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CONSUMER FRAUDS & PROTECTION BUREAU

September 13, 2021

Re: Docket ID ED-2021-OS-0107, Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers

Dear Secretary Cardona:

We, the undersigned attorneys general of New York, California, Colorado<sup>1</sup>, Connecticut, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Virginia, and the District of Columbia, write to express our strong support for the Department of Education's August 12, 2021 Notice (86 FR 44277) (the "2021 Notice") rescinding the Department's March 12, 2018 interpretation on preemption of state regulation and oversight of federal student loan servicers (83 FR 10619) (the "2018 Interpretation"). The Department's 2021 Notice's conclusion that state laws regulating student loan servicers are not preempted except in certain narrow circumstances is soundly reasoned and well-supported by federal case law. We share the Department's view, set out in the 2021 Notice, that state oversight of servicers advances the goals of the federal student loan program by protecting students from substandard servicing practices and that collaboration between federal and state entities will enhance servicer accountability and borrower protections. While we commend the Department for its thorough and accurate analysis of preemption principles, we urge the Department to clarify the 2021 Notice to confirm that state laws regulating servicers are not preempted except in the narrow circumstance where it would be impossible for the regulated entity to comply with state and federal requirements.

**I. States entities play a vital role in protecting federal student loan borrowers**

State entities play a crucial role in protecting federal student loan borrowers from servicer failures and misconduct. Student loan servicers collect monthly loan payments, enroll struggling borrowers in alternative repayment plans, provide information to borrowers about their loan repayment and loan forgiveness options, and determine eligibility for repayment plans and loan forgiveness programs. Unfortunately, many student loan servicers have failed to meet these

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<sup>1</sup> The Colorado Attorney General's Office is also separately submitting additional comments.

responsibilities, and some have engaged in deceptive, unfair, and abusive conduct. Servicer failures and misconduct has contributed to the student debt crisis by making it more difficult for struggling borrowers to repay their loans and by increasing the cost and repayment term of student loans.

The widespread nature of servicer failures has led state attorneys general and other state regulators to devote significant resources to servicer oversight. In recent years, state attorneys general have conducted investigations, brought enforcement actions, and obtained settlements with a number of federal student loan servicers. For example, the Attorneys General of Washington, Illinois, Pennsylvania, California, New Jersey, and Mississippi have each brought enforcement actions against federal loan servicer Navient for consumer protection law violations;<sup>2</sup> the Attorneys General of New York and Massachusetts have each brought enforcement actions against federal loan servicer the Pennsylvania Higher Education Assistance Agency (“PHEAA”) for consumer protection law violations;<sup>3</sup> and the New York Attorney General, in partnership with the New York Department of Financial Services, and the Attorney General of Massachusetts have each obtained multi-million dollar settlements with federal student loan servicer ACS Education Services (currently known as Conduent Education Services) for consumer protection law violations.<sup>4</sup>

In addition to investigating and bringing enforcement actions against federal student loan servicers, a number of states have reacted to servicer failures and misconduct by enacting state laws governing student loan servicers. Since 2015, a number of states, including California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey, New York,

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<sup>2</sup> See *AG Ferguson Files Suit Against Sallie Mae Offshoot Navient Corporation* (Jan. 18, 2017), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-suit-against-sallie-mae-offshoot-navient-corp-announces-student>; *Attorney General Madigan Sues Navient and Sallie Mae for Rampant Student Loan Abuses* (Jan. 18, 2017), [https://www.illinoisattorneygeneral.gov/pressroom/2017\\_01/20170118.html](https://www.illinoisattorneygeneral.gov/pressroom/2017_01/20170118.html); *Attorney General Shapiro Sues Nation’s Largest Student Loan Company for Widespread Abuses* (Oct. 5, 2017), <https://www.attorneygeneral.gov/taking-action/legal-action/attorney-general-shapiro-sues-nations-largest-student-loan-company-for-widespread-abuses/>; *Attorney General Becerra Charges Navient Corporation, Largest Student Loan Servicer, with Deceitful Practices and Debt-Collection Misconduct in Lawsuit* (June 28, 2018), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-charges-navient-corporation-largest-student-loan>; *AG Grewal Files Suit Against Navient Corp. Alleging Student Loan Servicing Giant Targeted New Jersey Student Borrowers with Deceptive, Misleading Tactics to Boost Company Profits* (Oct. 20, 2020), <https://www.nj.gov/oag/newsreleases20/pr20201020a.html>; *Mississippi Sues Student Loan Processing Company* (July 24, 2018), <https://www.jacksonfreepress.com/news/2018/jul/24/mississippi-sues-student-loan-processing-company/>

