

No. 17-1334

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

IN RE: STEVEN PALLADINO; LORI PALLADINO,

Debtors.

MARK G. DEGIACOMO, Chapter 7 Trustee for the Estate of
Steven Palladino and Lori Palladino, et al.,

Appellant,

v.

SACRED HEART UNIVERSITY, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR DISTRICT OF MASSACHUSETTS, EASTERN DIVISION,
(HOFFMAN, J.)

**BRIEF *AMICI CURIAE* OF AMERICAN COUNCIL ON EDUCATION,
AND 19 OTHER EDUCATION ASSOCIATIONS IN SUPPORT OF
SACRED HEART UNIVERSITY, INC. AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *Amicus Curiae* the American Council on Education, and all other *Amici* listed in the Addendum state that they are non-profit associations or corporations with no parent corporations and no privately-owned stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
INTRODUCTION	2
ARGUMENT	4
I. PARENTS RECEIVE REASONABLY EQUIVALENT VALUE WHEN THEY HELP PAY FOR THEIR CHILDREN’S COLLEGE EDUCATION	4
A. Parents Gain Direct, Tangible Economic Benefits from Paying for Their Children’s College Education.....	4
B. Parents Receive Substantial, Indirect Value from Helping Pay Their Children’s College Costs, Consistent with Societal Expectations.....	7
C. The Federal Financial Aid System and Tax Incentives Are Premised on Parents’ Obligation to Pay for College Expenses	10
II. TUITION CLAW BACKS HAVE SIGNIFICANT CONSEQUENCES FOR COLLEGES AND UNIVERSITIES AND THEIR STUDENTS	14
A. Many Colleges and Universities Do Not Have the Fiscal Flexibility to Simply Absorb Claw Backs of Tuition and Related Payments	15
B. Colleges and Universities Cannot Anticipate and Plan for Claw Backs of Student Tuition.....	19
C. Colleges and Universities Have No Meaningful Options to Deal with Claw Backs Other Than to Pass the Cost on to Other Students.....	20
CONCLUSION	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Crumpton v. Stephens (In re Northlake Foods, Inc.)</i> , 715 F.3d 1251 (11th Cir. 2013)	7
<i>Donnelly v. Donnelly</i> , No. FA114115477, 2012 WL 3667312 (Conn. Super. Ct. Aug. 1, 2012)	10
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<i>Geltzer v. Xaverian High School (In re Akanmu)</i> , 502 B.R. 124 (Bankr. E.D.N.Y. 2013)	7
<i>Montoya v. Campos (In re Tarin)</i> , 454 B.R. 179 (Bankr. D.N.M. 2011)	8
<i>In re Oberdick</i> , 490 B.R. 687 (Bankr. W.D. Pa. 2013).....	8
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Statutes	
11 U.S.C. § 523	22
11 U.S.C. § 525	22
11 U.S.C. § 544.....	2
11 U.S.C. § 548.....	2
11 U.S.C. § 550.....	2

20 U.S.C. § 1087mm.....12

20 U.S.C. § 1087oo.....11, 12, 19

26 U.S.C. § 25A.....13

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26 U.S.C. § 529.....13

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2017 Conn. Legis. Serv. P.A. 17-509

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INTERESTS OF THE *AMICI CURIAE*

Amicus American Council on Education (“ACE”) represents all higher education sectors. Its approximately 1700 members reflect the extraordinary breadth and contributions of degree-granting colleges and universities in the United States. Founded in 1918, ACE seeks to foster high standards in higher education, believing a strong higher education system to be the cornerstone of a democratic society. ACE participates as *amicus curiae* on occasions, such as this, where an issue involves matters of substantial importance to higher education in the United States. The additional 19 *amici* are national associations of colleges, universities and other representatives and supporters of higher education in the United States, as well as three state associations of colleges and universities. The Addendum contains information on the other *Amici* on this brief.

Tuition claw-back claims have serious implications for the hundreds of colleges and universities within the First Circuit, and across the country, and their students, and are of great concern to the *Amici*. They submit this brief to assist the Court in understanding the larger, practical implications of the Trustee’s position on colleges and universities and their students.¹

¹ All parties have been informed and consent to the filing of this brief. Counsel for the *Amici* certify that: (i) no party’s counsel authored this brief in whole or in part; (ii) no party or party’s counsel contributed money intended to fund the preparation or submission of this brief; and (iii) no person, other than *Amici* and their counsel, contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

Over the past few years, bankruptcy trustees have brought fraudulent transfer claims against colleges and universities, seeking to recover payments for tuition and other education-related expenses that parents made on behalf of their children. The trustees are not trying to recover these funds from the students, who received the education, but from the colleges and universities that provided that education in good faith. Trustees, like the one in this case, are demanding the return of payments that institutions received before the parents even filed for bankruptcy—in many cases years before. The trustees nevertheless seek to “claw back” those payments on a theory of constructive fraud, contending that the parents were insolvent when the payments were made and that the parents received less than “reasonably equivalent value” for the payments, 11 U.S.C. § 548(a)(1)(B), 550(a)(1),² because the child received the education, not the parents.³

² Under 11 U.S.C. § 548(a)(1)(B), a trustee can seek to recover any payment made two years before the debtor filed bankruptcy, while under § 544 (the “strong arm provision”), a trustee can seek to claw back any payment that is voidable under the law of the state where the parent filed for bankruptcy. The reach-back period under state fraudulent transfer statutes is typically longer than two years.

