August 16, 2021

VIA ELECTRONIC SUBMISSION

Clerk of the Commission
State Corporation Commission
c/o Document Control Center
P.O. Box 2118
Richmond, Virginia 23218

Re: Case No. BFI-2021-00007

Dear Commissioners:

The undersigned organizations representing Virginia consumers, students, student loan borrowers, and educators submit this comment in response to the State Corporation Commission's (the "Commission") July 9, 2021, Order Requesting Additional Comments (the "Order") on proposed regulations to implement Virginia's new Student Borrower Bill of Rights.[1] The Commission specifically requested comments further addressing whether the new law and/or its implementing regulations implicate either federal preemption or intergovernmental immunity. The Commonwealth seeks this information in response to a false alarm raised by lobbyists for the student loan industry, the National Association of Student Loan Administrators ("NASLA") and Student Loan Servicing Alliance ("SLSA").[2]

Both NASLA and SLSA raised these same specters of preemption and intergovernmental immunity during the legislative process, which the General Assembly and the Governor considered and dismissed when passing Virginia's Student Borrower Bill of Rights into law. By raising these claims again, however, these industry groups seek to accomplish through regulation what they could not through legislation. The Bureau of Financial Institutions ("BFI") noted as much in its Response to Comments when it stated that "instead of seeking regulations that effect the purposes of [Virginia's Student Borrower Bill of Rights], NASLA and SLSA want the Commission to establish exemptions or waivers that conflict with the statutory scheme established by the Virginia General Assembly in [the law]."[3] NASLA and SLSA clearly seek to circumvent Virginia law, and their comments to the Commission, which rely on inapplicable legal support or no support at all, must be understood as being toward that end.

[1] *See* Chapter 26 of Title 6.2, § 6.2-2600 *et seq*., of the Virginia Administrative Code.
[2] This request also seeks information as to the relevance of *Student Loan Servicing Alliance v. District of Columbia*, 351 F.Supp.3d 26 (D.D.C. 2018) ("SLSA v. D.C.").
[3] BFI Comment at 7.

The U.S. Department of Education recently spoke out against these efforts to preempt state action and to stress the importance of "cooperative federalism" in overseeing the student loan servicing industry. It issued notice of a formal legal opinion on this point to clarify that, not only are states not categorically preempted from supervising the industry of student loan servicers, but also that "State regulators can be additive in helping to achieve" the Department's goals.[4] The opinion explains that the Department's goals are served better with state cooperation, and that state laws that focus on customer service, such as Virginia's Student Borrower Bill of Rights, enhance servicer compliance with contractual requirements and increased accountability.[5] This most recent announcement is in line with the Department's historical respect for and cooperation with states, and is reflective of the current administration's explicit commitment to partnering with states to protect borrowers, including through state legislation to regulate servicers.

As the following letter discusses in detail and as the Department of Education makes clear, NASLA's and SLSA's dire warnings are misplaced. They are part of an ongoing and largely unsuccessful campaign by student loan companies to convince state regulators across the country to abandon their historic consumer protection role in the student loan market. Instead of heeding these warnings, the Commission should fully implement Virginia's Student Borrower Bill of Rights, as passed by the General Assembly and signed by the Governor, and follow in the footsteps of more than a dozen other state regulators by faithfully executing the law and standing up for student loan borrowers.

Discussion and Analysis

Virginia's Student Borrower Bill of Rights was proposed and enacted as a direct response to the ongoing student loan debt crisis affecting borrowers throughout the Commonwealth, and empowers the BFI to license and oversee the private-sector companies that interact with borrowers about their student loans. As this comment discusses in detail, the law is neither federally preempted nor does it violate the doctrine of intergovernmental immunity, despite NASLA's and SLSA's claims to the contrary, and the specific court case identified in the Commission's Order, *SLSA v. D.C.*, is relevant only as a basis by which to distinguish the Commonwealth's automatic licensing regime from the application-based regime at issue in that case.

The same actors that contributed to the student loan crisis that prompted the Commonwealth to enact these new consumer protections now seek to undermine them. We urge the Commission to

[4] Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 86 Fed. Reg. 44,277, 44281 (Aug. 12, 2021) ("Department Interpretation on Preemption").
[5] *Id.*

ignore their baseless claims and to implement Virginia's Student Borrower Bill of Rights as it was passed into law, with the regulations as proposed by the BFI.

