COMMONWEALTH *of* VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North 9th Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120

August 16, 2021

VIA ELECTRONIC FILING

Hon. Bernard Logan, Clerk
State Corporation Commission
c/o Document Control Center
Tyler Building, First Floor
1300 East Main Street
Richmond, Virginia 23219

Re: *Ex Parte: In the Matter of Adopting Regulations Governing Qualified Education Loan Servicers under Chapter 26 of Title 6.2 of the Code of Virginia*, Case No. BFI-2021-00007

Dear Mr. Logan:

On behalf of the Office of the Attorney General of Virginia ("OAG"), we submit the following comments in response to the July 9, 2021 Order Requesting Additional Comments ("Order") issued by the State Corporation Commission ("Commission") in connection with the Bureau of Financial Institution's ("Bureau") proposed regulations implementing the statutes governing qualified education loan servicers, Virginia Code §§ 6.2-2600 to 6.2-2622:

BACKGROUND

A. Legislative History

During its 2020 Session, the General Assembly passed legislation that would create Chapter 26 of Title 6.2 of the Code of Virginia, and it did so by wide margins. On January 27, 2020, the House of Delegates passed H.B. 10 by a vote of 84 to 15. The Senate passed an identical bill, S.B. 77, by a vote of 40 to 0 on February 5, 2020. This strong bipartisan support demonstrates the General Assembly's intent to address what Delegate Marcus Simon, patron of H.B. 10, perceived as a critical issue for Virginia's student loan borrowers—the lack of regulation for student loan servicers "at the state level" even though the loans they service are "the second largest source of

debt in the United States."[1]

Indeed, the U.S. Department of Education ("DOED") reports that federal student loan borrowers owe more than $1.51 trillion nationwide through June 2021.[2] Just in Virginia, over 1 million student borrowers collectively owe nearly $42 billion.[3] And, at the time the General Assembly considered H.B. 10 and S.B. 77, servicers that contracted with the DOED to service this vast student loan debt were facing increasing scrutiny for allegedly padding their profits by misleading and abusing financially-distressed borrowers.[4] One such servicer, Navient Corporation ("Navient"), already had been sued by the Consumer Financial Protection Bureau ("CFPB") in 2017 and was accused in 2020 by consumer advocates of steering borrowers into harmful forbearances because they require "substantially less paperwork than enrolling [borrowers] in low-cost plans that peg monthly payments to a percentage of income."[5]

The General Assembly therefore sought to protect over 1 million student borrowers in Virginia from these types of servicing issues. Signed into law on April 22, 2020 by Governor Ralph Northam, S.B. 77 created a "bill of rights" for Virginia's student borrowers. For example, and apropos to the alleged misconduct cited above, this bill of rights requires qualified education loan servicers to evaluate a Virginia student borrower's "eligibility for an income-driven repayment program prior to placing the borrower in forbearance or default . . . ." Va. Code Ann. § 6.2-2611(1). Virginia's student borrowers are also protected from servicers who would, among other things, engage in unfair or deceptive conduct, misapply loan payments, or misreport information to credit bureaus. Va. Code Ann. § 6.2-2610(2), (4), and (5). And, the OAG has authority to investigate and to seek injunctive relief against suspected violations of these student borrower protections and Chapter 26 generally. Va. Code Ann. § 6.2-2620.

---

[1] Ned Oliver, *Aiming to Rein in Student Loan Industry, Virginia House Passes "Borrowers Bill of Rights"*, VIRGINIA MERCURY, Jan. 27, 2020, https://www.virginiamercury.com/2020/01/27/aiming-to-rein-in-student-loan-industry-virginia-house-passes-borrowers-bill-of-rights/.

[2] U.S. DEP'T OF EDUC., *Federal Student Aid Portfolio Summary*, https://studentaid.gov/data-center/student/portfolio.

[3] U.S. DEP'T OF EDUC., *Portfolio by Location*, https://studentaid.gov/data-center/student/portfolio. In addition to federal student loan debt, the total amount of private student loan debt is estimated at $136.3 billion through March 2021. *See* MeasureOne, *The MeasureOne Private Student Loan Report 16*, p. 3 (June 15, 2021), https://f.hubspotusercontent00.net/hubfs/6171800/assets/downloads/MeasureOne%20Private%20Student%20Loan%20Report%20Q1%202021.pdf.