³ The principal argument of the National Association of Bankruptcy Trustees Amicus Brief (“Ass’n Br”), appears to be that this Court should abandon its core function of interpreting and applying the language of the Bankruptcy Code based on the facts and circumstances of the case before it, and instead rely on Congress to address every new theory of recovery that bankruptcy trustees may come up with. That makes little sense, as does their suggestion that, by creating a defense in one, unusual context (involving constitutional issues surrounding donations to

In making these arguments, the trustees have ignored the very real direct and indirect value that parents receive when they pay for their child's college education. Among other things, parents receive the long-term security of having a college-educated child who is far more likely to become financially self-sufficient. Longstanding policies of the federal government not only encourage, but expect, parents to contribute to the cost of their children's college education. Indeed, the entire federal financial aid system is structured on the premise that parents must contribute first to those costs for a student to receive financial aid.

The trustees also ignore the broad ramifications of their position on higher education in the United States, which a bankruptcy court sitting as a court of equity can and should take into account. Colleges and universities have no realistic way of anticipating the parents' potential insolvency or absorbing the loss of clawed-back tuition payments for the education they have already provided in good faith. Their only options are to try to recover clawed-back tuition from the affected student, who likely has other debt and few resources, or to increase tuition and reduce services to the rest of the student body. As colleges and universities become increasingly tuition-dependent and their budgets tighten, these problems grow worse.

churches), Congress has implicitly approved of every other fraudulent transfer theory advanced by bankruptcy trustees.

No reasonable reading of the Bankruptcy Code compels this unfair and troubling result. The *Amici* urge the Court to consider the broad implications for colleges and universities and their students in deciding whether to affirm the Bankruptcy Court’s well-reasoned decision to reject the claw-back of tuition payments.

ARGUMENT

I. PARENTS RECEIVE REASONABLY EQUIVALENT VALUE WHEN THEY HELP PAY FOR THEIR CHILDREN’S COLLEGE EDUCATION

In their attempts to claw back college tuition and other payments, trustees argue that parents who pay college expenses of a child over 18 do not receive “reasonably equivalent value” because the parents are not legally obligated to pay and do not receive the education. The theory behind this argument is that these payments are merely a “gift,” for which parents receive nothing more than “ethereal and emotional rewards.” Ass’n Br, p. 9. As virtually all parents intuitively understand, when parents help pay for a child’s college education they receive substantial direct and indirect benefits, which have lasting value.

A. Parents Gain Direct, Tangible Economic Benefits from Paying for Their Children’s College Education.

The Trustees’ Association contends that “[p]roviding for the education and self-sufficiency does not create value for the parents,” Ass’n Br. at 4—a statement that virtually contradicts itself. Obviously, an economically “self-sufficient” adult

child has substantial value for parents because college-educated children are much more likely to achieve financial independence sooner. According to the U.S. Bureau of Labor Statistics, college graduates are less likely to be unemployed. *See* U.S. Dep't of Labor, *Earnings and Unemployment Rates by Educational Attainment*, (college graduates face 2.7% unemployment while high school graduates face 5.2%).⁴ College graduates also make more money as “[i]ndividuals with higher levels of education earn more, pay more taxes, and are more likely than others to be employed.” Jennifer Ma, Matea Pender, Meredith Welch, *Education Pays: The Benefits of Higher Education for Individuals and Society* at 3 (2016)⁵ (“[M]edian earnings were 84% (\$23,200) higher for females age 25 to 34 with at least a bachelor’s degree working full time year-round than for high school graduates; the premium for males was 75% (\$26,200).”).

Parental contribution to a child’s higher education costs is critical to achieving these benefits. Unsurprisingly, students graduate at a higher rate when their parents pay some (or all) of the cost of attendance. *See* Laura T. Hamilton, *More is More or More is Less? Parental Financial Investments during College*, 78(1) *Am. Soc. Rev.* 70, 85-87 (Feb. 2013) (“[P]arental aid significantly increases the likelihood of a bachelor’s degree”); Dalton Conley, *Capital for College*:

⁴ Available at http://www.bls.gov/emp/ep_table_001.htm.

⁵ Available at <https://trends.collegeboard.org/sites/default/files/education-pays-2016-full-report.pdf>.

Parental Assets and Postsecondary Schooling, 74 Soc. of Educ. 59-72 (Jan. 2001).

Students who have a college degree and low student debt are less likely to remain economically dependent on their parents. See Lynda Lytle Holmstrom et al., *Why Parents Pay for College: The Good Parent, Perceptions of Advantage, and the Intergenerational Transfer of Opportunity*, 34 Symbolic Interaction, Issue 2, 266, 285 (2011).

The inevitable result is that the percentage of young adults ages 18 to 31 living at the home of their parents is much lower for college graduates (18%) than it is for young adults with a high school degree or less (40%). See Pew Research Center, *A Rising Share of Young Adults Live in Their Parents' Home* (August 1, 2013).⁶ By paying a portion of their children's college costs, parents increase the likelihood that their children will graduate from college, find employment with a high enough salary to support themselves, and achieve economic independence.