<sup>3</sup> The New York Attorney General’s lawsuit is pending. See *AG James Sues Student Loan Servicer for Mismanaging Loan Forgiveness Program* (Oct. 3, 2019), <https://ag.ny.gov/press-release/2019/ag-james-sues-student-loan-servicer-mismanaging-loan-forgiveness-program>. The Massachusetts Attorney General obtained a landmark settlement with PHEAA that requires PHEAA to identify and correct servicing errors. See *AG Healey Secures First-of-its-Kind Relief in Settlement with Major Student Loan Servicer* (Feb. 10, 2021), <https://www.mass.gov/news/ag-healey-secures-first-of-its-kind-relief-in-settlement-with-major-student-loan-servicer>.

<sup>4</sup> See *Attorney General James and Superintendent Vullo Announce \$9 Million Settlement of Federal Student Loan Servicing Claims with ACS Education Services* (Jan. 4, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-and-superintendent-vullo-announce-9-million-settlement>; *ACS’s \$2.4 Million Settlement in Massachusetts Highlights Problems in Student Loan Servicing*, <https://www.washingtonpost.com/news/grade-point/wp/2016/11/22/acss-2-4-million-settlement-in-massachusetts-highlights-problems-in-student-loan-servicing/>

Oregon, Rhode Island, Virginia, and the District of Columbia, have passed state laws regulating student loan servicers.<sup>5</sup> Some of these state laws include licensing requirements for servicers, while others include protections against unfair, deceptive, or fraudulent conduct and prohibitions on specific types of misconduct such as misapplying payments, reporting inaccurate information to credit bureaus, or refusing to communicate with an authorized representative of the borrower. These state laws provide crucial protections for borrowers and further the goals of the federal student loan program by enhancing borrower accountability and helping borrowers repay their federal loans as quickly, fairly, and inexpensively as possible.

## **II. The 2018 Interpretation’s preemption analysis was deeply flawed and inconsistent with federal case law.**

The Department’s 2018 Interpretation espoused the inaccurate and unsupportable position that state consumer protection laws are broadly preempted by federal law with respect to federal loan servicers.<sup>6</sup> The 2018 Interpretation took aim not only at the recently enacted state laws creating state licensing regimes and affirmative consumer protection obligations for student loan servicers, but also suggested that traditional state consumer protection laws prohibiting deceptive practices could be preempted under federal law.<sup>7</sup> The position set forth in the 2018 Interpretation contradicted well-established case law affirming that state consumer protection law is not broadly preempted. The 2018 Interpretation, which was issued without notice and comment rulemaking, has since been deemed unworthy of deference by most courts that have considered it.<sup>8</sup> As the Department notes in the 2021 Notice, courts have found that the 2018 Interpretation warrants “no deference” because the 2018 Interpretation was conclusory and devoid of analysis, offering nothing more than “a retroactive, ex-post rationalization for DOED’s policy changes.”<sup>9</sup>

The 2018 Interpretation also represented a sharp and unjustified break from the Department’s historical position supporting the application of state consumer protection laws to federal student loan servicers. Until 2017, the federal government repeatedly and explicitly acknowledged the importance of state laws and state enforcement actions in regulating student loan servicer conduct. Indeed, such acknowledgements appeared expressly in the federal government’s contracts with servicers. Such contracts typically included a provision to the effect that “[t]he contractor(s) will be responsible for maintaining a full understanding of all federal and state laws

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<sup>5</sup> E.g., California Student Loan Servicing Act, Cal. Fin. Code § 28100 et seq.; Colorado Student Loan Servicer Act, 5-20-108, C.R.S.; Sections 36a-846 et seq., of the Connecticut General Statutes; 110 Ill. Comp. Stat. 992/ Art. 1 et seq.; Md. Code Ann., Educ. § 26-602; Me. Rev. Stat. Title 9-A, Art. 14; Section 65 of Chapter 358 of the Acts of 2020 (Mass.); NJ Rev Stat §17:16ZZ-1 to -18; N.Y. Banking Law, Art. 14-A; Oregon Senate Bill 485 (2021); R.I. Gen. Laws § 19-33; VA Code § 6.2-2600 et seq.; D.C. Code §31-106.02.

<sup>6</sup> Federal Preemption and State Regulation of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619 (Mar. 12, 2018).

<sup>7</sup> See *id.*, 83 Fed. Reg. at 10619.