[4] Incredibly, a 2019 report by the Office of the Inspector General for the DOED found that servicers "with more frequent instances of noncompliance [with federal servicing standards] experienced no reduction in the amount of new loans that [DOED] assigned to them." U.S. DEP'T OF EDUC., OFFICE OF INSPECTOR GEN., *Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans*, p. 10 (Feb. 12, 2019), https://www2.ed.gov/about/offices/list/oig/rpauditfsa.html.

[5] Danielle Douglas-Gabriel, *Navient Memo Raises Questions about Its Student Loan Servicing Practices*, WASHINGTON POST, Sep. 19, 2019, https://www.washingtonpost.com/education/2019/09/19/navient-memo-raises-questions-about-its-student-loan-servicing-practices/.

Chapter 26 also creates a licensing and regulatory scheme under which qualified education loan servicers must comply with the foregoing student borrower protections, and the Commission is granted authority over licensees. Va. Code Ann. § 6.2-2601(A); *see also* Va. Code §§ 6.2-2601 to 6.2-2618. The Commission's authority includes, among other things: determining surety bond requirements, § 6.2-2604; requiring the retention of certain records, § 6.2-2608; conducting investigations and examinations, § 6.2-2613; and assessing annual fees, § 6.2-2614. The Commission is also authorized to issue cease and desist orders in connection with violations of Chapter 26 and its related regulations after providing notice and an opportunity to be heard. Va. Code Ann. § 6.2-2617. The Commission may also impose civil penalties if it determines that a licensee has violated Chapter 26 or its related regulations. Va. Code Ann. § 6.2-2618.

But nowhere in Chapter 26 is the Commission granted the authority to prevent a licensee from performing any contractual obligations it may have with the DOED. The General Assembly made this clear through § 6.2-2602, a provision which requires the Commission to "*automatically* issue a license" to qualified education loan servicers with either (1) "an agreement with the [DOED] under 20 U.S.C. § 1078(b)" or (2) "a contract awarded by the [DOED] under 20 U.S.C. § 1087(f)." Va. Code Ann. § 6.2-2602(A) and (B)(1) (emphasis added). By removing any discretion for the Commission to deny licenses to these federal contractors, the General Assembly ensured that these licensees could continue to perform their contractual obligations to the DOED in Virginia. The General Assembly simply gave the Commission regulatory oversight beyond the floor established by the DOED for these specific licensees.

B. The Bureau's Proposed Regulations

On March 9, 2021, the Commission issued its Order to Take Notice regarding the regulations proposed by the Bureau to effect the purposes of Chapter 26. The proposed regulations covered topics related to the Bureau's implementation of Chapter 26 and its regulatory authority over licensees, to-wit: surety bond standards, 10 VAC § 5-220-20; automatic licensure procedures for federal contractors, 10 VAC § 5-220-30; use of the Nationwide Multistate Licensing System and Registry, 10 VAC § 5-220-40; record retention requirements, 10 VAC § 5-220-50; information requests made by the Bureau, 10 VAC § 5-220-60; annual reporting requirements, 10 VAC § 5-220-70; annual fees, 10 VAC § 5-220-80; and the Commission's authority to waive or grant exceptions to Chapter 26, 10 § VAC § 5-220-90. The Commission's Order to Take Notice allowed interested parties to file comments on the Bureau's proposed regulations on or before April 16, 2021. Because the proposed regulations concerned matters unique to the Bureau's role under Chapter 26 and did not implicate the OAG's enforcement authority, the OAG did not comment at that time.

C. Relevant Comments Received by the Commission

On April 19, 2021, the Student Loan Servicing Alliance ("SLSA") filed comments with the Commission relating to the Bureau's proposed regulations. In its comments, SLSA referred to itself as a "trade association that represents federal and private student loan servicers" and raised a general concern that federal student loans "are preempted from any licensing regime . . . ." (SLSA Comment at 1-3.) SLSA did not provide any citations to Virginia or federal law supporting that legal conclusion. Nor did it explain how compliance with Chapter 26 and the Bureau's proposed regulations would prevent its members from continuing to perform their contractual obligations to the DOED.