1. **Servicer Oversight Is a Necessary Response to Virginia's Student Loan Debt Crisis.**

Virginia, as with the nation, is experiencing a student loan debt crisis. Approximately 1.03 million borrowers in the Commonwealth owe a collective $43.5 billion in student loan debt,[6] with an increase in student loan debt of 175% between 2007 and 2017.[7] As of 2020, nearly 13% of Virginia borrowers were delinquent on their debts.[8] These borrowers should have received help from their loan servicers to return to good standing and to enter an affordable payment plan, however, we know that these same industry actors tasked with helping borrowers instead caused them substantial harm.

This industry misconduct is borne out by Virginians' complaint filings. To date, Virginia borrowers have submitted 2,291 complaints to the Consumer Financial Protection Bureau (CFPB) regarding student loans.[9] Among these complaints, 313 are from servicemembers, 54 are from older Americans, and 19 are from servicemembers who are older Americans.[10] As the following sample complaints illustrate, Virginia borrowers' experiences in the student loan system are often harrowing:

> "My student loan servicer is ACS Education. . . I submitted an application to . . . consolidate my federal student loans [to] qualify for the Public Service Loan Forgiveness program. A few weeks after I submitted my consolidation application . . . I was informed that my application was denied because ACS Education had failed to certify the loan amounts. As part of the consolidation application process, [PHEAA] makes a request to ACS Education to certify the loan amounts. ACS Education is supposed to provide [PHEAA] with Loan Value Certificates. As of today ACS still has not sent those certificates to [PHEAA]. . .[O]nce I learned my application had been denied I contacted ACS. I was told that ACS is still working on the certificates and making "adjustments." The most outrageous part is that the representative on the phone could not tell me when the certificates would be completed. . . It is literally going on six (6) months and I still have not been able to consolidate my loans. This is truly unfair . . . I am literally being

[6] Student Borrower Protection Ctr., *Virginia: Student Debt by the Numbers*, https://protectborrowers.org/wp-content/uploads/2020/05/VA-2020.pdf (Last viewed on July 27, 2021).
[7] Student Borrower Protection Ctr., *Virginia: 2019 State of Student Loan Debt*, https://protectborrowers.org/wp-content/uploads/2019/01/Virginia-2019-State-of-Student-Debt.jpg (Last viewed on July 27, 2021).
[8] *Virginia: Student Debt by the Numbers.*
[9] *See* Consumer Fin. Prot. Bureau, *Consumer Complaint Database* (accessed Aug. 3, 2021) (apply filters: federal student loan debt, private student loan debt, non-federal student loan, federal student loan, student loan, and Virginia), https://www.consumerfinance.gov/data-research/consumer-complaints/search/.
[10] *Id.*

held kidnapped by ACS Education who refuses to issue loan value certificates so I can consolidate my loans with another company . . ."[11]

"I am a veteran and I was on a steady payment plan before Navient took over my loan. I paid faithfully every month and when they took over they stopped the payment plan I [was] paying and started calling [and] harassing me about paying excessive amounts when I was paying based on my income. I have put in for a hardship with them and they denied me once again [while] still demanding a high monthly payment."[12]

"[I] was approved . . . for income based repayment. . . Every month there were issues of the repayment not being applied to all of my loans, building interest on forbearance. This has happened many times within 1 year. Then they had me repay the loan and make payments out of the blue. When I call I am assured everything is fine. I am again being charged too early for my repayment plan. I am tired of the lies and the extra interest this company is making off of me for their errors."[13]

"[M]y apartment suffered damage as a result of a hurricane . . . and Navient contacted me via email and instructed me to contact them if 'you need payment help due to recent natural disasters.' I did call them and was told that Navient wouldn't require payments for two months from the time of my call to help me out after the hurricane. What they didn't tell me was that interest would be accumulating as usual, so it would have been better off not to take the forbearance and just pay them while cleaning up after [the] hurricane. In addition, I accepted a [job] offer . . . primarily due to the public service debt repayment benefit. I was devastated to find out after accepting the job that I did not qualify [for] this program since my loans had been consolidated - this after already trying to pay them down for 20 years!"[14]