<sup>8</sup> See, e.g., *Nelson v. Great Lakes Educ. Loan Services, Inc.*, 928 F.3d 639, 651 n. 2 (7th Cir. 2019); *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 921 n. 13 (11<sup>th</sup> Cir. 2020); *New York v. Pennsylvania Higher Educ. Assistance Agency*, 19 Civ. 9155, 2020 WL 2097640 at \*17 n. 14 (S.D.N.Y. May 1, 2020); *Student Loan Servicing All. v. D.C.*, 351 F. Supp. 3d 26, 50 (D.D.C. 2018).

<sup>9</sup> See *Student Loan Servicing All.*, 351 F. Supp. 3d at 50–51.

and regulations . . . and ensuring that all aspects of the service continue to remain in compliance as changes occur.”<sup>10</sup> Prior to 2017, the Department also demonstrated a willingness to work in partnership with the states to improve loan servicers’ compliance with federal and state laws. For example, in 2016, the Department issued a memorandum that stated that servicers “should comply with federal *and state law*, taking any necessary steps to support oversight by federal or *state agencies*.” [emphasis added]<sup>11</sup> The Department also advocated for the continued sharing of information between the Department and state law enforcement agencies “so these agencies can take action if illegal practices occur.”<sup>12</sup> In 2016, the Department formally amended its regulation concerning data sharing “to more easily accommodate . . . requests” for relevant data by state governmental entities seeking to enforce consumer protection laws against student loan servicers.<sup>13</sup>

### **III. The 2021 Notice’s preemption analysis is well reasoned and supported by federal case law.**

The Department’s 2021 Notice is a thorough and well-reasoned analysis of preemption principles that accurately reflects federal case law. The Department’s analysis acknowledges that there is an established presumption against preemption, particularly in fields “traditionally occupied by the States”, such as consumer protection and education.<sup>14</sup> As the Department recognizes, federalism principles counsel against interpreting federal statutes as preempting state law “unless that [is] the clear and manifest purpose of Congress.”<sup>15</sup>

Federal law may preempt state law in two ways: by express preemption or implied preemption.<sup>16</sup> Express preemption occurs when Congress includes “an express preemption provision” in a federal statute, explicitly demonstrating an “intent to invalidate state law”.<sup>17</sup> Implied preemption occurs through the “substantive nature and reach of the federal regulatory scheme,” and can take the form of either field preemption or conflict preemption.<sup>18</sup>

The Department’s analysis in the 2021 Notice correctly concludes that “express preemption” does not bar state laws regulating servicers except with respect to specific, limited provisions of the Higher Education Act (“HEA”), such as provisions related to usury laws, statutes of limitation, and wage garnishment, that explicitly preempt certain areas of state law.<sup>19</sup>

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<sup>10</sup> See e.g., U.S. Dep’t of Educ., 2009 Contract with Nelnet Servicing LLC at 23, <http://www2.ed.gov/policy/gen/leg/foia/contract/nelnet-061709.pdf>.

<sup>11</sup> U.S. Dep’t of Educ., Policy Direction on Federal Student Loan Servicing at 38 (July 20, 2016), <https://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf>.

<sup>12</sup> *Id.* at 37.

<sup>13</sup> 81 Fed. Reg. 60683 (Sept. 2, 2016).

<sup>14</sup> See Federal Preemption and Joint Federal-State Regulation and Oversight of the Dep’t. of Educ.’s Federal Student Loan Programs and Federal Student Loan Servicers, 88 Fed. Reg. 44277, 44278 (Aug. 12, 2021) (citing *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008)).

<sup>15</sup> *Student Loan Servicing Alliance*, 351 F. Supp. 3d at 46 (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516.)

<sup>16</sup> See *id.* at 47.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* (quoting *Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d at 346).

<sup>19</sup> See 86 Fed. Reg. at 44279.

The 2021 Notice also correctly explains that federal circuit courts have held that the HEA’s provision regarding preemption of state disclosure requirements does *not* preclude state protections against affirmative misrepresentations.<sup>20</sup> The 2021 Notice further notes that courts have found that a state’s authority to grant or withhold a license to a federal student loan servicer may be preempted to the extent that it could disqualify a federal student loan contractor from operating within the state.<sup>21</sup>