On April 16, 2021, the National Association of Student Loan Administrators ("NASLA") also filed comments with the Commission relating to the Bureau's proposed regulations. NASLA referred to itself as an "entity advocating for federal student loan guarantors" and noted that one of its members—Educational Credit Management Corporation ("ECMC")—is the "designated Federal Guarantor" for Virginia.[6] (NASLA Comment at 1-2.) In its comments, NASLA raised two general concerns with Chapter 26 and its related regulations. It claimed, "Put simply, the Commission may not avoid [federal preemption] by automatically issuing a state license that Federal Guarantors may not be required to obtain and then regulating Federal Guarantors on the basis of that license." (*Id.* at 6.) NASLA also claimed, "In subjecting Federal Guarantors—who only serve a federal function—to regulatory oversight, the proposed regulations both attempt to impermissibly regulate the federal government through its contractors and unconstitutionally discriminate against those contractors on account of their fulfilling a federal function." (*Id.*)

D. The Commission's Order

Chapter 26 took effect on July 1, 2021. Eight days later, the Commission issued its Order, observing that "neither the Bureau, nor any of the commenters, other than NASLA and SLSA, have substantively addressed the legal issues of federal preemption or intergovernmental immunity raised by NASLA and SLSA." (Order at p. 2.) The Commission then noted its intent to rule on the following "legal questions" (as narrowed here by the OAG) in the context of this rulemaking proceeding: why Chapter 26 and the Bureau's proposed regulations (1) are preempted by federal law; (2) violate the doctrine of intergovernmental immunity; (3) are *not* preempted by federal law; and/or (4) do *not* violate the doctrine of intergovernmental immunity? (*Id.* at 2-3.)

E. The 2021 DOED Notice

On March 12, 2018, the DOED issued a notice explaining its position that federal law

[6] As it concerns Virginia, NASLA appears essentially to be a trade association of one and acts as a spokesperson for the concerns of and interests specific to Virginia's sole federal guarantor—ECMC.

preempts state licensing schemes aimed at regulating federal student loan servicers.[7] The DOED's 2018 notice was met with significant criticism. For example, the United States Court of Appeals for the Seventh Circuit referred to it as "not particularly thorough" and accorded it "little weight."[8] On August 9, 2021, the DOED announced that it is changing course on its prior notice.[9] It has now "reconsidered the issues of preemption and the place of the States in regulating Federal student loan servicers" and believes that "it is appropriate to pursue an approach marked by a spirit of cooperative federalism that provides for concurrent action" by "Federal and State officials."[10]

ANALYSIS

Chapter 26 and the Bureau's proposed regulations are not preempted by federal law and do not violate the doctrine of intergovernmental immunity, so the OAG will not respond to questions 1 and 2 of the Order. On the other hand, questions 3 and 4 ask why Chapter 26 and the Bureau's proposed regulations do *not* offend the Supremacy Clause through federal preemption theories or the doctrine of intergovernmental immunity, and the OAG welcomes the opportunity to comment on why Chapter 26 and the Bureau's proposed regulations are constitutional.[11]

But it is important to note first that the Commission must answer the questions raised by SLSA and NASLA with due regard for the "fundamental principle that all actions of the General Assembly are presumed to be constitutional." *Old Dominion Comm. for Fair Util. Rates v. State Corp. Comm'n*, 294 Va. 168, 177 (2017) (internal quotations and citation omitted). There is "no stronger presumption known to the law," and SLSA and NASLA have a "heavy burden" to show the "clear and palpable" unconstitutionality of Chapter 26. *Id.* at 177-78 (internal quotations and citation omitted).

Because Chapter 26 is entitled to the strongest presumption of constitutionality, and because SLSA and NASLA carry the burden of overcoming that presumption, the OAG will limit its comments to only those issues raised by SLSA and NASLA in the record currently available to the OAG. To the extent SLSA and NASLA might raise new challenges to Chapter 26 and the Bureau's

---

[7] U.S. DEP'T OF EDUC., *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).

[8] *Nelson v. Great Lakes Educ. Loan Servs.*, 928 F.3d 639, 651 n.2 (7th Cir. 2019).