Numerous federal and state investigations into student loan servicer and guaranty agency conduct make clear the need for Virginia's Student Borrower Bill of Rights's oversight regime and borrower protections. Between 2017 and 2020, state and federal officials across the country brought public enforcement actions against the largest student loan servicers for systematically cheating borrowers out of their rights to affordable payments and loan forgiveness.[15] In 2020, the

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[11] Consumer Fin. Prot. Bureau, *Consumer Complaint 1970885*, https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/1970885 (Last viewed on Aug. 3, 2021).
[12] Consumer Fin. Prot. Bureau, *Consumer Complaint 2299213*, https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2299213, (Last viewed on Aug. 3, 2021).
[13] Consumer Fin. Prot. Bureau, *Consumer Complaint 2394581*, https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2394581, (Last viewed on Aug. 3, 2021).
[14] Consumer Fin. Prot. Bureau, *Consumer Complaint 2310664*, https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2310664, (Last viewed on Aug. 3, 2021).
[15] *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 17-cv-00101, 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. Aug. 4, 2017), Complaint, *Pa. v. Navient Corp.*, No. 3:17-cv-1814-RDM (M.D. Pa. June 19, 2019),

Consumer Financial Protection Bureau began to investigate the Commonwealth's own guaranty agency, Education Credit Management Corporation ("ECMC"), for its scheme "to cause student-loan borrowers to incur collection costs in a manner that violates [federal law]."[16] The CFPB is also investigating Ascendium Education Solutions, another guaranty agency, for improperly incurring and charging fees.[17] Here, as with the federal investigations--which only became public through court filings when the target guaranty agencies like ECMC refused to comply with or fought to quash the government's investigations--NASLA and its members continue to go to extreme lengths to evade oversight and accountability. There is clearly an ongoing need to supervise this industry, which historically falls within state oversight.

2. The Commonwealth's Law is Not Federally Preempted.

In its Order, the Commission specifically seeks comments on whether any part(s) of the statute and/or regulation are federally preempted. As discussed below, Virginia's new student loan borrower protection law is not preempted by federal law, and by raising the specter of preemption and relying on readily-distinguishable or otherwise irrelevant caselaw, NASLA and SLSA seek to evade state oversight in an end run around the legislative process.

Preemption can be "express" in statute or implied, either by the thoroughness of federal regulation or by a conflict between federal and state law.[18] Essentially, where Congress had clear intent to preempt a law or to accomplish a goal, state law may not stand in the way. There is, however, a strong presumption against preemption of state laws short of such clear Congressional intent,[19] which is especially true when federal law operates "in a field which the States have traditionally occupied,"[20] such as consumer protection laws.[21]

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https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf (Last viewed on Aug. 3, 2021); Complaint, Cal. v. Navient Corp., No. CGC-18- 19 567732 (Cal. Oct. 16, 2018), https://oag.ca.gov/system/files/attachments/press_releases/CA%20AG%20First%20Amended%20Complaint%20-%20Navient.pdf (Last viewed on Aug. 3, 2021); Complaint, Ill. v. Navient Corp., No. 2017-CH-00761 (Ill. July 10, 2018), https://illinoisattorneygeneral.gov/pressroom/2017_01/NavientFileComplaint11817.pdf (Last viewed on Aug. 3, 2021);
Complaint, *Miss. v. Navient Corp*., No. G2108-98203 (Miss. July 24, 2018), https://www.scribd.com/document/384612507/Navient-ComplaintFiled (Last viewed on Aug. 3, 2021); Complaint, Wash. v. Navient Corp., No. 17-2- 01115-1 SEA (Wash. Jan. 18, 2017), https://www.classaction.org/media/state-of-washington-v-navient-corporation-et-al.pdf (Last viewed on Aug. 3, 2021).

[16] *Petition to Enforce Civil Investigative Demands* at 2, *Consumer Fin. Protection Bureau v. Educ. Credit Mgmt. Corp.*, 21-mc-00019 (D. Minn. Mar. 4, 2021).

[17] Consumer Fin. Prot. Bureau, *Decision and Order on Petition by Ascendium Education Solutions, Inc., to Set Aside or Modify Civil Investigative Demand*, In re Ascendium Educ. Solutions, Inc., 202-MISC ASCENDIUM-0001 (Dec. 16, 2020).