A lighter debt load also fosters a student's long-term financial self-sufficiency. Today's young adults carry a heavier debt burden than young adults in previous generations, and that debt is disproportionately comprised of "student loan debt." See Jason N. Houle, *A Generation Indebted: Young Adult Debt across Three Cohorts*, 61 Soc. Probs., Issue 3, 448-465 (Aug. 2014). Strikingly, "[t]he

⁶ Available at <http://www.pewsocialtrends.org/2013/08/01/a-rising-share-of-young-adults-live-in-their-parents-home/>.

growth in debt burden . . . has been most pronounced among college-educated young adults.” *Id.* Parents who lessen this debt load accelerate their child’s path to financial independence. *See* Jason N. Houle, *Disparities in Debt: Parents’ Socioeconomic Resources and Young Adult Student Loan Debt*, 87(1) *Soc. of Educ.* 53-69 (Jan. 2014).

Furthermore, “research suggests that . . . parents will likely receive some assistance from an adult child when elderly, especially if the parent-child relationship is an agreeable one.” *See* Holmstrom, *Why Parents Pay for College*, at 266. As noted above, college graduates are more likely to have the financial resources to care for an elderly parent, an additional, long-term value that parents receive from helping pay for their children’s college education.⁷

B. Parents Receive Substantial, Indirect Value from Helping Pay Their Children’s College Costs, Consistent with Societal Expectations.

A debtor can receive both direct and indirect “value” when he pays a third party’s debts, particularly when that third party is the debtor’s child.⁸ For example,

⁷ Parents can also claim certain tax benefits for paying a child’s college expenses, such as the America Opportunity (up to \$2,500 per eligible student) or the Lifetime Learning Credit (up to \$2,000). Tax benefits can constitute reasonably equivalent value. *E.g. Crumpton v. Stephens (In re Northlake Foods, Inc.)*, 715 F.3d 1251 (11th Cir. 2013).

⁸ “Value” can include transfers that “satisfy, discharge, or secure all or part of an obligation of the transferor . . .” *Geltzer v. Xaverian High School (In re Akanmu)*, 502 B.R. 124, 131 (Bankr. E.D.N.Y. 2013).

in *Montoya v. Campos (In re Tarin)*, 454 B.R. 179 (Bankr. D.N.M. 2011), the debtors received “value” when they paid their daughter’s wedding planner because the debtors, their guests, and the daughter “got to smell the flowers, listen and dance to the music, eat the food, etc.” *Id.* at 183.

Parents who pay their child’s college expenses receive far more than that. Indeed, there is a clear societal expectation—reflected in state law and in the federal financial aid system (Part II.C. below)—that parents will contribute to the costs of their children’s college education. As the bankruptcy court in *Sikirica v. Cohen (In re Cohen)*, No. 07–02517–JAD, 2012 WL 5360956, at *10 (Bankr. W.D. Pa. Oct. 31, 2012), *rev’d on other grounds*, 487 B.R. 615 (W.D. Pa. 2013), recognized in rejecting a chapter 7 trustee’s tuition claw-back effort: “While the Pennsylvania legislature has not yet enacted a statute that requires parents to pay for their children’s post-secondary education, this Court holds that such expenses are reasonable and necessary for the maintenance of the Debtor’s family for purposes of the fraudulent transfer statute only.” *See also In re Oberdick*, 490 B.R. 687 (Bankr. W.D. Pa. 2013) (same).

As society has come to see college as a necessity, “[t]he notion that parents will do whatever is required—including taking out loans and remortgaging homes—to ensure their children’s education has simply become part of the ‘world as taken-for-granted’” Holmstrom, *Why Parents Pay for College*, at 266.

According to one survey, more than two-thirds of parents (69%) contribute to their children's tuition through either out-of-pocket or borrowed funds, paying on average 37% of the cost of attendance through direct payments or loans. *See* SallieMae Bank, *How America Pays for College*, at 11 (2014).⁹

These expectations and values were paramount in the recent decision of the Connecticut legislature to amend Connecticut's Uniform Fraudulent Transfer Act so that a parent's payment for the undergraduate education of a minor or adult child is not voidable. Conn. Public Act 17-50; 2017 Conn. Legis. Serv. P.A. 17-50 (S.B. 1021). A representative of the Connecticut State Colleges & Universities explained that providing an education is not "merely a gift, similar to providing a car. On the contrary, education is a lasting investment that parents make in their children's future, and possibly their own." *See* Test. of Sean Bradbury, Director of Gov't Relations, Conn. State Colleges & Universities, Judiciary Committee, Connecticut General Assembly (March 20, 2017) ("Bradbury Test."). Connecticut's Attorney General explained that "parents and guardians unquestionably receive value for their children's college education. Our state laws should recognize that value—not create legal or financial disincentives for parents or guardians." *See* Test. of Attorney General George Jepsen, Judiciary Committee,

⁹ Available at http://news.salliemae.com/files/doc_library/file/HowAmericaPaysforCollege2014FNL.pdf.

Connecticut General Assembly (March 20, 2017) (“Jepsen Test.”).