[9] Press Release, U.S. DEP'T OF EDUC., *New Interpretation to Encourage State Collaboration on Student Loan Servicing* (Aug. 9, 2021), https://www.ed.gov/news/press-releases/new-interpretation-encourage-state-collaboration-student-loan-servicing.

[10] U.S. DEP'T OF EDUC., *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. 44277, 44278 (Aug. 12, 2021) ("2021 DOED Notice").

[11] The OAG will respond to question 5 of the Order—whether *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26 (D.D.C. 2018) addresses any issues raised by SLSA and NASLA—through citations in the analysis that follows.

proposed regulations in response to the Commission's Order, the OAG welcomes the Commission's invitation to address them.[12]

A. Federal law does not preempt Chapter 26 or the Bureau's proposed regulations.

Without citation or elaboration, SLSA generally states that Chapter 26 and the Bureau's proposed regulations are unconstitutional because "[f]ederal student loans are preempted from any licensing regime . . . ."[13] (SLSA Comment at 1-3.) NASLA wades slightly deeper. It suggests that a line of cases stemming from *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956), establishes that the DOED's discretion to choose its own federal student loan guarantors preempts Chapter 26 and the Bureau's proposed regulations. NASLA's analysis of *Leslie Miller* and its progeny fails to recognize a key distinguishing factor here that is explained below. But first, and importantly, SLSA and NASLA both raise "federal preemption" without discussing its genesis or categories, and that background information may be helpful to the Commission in its analysis.

Federal preemption of state law is a consequence of our federalism—a system "where National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012). Where the laws of the two governments are "in conflict or at cross-purposes[,]" the Supremacy Clause vests in Congress "the power to pre-empt state law." *Id.*

But the review of a potential Supremacy Clause issue begins with the "assumption that the historic police powers of the States [are] not to be superseded" by Congress unless that is Congress' "clear and manifest purpose . . . ." *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) (internal quotations and citation omitted); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").[14] This is a "presumption against preemption." *Pennsylvania v. Navient Corp*., 967 F.3d 273, 287 (3d Cir. 2020); *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 47 (D.D.C. 2018) ("Indeed, there is an established presumption against preemption.").

With the presumption against preemption in mind, the analysis then turns to whether

---

[12] As of the date and time of this filing, SLSA and NASLA do not appear to have filed any additional comments with the Commission.

[13] This statement is analytically misleading because the proper question is whether federal law preempts Chapter 26 and the Bureau's proposed regulations—not whether federal student loans are preempted.

[14] One such "historic police power" is consumer protection. *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) ("Given the long history of state common-law and statutory remedies against . . . unfair business practices, it is plain that this is an area traditionally regulated by the States.").

Chapter 26 and the Bureau's proposed rules are preempted by federal law under theories that "are not rigidly distinct" but include "express, field, and conflict preemption." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019). The United States District Court for the District of Columbia summarized, "Congress preempts state law in two ways: express preemption and implied preemption[,]" and placed "field" and "conflict" preemption under the category of "implied" preemption. *Student Loan Servicing All.*, 351 F. Supp. 3d at 47. Regardless of the categories, each of the three preemption theories—express, field, and conflict—is briefly considered below.

1. Congress did not expressly preempt Chapter 26 and the Bureau's proposed rules.

Express preemption occurs "when Congress announces its intent to invalidate state law through an express preemption provision explicit in the federal statute itself." *Id.* (internal quotations and citation omitted). The federal statute at issue here is the Higher Education Act of 1965 ("HEA"), 20 U.S.C. §§ 1001 to 1155. Pursuant to the HEA, the DOED is granted authority either to contract with, or to enter into agreements with, two types of entities that meet the definition of a "qualified education loan servicer" in § 6.2-2600 of Chapter 26. First, guaranty agencies or "guarantors" (like ECMC) enter into agreements with the DOED pursuant to § 1078(b) of the HEA to guarantee loans made by private lenders pursuant to the Federal Family Education Loan Program ("FFELP").[15] And second, federal student loan servicers (like Navient) enter into contracts with the DOED pursuant to § 1087f of the HEA in connection with the administration of the William D. Ford Federal Direct Loan Program ("FDLP").