[18] *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 375-76 (2015).

[19] *See Arizona v. United States*, 567 U.S. 387, 400 (2012).

[20] *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[21] *See Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990).

Further, there is a presumption of constitutionality for legislative acts,[22] and, "in case of doubt, [a presumption] to resolve that doubt in favor of constitutionality of the enactment."[23] We urge the Commission to review carefully the Department of Education's recent legal opinion on federal preemption and joint Federal-State regulation and oversight of student loan servicers, which echoes the discussion below, namely that "States may consider and adopt additional measures [to Federal law] which protect borrowers and do not conflict with Federal law."[24]

Given these strong presumptions in support of upholding state action, the lack of thorough federal regulation of student loan servicers, recent court determinations regarding student loan servicer licensing, and the Department of Education's commitment to "cooperative federalism," it is clear that Virginia's new law is not preempted and that its regulations should be implemented.

a. <u>There is no express or "field" preemption of Virginia's Student Borrower Bill of Rights.</u>

The text of the Higher Education Act of 1965 ("HEA") and relevant case law are unambiguous that there is no express preemption by the HEA of state oversight over student loan servicers.[25] Courts have been equally clear that the federal government does not so thoroughly regulate the industry of student loans as to "occupy the field" in any implied preemptive manner.[26] In various contexts, both the Fourth Circuit Court of Appeals and the U.S. District Court for the Eastern District of Virginia have rejected "field" preemption under the HEA.[27] Neither the doctrines of express or field preemption apply in this case, and as discussed next, nor does conflict preemption.

[22] *Atl. Mach. & Equip., Inc. v. Tigercat Indus*., 427 F. Supp. 2d 657, 662 (E.D. Va. 2006).
[23] *Wayside Rest., Inc. v. Va. Beach*, 215 Va. 231, 236 (1974).
[24] Department Interpretation on Preemption at 23.
[25] *See SLSA v. D.C.*, 351 F. Supp.3d at 55; *Pa. Higher Educ. Assistance Agency v. Perez*, 457 F. Supp.3d 112, 121 (D. Conn., 2020).
[26] *See SLSA v. D.C.*, 351 F. Supp.3d at 57 ("[Circuit] courts have consistently held that the HEA does not have field preemptive effect.") (collecting cases); *Chae v. SLM Corp*., 593 F.3d 936, 942 (9th Cir. 2010) ("[F]ield preemption is off the table to resolve this case involving the HEA and its attendant federal regulations."); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1126 (11th Cir. 2004) (noting that "enactment of the HEA does not 'occupy the field' of debt collection practices").
[27] *See Coll. Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 n. 5 (4th Cir.2005) ("[I]t is clear that Congress could not have intended the [Higher Education Act] to so occupy the field that it would automatically preempt all state laws.") (internal quotation marks omitted); *Career Care Inst., Inc. v. Accrediting Bureau of Health Educ. Sch., Inc.*, 1:08CV1186 AJT/JFA, 2009 WL 742532, at *4 (E.D. Va. Mar. 18, 2009) (following *College Loan Corp.* and denying preemption-based motion to dismiss state law claims).

b. Virginia's Student Borrower Bill of Rights poses no "conflict" to federal contracting requiring preemption.

Although NASLA, SLSA, and other industry actors draw on *Leslie Miller, Inc. v. Arkansas*[28] and its progeny to assert that state licensing requirements for servicers of federal student loans are preempted, such reliance is misplaced. *Leslie Miller* preemption requires a conflict between federal government contracting and state licensing, but Virginia's automatic licensing regime poses none of the conflicts justifying preemption found in those cases.

i. *Leslie Miller* does not apply to Virginia's automatic licensing.

Leslie Miller and its progeny turn on whether a state licensing regime affords the state "a virtual power of review" over federal contracting decisions,[29] that allows states to "second guess" those decisions.[30] The cases hold that obstacle preemption, a form of conflict preemption, bars state action that prohibits a federal contractor from operating within its borders or impedes the federal government's interests. In short, if the federal government cannot freely select a company with which to contract due to a state law that impedes that company's ability to obtain a license and operate in the state, that state law is preempted as an obstacle to federal interests.