In a related context, many states have recognized the expectation that parents contribute to their adult children’s college education . Twenty-five states have statutes or case law that reflect that expectation. *See* Lawyers.com, *Non-Custodial Parents College Expense Obligation* (June 27, 2017).¹⁰ For example, Massachusetts has given its courts the power to issue support orders for children enrolled in undergraduate education programs until they reach age 23, Mass. Gen. Laws ch. 208 § 28, recognizing that “children of married parents have more financial opportunities for . . . college than do children of non-married parents, such that the inclusion of these expenses in a child support order advances the best interests of the latter group of children,” *Fathers & Families, Inc. v. Mulligan*, No. SUCV2009-01069E, 2009 WL 3204984, at *9 (Mass. Super. Sept. 23, 2009). Connecticut and New York courts have similar powers. *Donnelly v. Donnelly*, No. FA114115477, 2012 WL 3667312, at *5 (Conn. Super. Ct. Aug. 1, 2012) (power to order payments up to age 23); N.Y. Fam. Ct. Act §413; N.Y. Dom. Rel. Law §240 1-b (power to order payments up to age 21).

C. The Federal Financial Aid System and Tax Incentives Are Premised on Parents’ Obligation to Pay for College Expenses.

The federal system of financial aid for higher education is built on the

¹⁰ Available at <http://family-law.lawyers.com/child-support/non-custodial-parents-college-expense-obligation.html>.

premise that parents will contribute to the costs of their child’s college education. Over the past thirty years, “[t]here has been a gradual shift in the responsibility for U.S. higher education funding—from state and federal subsidies to individual families.” Hamilton, *More is More*, at 71. During that time, “the federal government has increasingly transferred a greater proportion of aid from grants to loans that are often carried in part by parents.” *Id.* at 70.¹¹ Recognizing that families were taking on a greater financial burden, the federal and state governments enacted various assistance and incentives in “the form of federal income tax credits and deductions for educational costs, tax sheltered savings plans, state merit aid programs, and institutionally funded scholarships and discounts.” *Id.* All of these programs are predicated on the notion that parents and families have an obligation to contribute to their child’s education.

This expectation is most obvious in the baseline calculations of student need. The U.S. Department of Education (“USDOE”) uses the Free Application for Federal Student Aid (FAFSA) to determine a student’s eligibility for financial assistance. *See* 20 U.S.C. § 108700. This form requires financially dependent students under the age of 24 to disclose not only their income and assets, also their

¹¹ This trend accelerated in the early 1990s. National Center for Public Policy and Higher Education, *Losing Ground: A National Status Report on the Affordability of American Higher Education* at 10 (2002).

parents' financial information.¹² *See* Dep't of Educ., *2015-2016 EFC Formula Guide*, at 3.¹³

This information is used to calculate each applicant's Expected Family Contribution (EFC) (*see* 20 U.S.C. § 1087oo), which in turn is used to calculate the amount of aid the student is eligible to receive. 20 U.S.C. § 1087mm. The EFC is the basis for determining a student's eligibility for Federal Direct Stafford/Ford Loans, Perkins Loans, and Pell Grants, as well as state and institutional grants and loans. In short, the government has tied financial aid to the expectation that parents must contribute to the cost of college education. If, as trustees suggest, parents are not expected to contribute, financial aid would be calculated based solely on the income and assets of the students, who generally have little income or assets. The result would be that financial aid would be distributed more uniformly among students regardless of family wealth, and less aid would be available to students from low- and moderate-income families.

Various federal tax credits and deductions reinforce the expectation that parents will help pay for college expenses. For example, while a parent can claim a

¹² "Roughly half of all students are considered dependent students, whose financial need is primarily calculated using their parents' income." *See* National Center for Education Statistics, U.S. Department of Education, *2011-12 National Postsecondary Student Aid Study* (2013).

¹³ Available at <http://www.ifap.ed.gov/efcformulaguide/attachments/090214EFCFormulaGuide1516.pdf>.

child under 19 as a dependent, the parent can claim that tax benefit for a child under 24 if the child is a student. *See* 26 U.S.C. § 152(c). The same is true for the earned income tax credit.¹⁴ Other statutes allow parents to reduce their tax burden to account “for qualified education expenses” for dependent students.¹⁵ Congress has also created various tax-favored savings plans to encourage parents to save for their children’s college education, including the so-called “529 plan” (26 U.S.C. § 529) and the Coverdell Education Savings Account (26 U.S.C. § 530).

These programs reflect Congress’s judgment that parents should be the first resource for funding their children’s college education. They also highlight the fact that “since the Land-Grant College Act of 1862, American higher education, particularly public higher education, has been a compact between states, the federal government, and families and students.” *See* Emily Deruy, *9 Questions With the Man Who Oversaw Higher Education Under Obama*, *The Atlantic* (Jan. 20,

¹⁴ *See* Internal Revenue Service, *Qualifying Child Rules*, <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/qualifying-child-rules>.

¹⁵ *See* American Opportunity Credit (26 U.S.C. § 25A(i)) and the Lifetime Learning Credit (26 U.S.C. § 25A(b)). Congress designed these credits to “assist low- and middle-income families and students in paying for the costs of post-secondary education.” *See* H.R. REP. 105-148, 316, 1997 U.S.C.C.A.N. 678, 710 (June 24, 1997). Alternatively, parents can seek deductions for qualified education expenses for dependent students and can deduct student loan interest. *See* Internal Revenue Service, IRS Publication 970, Chpt. 6, at 29-35, 37-43 (2014), *available at* <http://www.irs.gov/pub/irs-pdf/p970.pdf>.