Thus, the potential sources of express preemption include the HEA itself and any regulations issued by the DOED in connection with its congressionally delegated authority under the HEA. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) ("[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."). Here, neither SLSA nor NASLA asserts that the HEA or the related DOED regulations expressly preempt Chapter 26 and the Bureau's proposed rules, and for good reason.

First, SLSA lost an express preemption argument in a declaratory judgment action testing the constitutionality of the District of Columbia's Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act of 2016 (the "D.C. Law"). *Student Loan Servicing All.*, 351

[15] 20 U.S.C. § 1085j (defining "guaranty agency"). NASLA states that "Federal Guarantors are *not* servicers" but then notes that they "engage in default aversion activities aimed at helping delinquent borrowers avoid default." (NASLA Comment at 1-2 (emphasis original).) Federal law defines "student loan servicing" to include "activities to help prevent default on obligations arising from post-secondary education loans . . . ." 12 C.F.R. § 1090.16. Chapter 26 uses similar language in its definition of "servicing[.]" Va. Code Ann. § 6.2-2600. So, it is unclear on what authority NASLA relies to claim that "Federal Guarantors are not servicers under federal law and likewise should not be treated as such under state law." (NASLA Comment at 3.)

F. Supp. 3d at 55.[16] There, SLSA argued that "Congress intended Section 1098g [of the HEA] to prohibit states from requiring servicers to report to third parties or to make any disclosures to borrowers that are not explicitly set out in the HEA[,]" and went so far as to claim that § 1098g expressly preempted more than just the D.C. Law's reporting requirements—it preempted the "entire D.C. licensing scheme." *Id.* at 51. The court disagreed with both arguments and, regarding the latter, noted that it saw no "reason to derive from this one sentence provision an intent by Congress to invalidate an entire state regulatory scheme that would require reporting." *Id.* at 55.[17]

And second, the DOED issued regulations related to the administration of the FFELP by guaranty agencies like ECMC. *See* 12 C.F.R. §§ 682.400 to 682.423. Section 682.410(b)(8) of the DOED's regulations expressly states that the "provisions of paragraphs (b)(2), (5), and (6) of this section preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements of these provisions." But ¶¶ (b)(2), (5), and (6) of § 682.410 all concern activities by federal guarantors *after* a student borrower has defaulted, where Chapter 26 and the Bureau's proposed regulations concern the activities federal guarantors take to *prevent* default. The fact that the DOED expressly preempted state laws governing certain *post*-default activities of federal guarantors means there is no need to infer any intent by the DOED to preempt state laws governing *pre*-default activities.[18] This is "a variant of the familiar principle of *expressio unius est exclusio alterius* . . . ." *Cipollone*, 505 U.S. at 517.

2. Congress has not preempted the "field" of student loan servicing regulation.

Like its name suggests, "field preemption" asks in this context whether Congress has occupied the entire "field" of student loan servicing regulation. *Student Loan Servicing All.*, 351 F. Supp. 3d at 55. The United States District Court for the District of Columbia analyzed that precise issue and began its analysis by noting that "courts have consistently held that the HEA does not have field preemptive effect." *Id.* at 56. The decisions cited by the court relied on two tests for field preemption—"the pervasiveness of federal regulation or the dominance of the federal interest . . . ."

---

[16] The D.C. Law and its related regulations were akin to Chapter 26 and the Bureau's proposed rules—with the important difference that the District of Columbia's regulatory authority had "the ability to grant, deny, or revoke servicer licenses . . . ." *Id.* at 62. The same is not true for the Commission.

[17] Note that the DOED "finds that, except in the limited and specific instances set forth in the HEA itself, State measures to engage in oversight of Federal student loan servicers are not expressly preempted by the HEA." 2021 DOED Notice, 86 Fed. Reg. at 44279. Those "limited" instances of express preemption concern topics beyond the scope of Chapter 26 and the Bureau's proposed regulations. *Id.* at 44278-79.