The Department’s 2021 Notice also correctly concludes that there is no “field preemption” of state law regulating servicers in the context of the HEA and affirms that states are not categorically preempted from enacting requirements in areas to which the HEA also applies.<sup>22</sup> The Department’s analysis also explains that state laws governing servicers are not preempted under conflict preemption principles, except in narrow instances where there is an “irremediable” conflict where it is not possible for a servicer to comply with both federal and state requirements.”<sup>23</sup> The 2021 Notice refers to a federal court’s analysis in *Student Loan Servicing Alliance*, which concluded that the District of Columbia’s requirements related to protecting privacy, compliance with timelines, and resolving complaints, were not preempted under the HEA because “there is no actual conflict on the grounds of impossibility.”<sup>24</sup> The Department’s 2021 Notice also accurately explains that state laws regulating servicers are not generally preempted under “obstacle preemption” because the HEA is not aimed at creating uniformity in the servicing of federal student loans.<sup>25</sup>

#### **IV. The Department should clarify that state laws regulating servicers are not preempted unless compliance with state and federal law is impossible.**

Although the 2021 Notice accurately states that state laws regulating federal loan servicing are not preempted under principles of conflict preemption unless it is impossible to comply with both state and federal law or if state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”,<sup>26</sup> the 2021 Notice includes some instances of inconsistent language that may create confusion about the applicable standard. Specifically, the 2021 Notice states that, with respect to the Federal Family Education Loan (FFEL) program, certain state laws may be preempted if they are “directly inconsistent with an equally specific Federal law.”<sup>27</sup> This language creates some confusion by suggesting that a state law provision that is *inconsistent* with a federal provision would be preempted even if it were possible for a regulated entity to comply with both the state and federal provision. The 2021 Notice further states that “some specific Federal laws and regulations

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<sup>20</sup> *Id.* (citing *Nelson v. Great Lakes Educ. Loan Services, Inc.*, 928 F.3d 639,647–49; *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 917–19 (11th Cir. 2020)).

<sup>21</sup> *Id.* at 44280 (citing *Pennsylvania Higher Educ. Assistance Agency v. Perez*, 457 F. Supp. 3d 112, 122–25 (D. Conn. 2020)).

<sup>22</sup> *Id.* at 44279.

<sup>23</sup> *Id.* at 44279 (citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

<sup>24</sup> *Id.* (citing *Student Loan Servicing Alliance*, 351 F. Supp. 3d at 60).

<sup>25</sup> *Id.* at 44279 (citing *Pa. v. Navient Corp.*, 967 F.3d 273, 292–94 (3d Cir. 2020); *Lawson-Ross*, 955 F.3d at 920–23; *Nelson*, 928 F.3d at 650–51).

<sup>26</sup> *Id.* at 44279 (quoting *Crosby*, 530 U.S. at 373).

<sup>27</sup> *Id.* at 44281.

preempt State laws that conflict squarely on matters such as timelines, dispute resolution procedures, and some particulars of debt collection and loan servicing.”<sup>28</sup> This language also suggests that mere *inconsistency*, rather than *impossibility*, is the appropriate standard to apply to determine whether state laws regulating servicers are preempted.

As explained in *Student Loan Servicing Alliance*, the federal regulatory scheme for student loan servicers establishes a “floor,” not a ceiling, for servicer regulation.<sup>29</sup> That court explained that the “very language of the statute indicates that Congress intended DOED to set ‘minimum standards’” for servicers.<sup>30</sup> Accordingly, provisions of state laws that impose additional or more stringent standards on servicers are not preempted by the HEA. The Department should clarify that federal requirements are a floor, not a ceiling, for protections for student loan borrowers, and that impossibility, rather than mere inconsistency, is the appropriate standard for analysis of state servicer regulations.

The Department should also take this opportunity to make clear that the Department lacks authority under the HEA to interpret preemption in a manner broader than the limited, express preemption provisions specifically and selectively set out in the HEA.<sup>31</sup> The Department should further make clear that state law is directly applicable against federal student loan servicers, rather than being deemed applicable through contractual terms in any agreement between the student loan servicer and the federal government.

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We strongly support the Department’s revocation of the 2018 Interpretation and commend the Department on the thoroughness and accuracy of its analysis of preemption principles in the 2021 Notice. In addition, we wholeheartedly support the Department’s view that the states play a vital role in servicer oversight and that the goals of the federal student aid program will best be served by a collaborative and multi-pronged regulatory approach that involves both federal and state oversight. We look forward to expanding and strengthening our partnership with the Department as we continue working to increase servicer accountability and protect student loan borrowers.

Respectfully submitted,



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<sup>28</sup> *Id.* at 44280.

<sup>29</sup> *Student Loan Servicing All.*, 351 F. Supp. 3d at 57.

<sup>30</sup> *Id.* (citing 20 U.S.C. § 1082(a)(1)).

<sup>31</sup> *See, e.g.*, 20 U.S.C. § 1078(d) (state usury laws); 20 U.S.C. 1095a(a) (state wage-garnishment laws).

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