However, those cases and their rationale are easily distinguishable from the licensing regime at issue here. Under the Commonwealth's automatic licensing framework, companies that hold an agreement with the Department as a loan guarantor pursuant to 20 U.S.C. § 1078(b) or a contract to service federal student loans under 20 U.S.C. § 1087f are automatically issued a license to service student loans, without any meaningful or substantive review.[31] Virginia's Student Borrower Bill of Rights specifically provides that such companies are "deem[ed] . . . to have met all the requirements [for licensure] set forth in subsections A and B of § 6.2-2603,"[32] and therefore undergo no substantive review by the Commonwealth. The only requirements on these companies for licensure are merely ministerial: the payment of a fee and provision of a bond.[33] Such administrative steps do not represent an obstacle "so direct and positive that the [federal contracts and state licensing] cannot be reconciled or consistently stand together," and therefore do not justify preemption.[34] Licensure renewal by the Commonwealth is equally as administrative, and relies only on the payment of a renewal fee.[35] Without any meaningful review, the Commonwealth is afforded no "power of review" or opportunity to "second guess"

[28] 352 U.S. 187 (1956).
[29] *Leslie Miller*, 352 U.S. at 190.
[30] *Perez*, 457 F. Supp.3d at 124.
[31] *See* VA § 6.2-602(B).
[32] *Id*. at 6.2-602(B)(3).
[33] *Id*. at 6.2-602(B)(1).
[34] *Goldstein v. California*, 412 U.S. 546, 554-55 (1973).
[35] VA § 6.2-602(B)(2).

the Department of Education's contracting decisions, and therefore there are no grounds for preemption of Virginia's automatic licensing of servicers for federal student loans.

ii. *Leslie Miller* does not apply to servicing of Commercial FFELP loans.

Additionally, *Leslie Miller* cannot apply to federally-guaranteed loans for which the federal government holds no direct contracts with servicers. The federal court in *SLSA v. D.C.* recognized that the Department of Education does not directly contract for the servicing of so-called Commercial Federal Family Education Loan Program ("Commercial FFELP") loans, and "acts only as a reinsurer or guarantor."[36] Specifically, participants in the federally guaranteed loans program "are not accorded the same type of preemptive effect mandated by the *Leslie Miller* line of cases . . . [and] that there is no reason to "[i]mmunize [s]tudent [l]oan [s]ervicers [f]rom [s]tate [r]egulation [m]erely [b]ecause [s]ome [a]lso [a]ct as [f]ederal [c]ontractors."[37] Without the support of *Leslie Miller*, the court concluded that "the presumption against preemption [was] not overcome . . . because [the licensing regime did] not impermissibly obstruct any . . . congressional goals as applied to the Commercial FFELP loans."[38] Therefore, with respect to these Commercial FFELP loans, the licensing under Virginia's Student Borrower Bill of Rights poses no conflict or obstacle to any federal contracting and no preemption is warranted.

iii. Guaranty Agencies are not "contractors" for *Leslie Miller* purposes.

Not only does the *Leslie Miller* rationale not apply to Virginia's automatic licensing, generally, NASLA's members are not even federal contractors as contemplated by those cases.[39] Unlike student loan companies like Navient that hold contracts with the United States to send bills and manage loan accounts for loans owned by the federal government, NALSA's members are merely private-sector market participants in the above-mentioned Commercial FFEL program. They guaranty these privately-originated and -held loans against default, and are eligible for reimbursement by the federal government when they pay out on these insured funds.

As guarantors, these companies engage in a specific subset of student loan servicing known as "default aversion"--the practice of contacting borrowers who are delinquent on these privately-held loans and to advise them about repayment options. Default aversion, when successful, helps borrowers get out of delinquency and avoid default; it also helps the guarantor avoid having to pay an insurance claim in the event of a loan default by the borrower, giving the guarantor a

[36] *SLSA v. D.C.*, 351 F. Supp. 3d at 66.
[37] *Id*. (quoting Def. Opp. at 19).
[38] *Id*. at 67.
[39] Even if NASLA's members were considered contractors per *Leslie Miller*, which they are not, they are explicitly part of the Virginia Student Borrower Bill of Rights's automatic licensing, *see* VA § 6.2-602(A), and therefore are not governed by *Leslie Miller*'s obstacle preemption analysis, as discussed in detail above.