[18] And, in fact, § 1082(a)(1) of the HEA tasks the DOED with prescribing regulations for the FFELP that establish "minimum standards" applicable to "third party servicers . . . ." Thus, DOED regulations relating to FFELP loan servicing activities are a floor over which Congress left room for state supplementation. *See also* 34 C.F.R. § 682.401 ("The guaranty agency shall ensure that all program materials meet the requirements of Federal and *State* law.") (emphasis added).

Id. After reasoning through both tests, the court determined that Congress had not occupied the field of student loan servicing regulation. *Id.* at 57 ("There is no indication, however, that Congress, in legislating in this field, left no room for state supplementation.") and 59 ("[T]he federal government's interests are not so dominant as to preclude the District of Columbia's legislating on the same subject.").

Here, neither SLSA nor NASLA raised field preemption as an issue, but, even if they had, the thorough analysis provided by the court in *Student Loan Servicing Alliance* correctly explains that Congress did not preempt the field of student loan servicing regulation.

3. Chapter 26 and the Bureau's proposed rules do not conflict with federal law.

Even where Congress has not expressly preempted state law or occupied a regulatory field, "state law is nullified to the extent that it *actually conflicts* with federal law." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (emphasis added). An actual conflict exists: (1) where compliance with the respective state and federal laws is a "physical impossibility," *id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)); or (2) where the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The "mere possibility of inconvenience" in complying with both the state and federal laws is insufficient. *Student Loan Servicing All.*, 351 F. Supp. 3d at 59 (internal quotations and citations omitted).

First, neither SLSA nor NASLA has argued that its members' compliance with Chapter 26 and the Bureau's proposed regulations would render their compliance with the HEA and the DOED's regulations a "physical impossibility." SLSA only generally claims that Chapter 26 and the Bureau's proposed regulations are preempted by federal law, but it fails to identify an actual conflict. At best, NASLA asserts the potential inconvenience of requiring ECMC to comply with Chapter 26 and the Bureau's proposed regulations, specifically referring to "recordkeeping requirements (proposed section 10 VAC § 5-220-50), investigative requests (proposed section 10 VAC § 5-220-60), and annual reporting requirements (10 VAC § 5-220-70)." (NASLA Comment at 5.) But, again, NASLA generally raises those proposed regulations as inconveniences, rather than as provisions that would *actually conflict* with ECMC's federal law obligations.

Second, NASLA identifies a purported "objective" of Congress to which Chapter 26 and the Bureau's proposed rules may pose an obstacle. In a footnote, NASLA suggests that 10 VAC § 5-220-80 (which concerns annual fees) "will undermine Congress's goal of saving the federal government and taxpayers in administering federal loans by increasing the costs of student loan guarantor services." (*Id.* at n.4.) But this is an argument which the United States District Court for the District of Columbia already rejected in the same context—"While cost-efficiency might be an

ever-present goal of Congress, without more explicit evidence, the Court finds that saving taxpayer money did not underpin Congress' purpose or intent in legislating in the area of FFELP servicing." *Student Loan Servicing All.*, 351 F. Supp. 3d at 67. Thus, the Bureau's proposed 10 VAC § 5-220-80 does not stand as an obstacle to ECMC's fulfillment of any identified goal of Congress.

Finally, the crux of NASLA's comment (and, presumably, of SLSA's comment) concerns a third type of conflict preemption that addresses a state's required licensure of federal contractors. As the United States District Court for the District of Columbia summarized,

> The seminal case is the Supreme Court's unanimous decision in *Leslie Miller, Inc. v. Arkansas*, in which the Court found an insurmountable conflict between the state licensing requirements placed on federal contractors and the actions taken by Congress and the Department of Defense to ensure "the reliability of persons and companies contracting with the Federal Government." *See Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190, 77 S. Ct. 257, 1 L. Ed. 2d 231 (1956). The Court held that to subject a federal contractor to the Arkansas licensing requirements "would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." *See id.* at 190.