2017).¹⁶ Implicit in that compact is the belief that “there is an investment for each of those three, but also a return to each of those three.” *Id.* Individuals benefit by improving “their economic standing” and “the long-term stability of their families and communities.” *Id.* Governments benefit not only through “growth in GDP, and the competitiveness of American businesses and industry” but also by securing “a strong democracy, in which citizens are educated and formed and are able to be critical thinkers. . . .” *Id.* A better-educated, more affluent, and highly skilled citizenry has a greater opportunity to produce more, consume more, and contribute more to not only their own parents, but also to the country at large.

The trustees’ theory of “reasonably equivalent value,” in which a parent’s payment of education costs for a child over 18 can be deemed constructively fraudulent, is fundamentally inconsistent with that policy and that compact.

II. TUITION CLAW BACKS HAVE SIGNIFICANT CONSEQUENCES FOR COLLEGES AND UNIVERSITIES AND THEIR STUDENTS

The Court also should consider the broader ramifications of tuition claw backs on colleges and universities. Those institutions are not in a position to anticipate and budget for the unpredictable claw back of payments for education they have already provided. And they have few options to deal with those unexpected losses, other than saddling affected students with more (and likely

¹⁶ Available at <https://www.theatlantic.com/education/archive/2017/01/9-questions-with-the-man-who-oversaw-higher-education-under-obama/513767/>.

uncollectable) debt or burdening the remainder of their student body.

A. Many Colleges and Universities Do Not Have the Fiscal Flexibility to Simply Absorb Claw Backs of Tuition and Related Payments.

Colleges have become increasingly dependent on tuition to fund operations, and are therefore less able to absorb unanticipated shortfalls—such as payments unexpectedly clawed back by bankruptcy trustees. Twenty-five years ago, tuition made up only a quarter of public higher education revenues. *See State Higher Education Executive Officers Ass’n, SHEEO State Higher Education Finance Study FY2016* at 25 (2017) (SHEEO 2017 Report).¹⁷ By 2016, that percentage had increased to 47.8 percent. *Id.* Today, in half the states, tuition comprises more than 50 percent of total educational revenue for public institutions. *Id.*

The increased reliance on tuition is a direct result of cuts in state and federal funding. U.S. Government Accountability Office, *Postsecondary Education: Financial Trends in Public and Private Nonprofit Institutions* at i (Jan 26, 2012) (“GAO Report”). Since 2008, educational appropriations dropped precipitously, as “nearly all types of public and private nonprofit schools saw decreases in state and local appropriations ranging from 6 to 65 percent” *Id.* “The new normal, therefore, expects students and their families to make increasingly greater financial sacrifices in order to complete a postsecondary education, and expects schools and

¹⁷ Available at http://sheeo.org/sites/default/files/SHEEO_SHEF_2016_Report.pdf.

colleges to find ways to increase productivity and absorb budget cuts, while increasing degree production without compromising quality.” *See* SHEEO 2017 Report at 58.

In addition, endowments have seen a decline in long-term average annual returns “to 5 per cent, below the 7.4 per cent target that universities say allows them to cover their spending obligations plus inflation and other costs.” Stephen Foley, *U.S. Universities’ Endowments Shrink as Investments Lose Money*, *The Financial Times* (January 31, 2017).¹⁸ “More than three quarters of US universities saw their endowments shrink in the most recent financial year,” suggesting “a looming funding crunch across US higher education as long-term investment returns sink further below target.” *Id.* Small institutions are “even more tuition-dependent as they have little cushion against unexpected revenue shortfalls through alternate revenue sources.” *Id.* For example, Franklin Pierce College—a small, liberal arts college with 1,400 undergraduates—reportedly has “an endowment of \$5.2 million and debt of \$39 million” and depends on student fees “to pay more than 95 percent of its operating costs.” *See* Anemona Hartocollis, *At Small Colleges, Harsh Lessons about Cash Flow*, *N.Y. Times* (April 29, 2016).¹⁹

¹⁸ Available at www.ft.com/content/e5ab65d4-e741-11e6-893c-082c54a7f539?mhq5j=e2.

¹⁹ Available at <https://www.nytimes.com/2016/04/30/us/small-colleges-losing-market-share-struggle-to-keep-doors-open.html>.

When combined with falling enrollment nationwide,²⁰ the increased dependence on tuition has left schools vulnerable, causing an average of five schools to close per year over the last ten years, “with as many as 9 institutions closing in 2009.” Tennessee Independent Colleges and Universities Association, *Learning from Closed Institutions: Indicators of Risk for Small Private Colleges and Universities*, (July 2013). Experts predict that these closures will triple in coming years. See Hartocollis, *At Small Colleges*, at 1.

As a result, tuition-dependent colleges and universities have little flexibility to deal with unanticipated shortfalls. As a practical matter, college budgets are set well before the admissions process begins. Building their budget around anticipated tuition, the institutions must determine precisely how many students they will admit to achieve that revenue. That decision is based on the expected “yield,” which is the percentage of admitted students who ultimately enroll in the institution after considering other admission offers. Colleges send out the number of offers that will yield the right size incoming class and generate the net tuition revenue needed to run the school.