financial stake in the borrower's repayment success.[40] Guarantors engaged in default aversion readily meet the definition of covered servicers under Virginia's Student Borrower Bill of Rights,[41] which borrows this definition from the federal definition of "student loan servicing" promulgated by the Consumer Financial Protection Bureau in 2013.[42]

Critically, though, they are not federal contractors like the construction company in *Leslie Miller*. Instead, NASLA's members merely hold agreements with the Department to insure loans and engage in related activities pursuant to 20 U.S.C. § 1078(c), as opposed to a contract for servicing pursuant to 20 U.S.C. § 1087f. The latter explicitly contemplates that the Department would engage in a competitive bidding and awarding process,[43] whereas the former is a mere agreement to provide eligible reimbursements and related activities.[44] This is analogous to federally-backed mortgages, which are routinely serviced by state-licensed and -regulated private companies. Nor are these guaranty agencies listed in the federal government's comprehensive database of contractors and contract awards.[45] Since these entities are not contractors as contemplated by *Leslie Miller* and its progeny, the Commonwealth's licensure can pose no obstacle to the federal government's ability to freely contract with them.

iv. Virginia's Student Borrower Bill of Rights does not obstruct the Department's objectives.

Finally, no other aspect of Virginia's Student Borrower Bill of Rights oversights and consumer protections stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[46] In fact, the Department anticipates that state laws will function alongside federal rules.[47] A string of federal Circuit Court cases have made clear that state consumer protection laws apply to servicers of federal student loans and are not preempted.[48] Neither NASLA nor SLSA has raised any specific or valid claim related to obstacles the statute poses in advancing federal interests, aside from the inapplicable *Leslie Miller* assertions discussed above. Where there is no clear conflict or obstacle, there can be no preemption. This is

[40] Mike Pierce, *What it means to be a student loan servicer: Guaranty Agency edition*, Student Borrower Prot. Ctr. (Mar. 29, 2019), https://protectborrowers.org/what-it-means-to-be-a-student-loan-servicer-guaranty-agency-edition/ (Last viewed Aug. 3, 2021).
[41] *See* § 6.2-2603.
[42] See 12 CFR § 1090.106
[43] *See* 20 U.S.C. § 1087f(a)(1).
[44] 20 U.S.C. § 1078(c)(1)(A) ("The Secretary may enter into a guaranty agreement with any guaranty agency, whereby the Secretary shall undertake to reimburse it[.]").
[45] See SAM.gov, available at https://sam.gov/content/home.
[46] *Arizona*, 567 U.S. at 399.
[47] *See, e.g.*, 34 C.F.R. § 682.401 ("The [student loan] guaranty agency shall ensure that all program materials meet the requirements of Federal and *State* law.") (emphasis added).
[48] *See, e.g.*, *Lawson-Ross v. Great Lakes Higher Educ. Corp*., 955 F.3d 908 (11th Cir. 2020); *Nelson v. Great Lakes Educ. Loan Servs*., 928 F.3d 639, (7th Cir. 2019); *Pennsylvania v. Navient Corp*, 967 F.3d 273 (3d Cir. 2020).

all the more true given that courts "uphold state law if there is any ambiguity as to whether the [state] and federal laws can coexist."[49]

3. Virginia's Student Borrower Bill of Rights is Not Barred by the Doctrine of Intergovernmental Immunity.

Contrary to NASLA's previous comment, the intergovernmental immunity doctrine does not bar implementation of Virginia's Student Borrower Bill of Rights. The intergovernmental immunity doctrine invalidates state statutes or regulations that either directly regulate the federal government or that discriminate against the federal government.[50] Virginia's Student Borrower Bill of Rights does neither. The doctrine therefore has no bearing here and the statute's regulations must be implemented.

i. Virginia's Student Borrower Bill of Rights does not regulate the federal government.

The doctrine's first prong--direct regulation of the federal government--requires a state regulation to run directly against the government itself.[51] Contractors are generally not afforded such an extraordinary measure as immunity, which is only applicable where the contractor is stepping into the role of government and is exercising a government function.[52] Clearly, there must be a direct implication for how the federal government operates.