Id. at 62. Because the D.C. Law could bar federal contractors "from operating in the District of Columbia," the court ruled: (1) that the "threat of District of Columbia officials' second-guessing the federal government's contracting decisions is sufficient under *Leslie Miller* to invalidate the state licensing scheme as applied to servicers when servicing their FDLP loans[;]" and, for the same reasons, (2) that the "District of Columbia may not second-guess DOED's contracting decisions with respect to servicing Government-Owned FFELP loans." *Id.* at 63-66.[19]

But NASLA's attempt to apply the *Leslie Miller* line of cases to Chapter 26 and the Bureau's proposed rules disregards a single, critical distinguishing factor—the Commission *has no authority to bar federal contractors from operating in Virginia*. *See Leslie Miller*, 352 U.S. at 190 (preemptive effect of a requirement that federal contractors "desist from performance until they satisfy a state officer upon examination that they are competent"); *Sperry v. Florida*, 373 U.S. 379, 385 (1963) (A state "may not deny to those failing to meet its own qualifications the right to

[19] Note that there are *two* types of FFELP loans but only one type of FDLP loan. For one type of FFELP loan, referred to as "Commercial FFELP Loans," the DOED "does not contract with servicers . . . ." *Id.* at 67. Accordingly, for that type of FFELP loan, the court did *not* rule that the D.C. Law was preempted under the *Leslie Miller* line of cases. *Id.* at 68.

perform the functions within the scope of the federal authority."); and *United States v. Virginia*, 139 F.3d 984, 985 (4th Cir. 1998) (preemptive effect of licenses required for federal contractors to operate in Virginia).[20] Instead, the Commission is plainly required to accept the DOED's contracting decisions as the final word on whether certain servicers must be automatically licensed. Va. Code Ann. § 6.2-2602.

Further, the United States Court of Appeals for the Fourth Circuit observed that, in ruling that the state laws at issue in *North Dakota v. United States*, 495 U.S. 423 (1990) were a constitutional exercise of state power, the Supreme Court "undoubtedly recognized" that the laws "did not prevent the federal government from selecting [its contractor] or otherwise enable the state to second-guess the federal government's judgment." *United States v. Virginia*, 139 F.3d at n.7. The same is true here as in *North Dakota*—Chapter 26 and the Bureau's proposed rules do not "prevent" the DOED from selecting its servicing contractors or enable the Commission to "second-guess" the DOED's judgment.

Instead, Chapter 26 and the Bureau's proposed rules are aligned with the stated purpose of the DOED's congressionally delegated authority under the HEA with respect to servicers of FFELP loans—the creation of "*minimum* standards" upon which states can build. 20 U.S.C. § 1082(a)(1) (emphasis added); *see Student Loan Servicing All.*, 351 F. Supp. 3d at 57. Similarly, DOED contracts "govern the servicers of FDLP loans for the most part, [so] the regulatory scheme itself does not evidence Congress' intention to exclude state supplementation." *Id.* Accordingly, because Congress allowed room for state supplementation in the area of federal student loan servicing regulation, the state laws at issue here are critically different from those in *Leslie Miller*—state laws that might "frustrate [an] expressed federal policy . . . ." *Leslie Miller*, 352 U.S. at 190. That frustration is missing here—Chapter 26 and the Bureau's proposed rules do not prevent the DOED from selecting its federal student loan servicers, but only fill regulatory gaps that Congress contemplated for the federal student loan servicing industry.[21]

Ultimately, SLSA and NASLA accord *Leslie Miller* the talismanic effect of rendering unconstitutional any state law that purports to regulate federal contractors. The Supreme Court heard a similar argument once and reasoned:

> To infer pre-emption whenever a federal agency deals with a

[20] Although § 6.2-2615 allows the Commission to "revoke any license issued" under Chapter 26, construing this authority to extend to the revocation of automatically-issued licenses leads to an "absurd result"—a never-ending revolving door of licensure-revocation for entities that receive automatic licenses under § 6.2-2602. *City of Charlottesville v. Payne*, 856 S.E.2d 203, 209 (Va. 2021) (internal quotations and citation omitted).

[21] NASLA also relies on the faulty proposition that guaranty agency agreements are similar to contracts awarded to federal contractors after a competitive bidding process—like the contracts in *Leslie Miller*. They are not. *See* 20 U.S.C. § 1078 (no competitive bidding requirements).

> problem comprehensively would be tantamount to saying that whenever the agency decides to step into a field, its regulations will be exclusive. Such a rule would be inconsistent with the federal-state balance embodied in this Court's Supremacy Clause jurisprudence.