²⁰ Nationwide “enrollment in colleges and universities has dropped for five straight years,” falling by 2.4 million since the fall of 2011. Jon Marcus, *Many Small Colleges Face Big Enrollment Drops. Here’s One Survival Strategy in Ohio.*, Washington Post (June 29, 2017) (citing National Student Clearinghouse), available at www.washingtonpost.com/news/grade-point/wp/2017/06/29/many-small-colleges-face-big-enrollment-drops-heres-one-survival-strategy-in-ohio/?utm_term=.789b8c43c9a7.

“[A]ccurately predicting yield is critical to colleges looking to avoid either over- or under-enrollment.” See National Ass’n of College Admission Counseling, *2015 State of College Admission* at 8 (2016).²¹ Even a small over-estimate of the yield will produce fewer students than predicted, and can result in missed revenue projections, low enrollments, canceled classes, staff layoffs, budget shortfalls, and other serious consequences. “Recent years have seen a few cases of universities missing yield that reportedly resulted in the loss of millions of dollars in revenue” a result that “can be something that challenges an institution for four or five years.” Chris Nicholson, *Enrollment Yields Becoming Ever Harder to Meet*, University Business (June 19, 2014).²²

As difficult as it is for colleges to deal with unexpected fluctuations in anticipated yield and student revenues, an after-the-fact claw back of tuition that was paid years before presents an even bigger problem. If a college miscalculates the yield, it can admit students off the waitlist, reduce course offerings, order less food for the cafeteria, or reduce costs associated with student housing. However, when past tuition payments are clawed back, the school has already provided the education that was paid for and expended all of these costs. The student has

²¹ Available at <https://indd.adobe.com/view/c555ca95-5bef-44f6-9a9b-6325942ff7cb>.

²² Available at <https://www.universitybusiness.com/article/enrollment-yields-becoming-ever-harder-meet>.

already attended classes, lived in the dormitory, eaten the food in the cafeteria, and participated in co-curricular programs.

B. Colleges and Universities Cannot Anticipate and Plan for Claw Backs of Student Tuition.

Compounding the issue, colleges are not in a position to anticipate when tuition claw backs will occur. Educational institutions have no way of determining the potential insolvency or predict future bankruptcy filings of the parents of the thousands, or tens of thousands, of applicants each year. As to the parents of students who do not seek federal financial aid, the institutions have no financial information at all, because those students don't fill out financial aid application forms.

Colleges are not much better off with regard to students who do seek financial aid. First, the FAFSA forms do not require disclosure of comprehensive information on parents' liabilities, which would be necessary to evaluate potential parental insolvency.²³ Second, the FAFSA forms only request the family's income information from the prior tax year. Colleges cannot be expected to predict the financial stability of a parent based on year-old income data. This problem will only grow starting with the 2017–18 FAFSA, which requires students to report

²³ Colleges and universities do not write this form or dictate its contents; the information required is set by law and is collected by USDOE. *See* 20 U.S.C. § 1087oo.

their income information from 2015,²⁴ i.e., information that is *two years old*, commonly referred to as the “prior-prior” year initiative.²⁵ As a consequence, schools will receive tuition payments on behalf of students during the 2017-18 school year, but only know the parents’ income from the 2015 tax year.

Finally, even if the FAFSA forms required more comprehensive financial information of parents, no college has the vast resources and expertise needed to scrutinize the information from every applicant for clues of potential parental insolvency. And no college has a crystal ball to glean whether a currently solvent parent will have a financial setback in two or three years that could result in a bankruptcy filing.

In short, tuition claw backs come out of the blue, leaving colleges with little or no capacity to absorb these unanticipated losses associated with services they have already paid for and provided in good faith to the student.

C. Colleges and Universities Have No Meaningful Options to Deal with Claw Backs Other Than to Pass the Cost on to Other Students

Colleges and universities have few options for dealing with these

²⁴ The FAFSA Form is available at <https://fafsa.ed.gov/fotw1718/pdf/PdfFafsa17-18.pdf>.

²⁵ See *FACT SHEET: The President’s Plan for Early Financial Aid: Improving College Choice and Helping More Americans Pay for College* (Sept. 13, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/14/fact-sheet-president%E2%80%99s-plan-early-financial-aid-improving-college-choice>.

unforeseeable tuition claw backs. Some may treat the student's account as delinquent in the amount of the clawed-back tuition and other education payments, depriving the student of privileges such as registering for classes, participating in campus activities, eating at the dining hall, living in university housing, and graduating.²⁶ That imposes enormous and unfair burdens on students who thought their education was paid for and probably had no idea that their parents might be insolvent.²⁷

Moreover, efforts to collect from students are unlikely to be successful. Students saddled with new, unexpected educational debt would be forced to seek additional loans—in order to finish college, receive their diplomas, and obtain transcripts needed to apply for jobs. However, a parent's bankruptcy may make it impossible for such students to secure an additional loan. *See* Andrew Mackenzie, *The Tuition "Claw Back" Phenomenon: Reasonably Equivalent Value and Parental Tuition Payments*, 2016 Colum. Bus. L. Rev. 924, 945 n.117 (2016). Students who have already received the maximum federal loan amount (\$31,000)

²⁶ *See* Test. of Maria Feeley, General Counsel of the University of Hartford, Judiciary Committee, Connecticut General Assembly (March 21, 2017) ("Feeley Test."); Test. of Wayne Locust, V.P. for Enrollment Planning & Management for University of Connecticut, Judiciary Committee, Connecticut General Assembly (March 20, 2017) ("Locust Test.").