Here, Virginia's Student Borrower Bill of Rights does not regulate the federal government in any way; it imposes no requirements on the Department of Education, nor does it substitute the Commonwealth's standards in place of the Department's. It is clear from the history of servicing of federal student loans--which has always been performed by private companies[53]--and from the HEA's explicit authority to the Department to contract with private companies to service,[54] that servicing itself lacks the trappings of a traditionally-governmental role justifying immunity for contractors. The discernibility between the federal government and student loan servicers is also evidenced by the fact that when borrowers have complaints about their loans, they file them

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[49] *Perez*, 457 F. Supp.3d at 122 (quoting *U.S. Smokeless Tobacco Mfg. Co., LLC v. City of N.Y.*, 708 F.3d 428, 433 (2d Cir. 2013)).
[50] *See North Dakota v. United States*, 495 U.S. 423, 435 (1990).
[51] *Id.* at 437 ("Both the reporting requirement and the labeling regulation operate against suppliers, not the Government, and concerns about direct interference with the Federal Government, therefore are not implicated.") (citations omitted).
[52] *See United States v. New Mexico*, 455 U.S. 720, 735 (1982) (immunity for non-government actors is appropriate only for "an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity . . . concerned").
[53] *See generally*, Consumer Financial Protection Bureau, *CFPB Examination Procedures: Education Loan Examination Procedures* 5 (Dec. 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_exam-procedures_education-loans.pdf (Last viewed on Aug. 3, 2021).
[54] 20 U.S.C. § 1087f.

against the companies servicing them, not the Department. The federal government and servicers are not so closely intertwined, and therefore there is no immunity under the doctrine's first prong.

As with the discussion of federal preemption, NASLA's guaranty agency members' association with the Commercial FFELP marketplace further undermines their claim for government treatment: the government's "interests in Commercial FFELP loans . . . do not qualify as federal property for purposes of intergovernmental immunity" and as such do not confer such protections.[55]

ii. Virginia's Student Borrower Bill of Rights does not discriminate against the federal government.

The second prong--discrimination against the federal government--can be disposed of easily: Virginia's Student Borrower Bill of Rights applies equally to all servicers of student loans, as defined therein, and in no way discriminates against the federal government or any company with which it has a business relationship. As such, no intergovernmental immunity is triggered on those grounds.

NASLA's comment relies solely on *Boeing Co. v. Movassaghi*,[56] to support its claim of intergovernmental immunity. But the circumstances and state law at issue in *Boeing* could hardly be more different than those here. There, the federal Department of Energy ("DOE") and NASA hired Boeing "to assist in the nuclear research and rocket testing" at the Santa Susana Field Laboratory outside Los Angeles, which "created a terrible environmental mess" for which the federal government was responsible.[57] After the DOE hired Boeing to clean up the radioactive contamination and set the applicable cleanup standards,[58] the California legislature "passed Senate Bill 990, 'Cleanup of Santa Susana Field Laboratory,'"[59] which the state admitted "singles out Boeing, DOE, NASA and the [Santa Susana Field Laboratory] site for a substantially more stringent cleanup scheme than that which applies elsewhere in the State."[60] The Ninth Circuit held that Senate Bill 990 was preempted by intergovernmental immunity both because it directly regulated the federal government and because, per the state's admission, it singled out the federal government for harsher treatment than other actors.[61] Conversely, Virginia's Student Borrower Bill of Rights does not supplant federal standards or regulate the federal government at all - much less discriminate against it - and no intergovernmental immunity is appropriate.

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[55] *SLSA v. D.C.*, 351 F. Supp.3d at 75.
[56] 768 F.3d 832 (9th Cir. 2014)
[57] *Id*. at 835.
[58] *Id*. at 836.
[59] *Id*. at 837.
[60] *Id*. at 842.
[61] *Id*. at 839-843.

4. Virginia's Student Borrower Bill of Rights Aligns With the Department's Historical Approach to State Cooperation

NASLA's and SLSA's interpretations are also misaligned with the Department of Education's historical approach to federalism and with the Biden administration's clear direction, which themselves align with Virginia's Student Borrower Bill of Rights.

As recently as 2016, in a response to a state regulator's inquiry about whether the state's licensing requirements conflict with federal regulations, the Department's own General Counsel's Office replied that, "[t]he Department does not believe the State's regulation of [student loan servicers] would be preempted by Federal law."[62] The federal government itself sees no conflict between its objectives and state licensure.

