *only* restriction placed on collection costs for those defaulted loans subject to rehabilitation agreements is that the collection costs cannot exceed 18.5% (or 16% since July 1, 2014) of the unpaid principal and accrued interest at the time the rehabilitated loans are sold.

III. DOE Requires That Guaranty Agencies Be Audited Pursuant to Office Of Management And Budget Criteria That Recognize The Guaranty Agencies' Right To Assess Collection Costs On Defaulted Loans, Regardless Of Whether Or When The Loans Become Subject To Rehabilitation Agreements

Guaranty agencies that participate in the FFEL Program operate under the scrutiny of DOE, which requires them to undergo annual financial and compliance audits of their FFEL programs. 34 C.F.R. § 682.410(b)(1). Those audits are conducted pursuant to audit criteria issued by OMB,[8] which is the

[8] DOE's regulations require guaranty agencies to be audited in accordance with OMB Circular A-133. *See* 34 C.F.R. § 682.410(b)(1)(ii); 2 C.F.R. Pt. 200, App. XI.

implementation and enforcement arm of Presidential policy government-wide. *The Mission and Structure of the Office of Management and Budget*, https://www.whitehouse.gov/omb/organization_mission/ (last visited February 1, 2016). To ensure that the FFEL Program compliance audits are properly conducted, OMB has issued and annually updates Compliance Supplements to its Circular A-133. *See OMB Circular A-133 Compliance Supplement 2015*, https://www.whitehouse.gov/omb/circulars/a133_compliance_supplement_2015 (follow "Part 4 – Department of Education (ED)" hyperlink under "Compliance Supplement sections") (last visited February 1, 2016). Those OMB Circular A-133 Compliance Supplements – including the most recent Compliance Supplement issued in June 2015 – contain a separate section devoted to audits of guaranty agencies in the FFEL Program. *Id.* at 84, CFDA 84.032-G-1.

One of the objectives that OMB has specified for audits of the guaranty agencies is "[t]o determine whether the guaranty agency charged appropriate costs for its default collection activities to borrowers on defaulted loans . . . ." *Id.* at 99, 4-84.032-G-16. In this regard, OMB's 2015 Compliance Supplement states that "[t]he guaranty agency *must charge* each defaulted borrower reasonable costs incurred by the agency for its default collection activities," *Id.* at 97, 4-84.032-G-14 (emphasis added), and it describes the criteria for determining whether the guaranty agency's assessments of collection costs were reasonable. *Id.* at 97-99, 4-84.032-G-14–16. It also states that there are three instances in which the criteria for determining the reasonableness of collection cost assessment rates do not apply. *Id.* One instance relates to the use of consolidation loans to pay off defaulted loans, which is not relevant here. The

second instance relates to the rehabilitated loans involved in this case, and states:

> b. Borrowers who make the required nine voluntary and on-time payments within 10 months and whose loans are then rehabilitated by sale to an eligible lender may not be charged more than 18.5 percent of the outstanding principal and interest on the loans being rehabilitated (34 CFR section 682.405(b)(1)(vi)).

Id. at 98, 4-84.032-G-15. Perhaps most significantly, the third exception to the rule that guaranty agencies must charge reasonable collection costs states that a guaranty agency *may choose* whether or not to charge the costs if a repayment agreement is executed within 60 days after notice that a default claim has been paid. Specifically, it states:

> c. A guaranty agency *may choose* not to charge collection costs to a borrower who enters into a voluntary repayment agreement with the guaranty agency during the 60-day period after notice from the guaranty agency that the guaranty agency has paid a default claim and will report default status on the loan to national credit bureaus (34 CFR section 682.410(b)(5)(ii)).

Id. at 99, 4-84.032-G-16 (emphasis added). Nothing in the OMB audit criteria suggests that a guaranty agency is ever prohibited from charging collection costs on loans subject either to rehabilitation agreements or to repayment agreements. Rather, the OMB criteria clearly state that (a) guaranty agencies may charge collection costs on all rehabilitated FFEL loans, so long as the collection costs do not exceed

18.5% of the outstanding principal and interest due on the loans, and (b) guaranty agencies have the *option* of either charging or not charging collection costs on FFEL loans subject to repayment agreements, if the repayment agreements were entered within 60 days after the borrowers received notice that default claims have been paid. These criteria cannot possibly be reconciled with the notion, recently announced by DOE, that a guaranty agency is categorically prohibited from charging collection costs on a defaulted loan if the borrower enters into a rehabilitation or repayment agreement within 60 days of receiving notice. Indeed, the criteria clearly and unequivocally state that the guaranty agency has the discretion to either charge, or not charge, collection costs on such loans.

Similar audit criteria have been applied to guaranty agencies for a number of years to determine whether they have complied with the FFEL Program's collection cost requirements. Even though OMB Circular A-133 makes DOE responsible for informing OMB annually of any revisions that need to be made to the Compliance Supplements, the provisions permitting the assessment of collection costs remained as of the June 2015 edition of the Compliance Supplement. *See OMB Circular A-133 Compliance Supplement 2015*, https://www.whitehouse.gov/omb/circulars/a133_compliance_supplement_2015 (follow "Part 1 – Background, Purpose, and Applicability" hyperlink under "Compliance Supplement sections") (last visited February 1, 2016), at 2-3, 1-2–1-3.

IV. DOE Has Acquiesced For Years In The Assessment Of Collection Costs On All Defaulted Loans Subject To Rehabilitation Agreements, Regardless Of When The Rehabilitation Agreements Were Executed

NCHER is familiar with the practices that guaranty agencies have used in assessing collection costs, based on its knowledge of the industry and its discussions with participants in the FFEL Program. Before DOE's recent pronouncement, it was a common practice for guaranty agencies to assess collection costs on defaulted FFEL loans that had been rehabilitated, regardless of when the rehabilitation agreements had been executed.

DOE must also have been fully aware of this common practice through its audits and program reviews. Since 1992 (when DOE began requiring guaranty agencies to assess collection costs on defaulted FFEL loans), DOE has conducted more than 135 audits and program reviews of guaranty agencies that engaged in the practice of assessing collection costs on loans where the borrowers entered into rehabilitation agreements within 60 days of being given notice that a default claim had been paid. NCHER has been informed that DOE did not, in any of those audits or program reviews, tell the guaranty agency that collection costs could not be, or should not have been, assessed if the borrower entered into a rehabilitation agreement within 60 days of being given notice of a default claim being paid. Thus, DOE knowingly acquiesced for years in the practice that its recent pronouncement seeks to retroactively ban.

DOE's knowing acquiescence in the industry's understanding and application of the rules underscores

the seriousness of the error committed by the Court of Appeals. By giving deference to DOE's pronouncement on collection costs, the Court of Appeals did not merely permit the agency to limit the collection costs that could be assessed in the future. Instead, it accepted DOE's pronouncement as the definitive word on what the existing rules always meant, even though DOE's pronouncement retroactively declared conduct that had been permitted for years – by OMB, by DOE itself, by the applicable statutes, by the applicable regulations, and by the DOE-mandated loan documents – to be illegal. NCHER respectfully submits that this result could not possibly be the type of deference envisioned by the *Auer* Court. As this Court has recognized:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Christopher, 132 S. Ct. at 2168.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari and issue a decision clarifying the scope and applicability of deference required by *Auer*.

Respectfully submitted,

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