²⁷ These students "may encounter difficulties obtaining their degrees and transcripts or transferring credits, unless and until they pay back to the college and universities the amounts recovered by the bankruptcy trustee." Jepsen Test., at 1.

would have to seek out expensive private loans to complete their education. While a parent's bankruptcy cannot be the sole basis for denying federal loans and grants,²⁸ most private lenders ask about the student's and parents' bankruptcy filings in the last 7-10 years, and are wary of lending money to anyone with a recent bankruptcy filing.

Colleges are even less likely to recover from students who have already graduated, when suspending the student's account has much less impact. Even assuming a college is willing to sue the student to collect, litigating costs may be prohibitive and a recent graduate is likely to be judgment proof and could declare bankruptcy.²⁹ (While student loans are non-dischargeable, 11 U.S.C. § 523(a)(8), there is no such provision for delinquent tuition payments, which would be ordinary, dischargeable debt in a student's bankruptcy.)

In today's economy, students are facing increasing debt and a challenging job market. Clawing back tuition payments create yet another hurdle for them. In an effort to give the parent a "fresh start" under the Bankruptcy Code, the trustee

²⁸ Federal loans cannot be denied based solely on the student's or borrower's past or present filing of a bankruptcy petition. *See* 11 § U.S.C. 525(c).

²⁹ It is difficult to determine the number of claw-back claims being asserted by trustees, as colleges and universities often feel compelled to settle them before suit is filed because of the costs of litigation. *See* Katy Stech, *Colleges Continue to Return Tuition Money in Bankruptcy Fights*, Wall Street Journal (April 19, 2016), available at <https://blogs.wsj.com/bankruptcy/2016/04/19/colleges-continue-to-return-tuition-money-in-bankruptcy-fights/>.

would bankrupt the child. That is why Connecticut found it necessary to pass its new law—to “protect children from adverse effects of their parents subsequently defaulting on obligations after they’ve made tuition payments to colleges and universities.” Remarks of Rep. Stafstrom, Transcript of Connecticut House of Representatives Debate, at 5-6 (May 31, 2017).

If it isn’t possible to collect the clawed-back payments from the student, many colleges and universities may have no choice but to spread the losses across the rest of the student body. This will upend their financial aid and budget calculations and require them to divert resources away from other needy students and critical services. Representatives of higher education institutions made this clear when testifying before the Connecticut legislature. If a debtor’s child proves unable to pay clawed-back tuition to the University of Connecticut, the school would have to “divert aid from others” or “divert other resources, i.e. University operating funds or tuition paid by other students.” *Locust Test.* at 1. Claw backs of tuition and other education expenses “unfairly increase the economic burden not only on academic institutions, but also on other students,” *Feeley Test.* at 2, and “unfairly transfer the financial burden of higher education to other paying students,” *Test. of Shawn Harrington, Vice President for Finance and Strategy for the University of Saint Joseph, Judiciary Committee, Connecticut General Assembly* (March 20, 2017). One legal commentator has described the

implications of tuition claw back cases as “potentially profound,” suggesting that these avoidance actions might force students to drop out of college, spark litigation between educational institutions and their recent alumni to recover disgorged tuition, or lead to higher tuition costs.³⁰ This is not an equitable result, nor is it a result compelled by a reasonable construction of the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully ask this Court to affirm the Bankruptcy Court’s decision.

Date: July 27, 2017

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³⁰ See Lynne B. Xerras, *PACT: Will Congress Except College Tuition Payments From Avoidance?*, 34 Am. Bankr. Inst. J. 7, 12 (July 2015).

ADDENDUM

- The **American Council on Education (ACE)** is described on page 1 of this brief.
- **APPA**, previously known as the Association of Physical Plant Administrators, promotes leadership in educational facilities for professionals seeking to build their careers, transform their institutions, and elevate the value and recognition of facilities in education. APPA is the association of choice for more than 12,000 educational facilities professionals from 1,300 educational institutions in North America. APPA is recognized as an ANSI Accredited Standards Developer.
- The **Association of American Medical Colleges (AAMC)** is a non-profit educational association whose members include all 147 accredited U.S. and 17 accredited Canadian medical schools, nearly 400 major teaching hospitals and health systems; and more than 80 academic and scientific societies.
- The **Association of Catholic Colleges and Universities (ACCU)** serves as the collective voice of U.S. Catholic higher education. Through programs and services, ACCU strengthens and promotes the Catholic identity and mission of its member institutions so that all associated with Catholic higher education can contribute to the greater good of the world and the Church.
- The **Association of Community College Trustees (ACCT)** is a non-profit educational organization of governing boards, representing more than 6,500 elected and appointed trustees who govern over 1,100 community, technical, and junior colleges in the United States. These community professionals, business officials, public policy leaders, and leading citizens offer their time and talent to serve on the governing boards of our country's most innovative higher education institutions—community, junior, and technical colleges—and make decisions that affect more than 1,100 colleges and over 11 million students annually
- The **Association of Governing Boards of Universities and Colleges (AGB)** is the only national association that serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership.