Hillsborough Cty., 471 U.S. at 709. Nor may it be inferred that, whenever a federal agency contracts with a third party, states are forbidden from regulating that third party. *See, e.g.*, *North Dakota*, 495 U.S. at 441 (state reporting and labeling requirements were not preempted by federal regulations allowing the Department of Defense to select liquor suppliers).

B. Chapter 26 and the Bureau's proposed regulations do not violate the doctrine of intergovernmental immunity.

NASLA separately raises the issue of whether Chapter 26 and the Bureau's proposed regulations violate the doctrine of intergovernmental immunity. A state law violates the Supremacy Clause through the doctrine of intergovernmental immunity if it "regulate[s] the Government *directly* or discriminate[s] against it . . . ." *North Dakota*, 495 U.S. at 434 (emphasis added); *Student Loan Servicing All.*, 351 F. Supp. 3d at 46. Here, NASLA suggests that the Bureau's "proposed regulations both attempt to impermissibly regulate the federal government through its contractors and unconstitutionally discriminate against those contractors on account of their fulfilling a federal function." (NASLA Comment at 6.) NASLA is mistaken on both counts.

First, Chapter 26 and the Bureau's proposed rules do not violate the doctrine of intergovernmental immunity because "they operate against suppliers" (e.g., Navient and ECMC) and not the DOED itself. *North Dakota*, 495 U.S. at 437. Indeed, the Supreme Court "decisively rejected the argument that any state regulation which indirectly regulates the Federal Government's activity is unconstitutional." *Id*. at 434.

NASLA nonetheless asserts that Chapter 26 and the Bureau's proposed rules are similar to a regulatory scheme in California that "directly interfere[d] with the functions of" the Department of Energy ("DOE"), "replace[d] the federal cleanup standards for" DOE contractors, and overrode "federal decisions as to necessary decontamination measures." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014). There, the United States Court of Appeals for the Ninth Circuit determined that California could not directly regulate the DOE as a "responsible party" and prevent its contractors from discharging their contractual obligations. *Id.* But here, again, Chapter 26 and the Bureau's proposed rules neither directly regulate the DOED itself as a qualified education loan servicer nor prevent its contractors from performing their obligations—they only permissibly supplement federal law in the area of student loan servicing regulation.

And second, Chapter 26 and the Bureau's proposed rules are facially neutral state laws, i.e.,

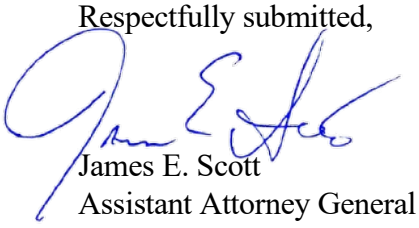
they treat student loan servicers under contracts with the DOED and all other servicers equally—with one caveat. Federal student loan servicers are accorded the benefit of automatic licensure under Virginia Code § 6.2-2602. Thus, Chapter 26 and the Bureau's proposed rules do not "treat someone else better" than they treat DOED contractors, leaving NASLA with no claim that ECMC will be subject to a discriminatory impact. *North Dakota*, 495 U.S. at 438 (internal quotations and citation omitted); *Student Loan Servicing All.*, 351 F. Supp. 3d at 75 ("The D.C. Law and Final Rules do not treat any other student loan servicers better than they treat those that contract with the federal government, and therefore are not impermissibly discriminatory.").

CONCLUSION

As explained above, Chapter 26 and the Bureau's proposed regulations do not violate the Supremacy Clause through any preemption theory or the doctrine of intergovernmental immunity. To the contrary, they are entitled to both a presumption of constitutionality and a presumption against preemption. And, by simply raising general constitutional questions relating to Chapter 26 and the Bureau's proposed rules, NASLA and SLSA fail to show that they are unconstitutional.

The OAG appreciates the opportunity to comment on the foregoing issues raised by NASLA and SLSA. To the extent NASLA and SLSA raise any additional issues with respect to Chapter 26 and the Bureau's proposed rules, the OAG would welcome the opportunity to submit further comments upon request.

Respectfully submitted,



James E. Scott
Assistant Attorney General
Consumer Protection Section