Although, in a notice to the Federal Register, then-Education Secretary DeVos took up industry's claims that states are categorically preempted from overseeing private companies servicing federal loans in their jurisdictions,[63] that position lacked any legal authority and should be given no deference. Twenty-six state attorneys general, including Virginia's, wrote to Secretary DeVos to explain why such a claim was both legally and historically inaccurate,[64] and courts have been explicit that this deviation from the Department's traditional opinion lacks merit and should be afforded no legal deference or authority.[65]

The Department's recently-noticed legal opinion unequivocally rescinded the DeVos-era informal guidance. It does so with a thorough discussion of the specifics of the Higher Education Act and states' role in protecting student loan borrowers, which we urge the Commission to review.[66] This opinion builds on a series of steps by the current administration to return to the long-held practice of respecting states' sovereignty to oversee industry actors operating in their jurisdictions, and that it plans to partner with states. Within days of becoming the Chief Operating Officer at Federal Student Aid within the Department, Richard Cordray issued a directive to the Department's servicers making it clear that the Department intends to work with

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[62] Letter from the U.S. Department of Education to J. Bellman, January 21, 2016, https://na-production.s3.amazonaws.com/documents/Dept._of_Ed_Response.1.21.2016_dORyoLm.pdf (Last viewed on July 26, 2021). *See also*, Statement of Interest of the United States at 2, *Sanchez v. ASA College, Inc*., No. 14-5006, 2015 WL 3540836 (S.D.N.Y. June 5, 2015) ("Nothing in the HEA or its legislative history even suggests that the HEA should be read to preempt or displace state or federal laws.").

[63] *See* 83 Fed. Reg. 10619 (Mar. 12, 2018).

[64] Letter from State Attorneys General to Sec. DeVos, Oct. 23, 2017, https://ag.ny.gov/sites/default/files/devos_letter.pdf (Last viewed on July 26, 2021).

[65] *SLSA v. D.C.*, 351 F. Supp. at 50 ("The [Department's] Notice is a retroactive, ex-post rationalization of [its] policy changes . . .[i]t does not analyze in any real way the regulations it cites."); *see generally Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies so long as they provide a reasoned explanation for the change.").

[66] *See* Department Interpretation on Preemption.

states and instructing them not to categorically reject state requests for information.[67] Immediately after issuing the directive, Cordray wrote one of the largest servicers, admonishing them for refusing a state information request and reiterating the importance of cooperating with states.[68] The new administration is clearly resuming the long-standing, pre-DeVos approach of collaboration by welcoming state inquiries and oversight. The Commonwealth's new Student Borrower Bill of Rights meets both the spirit and letter of this approach to "cooperative federalism" and student loan servicer oversight.

Conclusion

In response to the Commission's Order, and for the reasons discussed in detail above, the undersigned submit to the Commission that Virginia's Student Borrower Bill of Rights is neither federally preempted nor does it violate the doctrine of intergovernmental immunity. Additionally, *SLSA v. D.C.* is not applicable to this case, except to provide legal rationale to uphold the Commonwealth's automatic licensing. Finally, the undersigned urge the Commission to see NASLA's and SLSA's actions for what they are: an undemocratic attempt to override the legislative process and to avoid much-needed oversight. Please contact Winston Berkman-Breen with the Student Borrower Protection Center at winston@protectborrowers.org if you have any questions or would like to discuss our comments further.

Sincerely,

Student Borrower Protection Center
AARP Virginia
Center for Responsible Lending
Consumer Reports
Fairfax County Federation of Teachers (AFT Local 2401)
New Virginia Majority
Norfolk Federation of Teachers
Progress Virginia
The Commonwealth Institute for Fiscal Analysis
Virginia21
Virginia Civic Engagement Table
Virginia Organizing
Virginia Poverty Law Center

[67] Memorandum from R. Cordray, Chief Operating Officer, Fed. Student Aid, U.S. Dep't of Educ. (May 28, 2021), https://www2.ed.gov/policy/fund/guid/revised-vendor-guidance-fsa.pdf (Last viewed on July 26, 2021).
[68] Letter from R. Cordray to J. Steeley, May 28, 2021, https://static.politico.com/6a/26/333a727c40378c28daf61eda0b18/fsa-letter-to-pheaa-re-coag-request-final-redacted.pdf (Last viewed on July 26, 2021).