- The **Association of Independent Colleges and Universities in Massachusetts (AICUM)** is the leading voice on public policy issues affecting independent higher education in Massachusetts. The association is comprised of 60 degree-granting, accredited, independent (private) colleges and universities across the Commonwealth. AICUM works closely with its member institutions to strengthen higher education, to advocate for need-based financial aid for Massachusetts students, and to address state and federal legislative and regulatory issues. The Association also promotes increased awareness of the significant contributions by colleges and universities to the cultural, economic, and knowledge-based reputation of the state.
- The **Association of Independent Colleges and Universities of Rhode Island (AICU *Rhode Island*)** is an alliance representing the eight accredited independent institutions of higher learning within the State of Rhode Island. Designed to address the common interests and concerns of independent colleges and universities within the state, *AICU Rhode Island* serves as the collective and unified voice of its member institutions. It serves its members by facilitating cooperation among member institutions in the areas of academic programs, research and community service, and by providing federal and state level policy and program leadership on higher education issues.
- The **Association of Jesuit Colleges and Universities (AJCU)** represents all 28 Jesuit institutions in the U.S. and is affiliated with over 100 Jesuit institutions worldwide.
- The **Commission on Institutions of Higher Education of NEASC** is the recognized accreditor for 240 institutions of higher education in the six New England states. Established in 1885, NEASC is the oldest quality assurance agency in education in the United States.
- The **Connecticut Conference of Independent Colleges (CCIC)** is a voluntary membership organization representing 15 accredited nonprofit independent colleges and universities in Connecticut. Sacred Heart University is one of CCIC's member institutions. CCIC is dedicated to improving, strengthening, and growing Connecticut's private colleges and independent universities. It serves its members through government relations, public policy development, research analysis, communications and coordinated member services.
- The **Council for Christian Colleges & Universities (CCCU)** is a higher education association of 180 Christian institutions around the world. With

campuses across the globe, including 152 in the U.S. and Canada and 28 more from an additional 18 countries, CCCU institutions are regionally accredited, comprehensive colleges and universities whose missions are Christ-centered and rooted in the historic Christian faith. Most also have curricula rooted in the arts and sciences. The CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth: Advancing Faith and Intellect for the Common Good.

- The **Council of Independent Colleges (CIC)** represents 684 private, nonprofit liberal arts colleges and universities and 83 state councils and other higher education organizations.
- The **Higher Learning Commission (HLC)** is an independent corporation that was founded in 1895 as one of six regional institutional accreditors in the United States. HLC accredits degree-granting post-secondary educational institutions in the North Central region. HLC's mission is to serve the common good by assuring and advancing the quality of higher education.
- The **Middle States Commission on Higher Education (MSCHE)** is the agency that accredits degree-granting institutions in the Mid-Atlantic region of the United States. The mission of MSCHE is to assure students and the public of the educational quality of higher education. The Commission's accreditation process ensures institutional accountability, self-appraisal, improvement, and innovation through peer review and the rigorous application of standards within the context of institutional mission.
- The **National Association of College and University Business Officers (NACUBO)**, founded in 1962, is a nonprofit professional organization representing chief administrative and financial officers at more than 2,100 colleges and universities across the country. NACUBO's mission is to advance the economic viability, business practices, and support of higher education institutions in pursuit of their missions.
- The **National Association of Independent Colleges and Universities (NAICU)** serves as the unified national voice of private, non-profit higher education in the United States. It has more than 1,000 members nationwide.

- The **Southern Association of Colleges and Schools Commission on Colleges (SACSCOC)** is the regional body for the accreditation of degree-granting higher education institutions in the Southern states. Its mission is the enhancement of educational quality throughout the region, and it strives to improve the effectiveness of institutions by ensuring that institutions meet standards established by the higher education community that address the needs of society and students.
- **University Risk Management and Insurance Association (URMIA)** promotes the advancement and application of effective risk management principles and practices in institutions of higher education.
- The **WASC Senior College and University Commission** is a regional accrediting agency serving a diverse membership of public and private higher education institutions throughout California, Hawaii, and the Pacific as well as a limited number of institutions outside the U.S. Through its work of peer review, based on standards agreed to by the membership, the Commission encourages continuous institutional improvement and assures the membership and its constituencies, including the public, that accredited institutions are fulfilling their missions in service to their students and the public good.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R.

App. P. 29(a)(5) because this brief contains 5,455 words.

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 with a font size of 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Office Word 2013.

Dated: July 27, 2017

By: /s/Aaron S. Bayer
Aaron S. Bayer

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 27th day of July, 2017, I caused this **BRIEF**
AMICI CURIAE OF AMERICAN COUNCIL ON EDUCATION, AND 19
OTHER EDUCATION ASSOCIATIONS IN SUPPORT OF SACRED
HEART UNIVERSITY, INC. to be filed electronically with the Clerk of the
Court using the CM/ECF System, which will send notice of such filing to counsel
of record who are registered CM/ECF users.

By: /s/Aaron S. Bayer
Aaron S. Bayer