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March 15, 2018

The Honorable Paul D. Ryan
Speaker of the House
H-232, The Capitol
Washington, D.C. 20515

The Honorable Nancy Pelosi
House Minority Leader
H-204, The Capitol
Washington, D.C. 20515

The Honorable Mitch McConnell
Senate Majority Leader
S-230, The Capitol
Washington, D.C. 20510

The Honorable Charles E. Schumer
Senate Minority Leader
S-221, The Capitol
Washington, D.C. 20510

The Honorable Virginia Foxx
Chairwoman, Committee on Education
and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bobby Scott
Ranking Member, Committee on Education
and the Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Lamar Alexander
Chairman, Committee on Health,
Education, Labor & Pensions
U.S. Senate
428 Senate Dirksen Office Building
Washington, D.C. 20510

The Honorable Patty Murray
Ranking Member, Committee on Health,
Education, Labor & Pensions
U.S. Senate
428 Senate Dirksen Office Building
Washington, D.C. 20150

Dear Mr. Speaker, Leader McConnell, Leader Pelosi, Leader Schumer, Chairwoman Foxx, Ranking Member Scott, Chairman Alexander, and Ranking Member Murray:

We, the undersigned attorneys general, write to urge Congress to safeguard the rights of states to protect their residents from student loan-related abuses—and to omit language from the Higher Education Act (the "HEA") that attempts to immunize student loan originators, servicers, or debt collectors from state-level oversight and enforcement. Preempting state laws that apply to these companies would wrongly interfere with traditional state police powers and potentially harm the students and borrowers who rely on the federal student loan program.

In particular, we draw your attention to Section 493E(d) of the HEA reauthorization ("Section 493E(d)") pending in the House (H.R. 4508, as amended in committee), which follows as Exhibit A. In its current form, Section 493E(d) would prohibit states from overseeing, licensing, or addressing certain state law violations by companies that originate, service, or collect on student loans. As more fully discussed in Section I, this language constitutes an all-out assault on states' rights and basic principles of federalism; would upend the dual state-federal oversight of the student loan industry that has persisted since the passage of the HEA; and would thrust the U.S. Department of Education (the "Department") into a heightened consumer protection role for which it is ill-equipped. As addressed in Section II, instead of sidelining state partners, now is the time to empower law enforcement at all levels of government to prevent and combat fraudulent and abusive loan originating, servicing, and collection practices.

In the fall, a bipartisan group of attorneys general wrote to the Secretary of Education encouraging her to resist requests from the student loan industry to preempt state action administratively.[1] As the letter explained, such a move is misguided as a matter of policy and prohibited as a matter of law. In a similar bipartisan fashion, we now call on Congress to affirm the rights of states to protect their residents from fraud and other abuses, including in connection with student loans—and to exclude Section 493E(d) or similar preemption language from the HEA reauthorization. Congress should champion greater federal-state cooperation to assist students and borrowers, as it has in the past, and allow state governments to continue to fulfill their most important constitutional duty: protecting the residents of their states.

I. Section 493E(d) Would Improperly Interfere with the Rights of States Long Respected By Congress and the Department

The U.S. Constitution and the system of federalism it establishes depend on Congress and the other federal branches to respect the rights, sovereignty, and autonomy of the states. As James Madison declared in Federalist 45:

> The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the state.

Federal deference to state prerogatives is greatest with respect to traditional state police powers, which include protecting residents from unfair and deceptive commercial practices. *See Castro v. Collecto, Inc.*, 634 F.3d 779, 784-785 (5th Cir. 2011) ("states have traditionally governed matters regarding contracts and consumer protections"); *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) ("consumer protection law is a field traditionally regulated by the states"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (absent a compelling

[1] https://www.texasattorneygeneral.gov/files/epress/The_Honorable_Betsy_DeVos.pdf

justification, "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power"). Without exception, every state has laws on the books to protect residents from marketplace and financial abuses—and has developed the regulatory framework, legal tools, and expertise to prevent, deter, and respond to misconduct.[2]

It is therefore unsurprising that, when first enacting and later reauthorizing the HEA, Congress took pains to avoid preempting or otherwise interfering with state rights. Even as it granted the Department a range of authorities for administering the federal student loan program, 20 U.S.C. §§ 1071-1087aa-ii, Congress carefully designed the HEA to preempt state law only in "narrow and precise" respects. *Keams v. Tempe Tech. Inst.*, 39 F.3d 222, 225 (9th Cir. 1994). This surgical approach (in contrast to the expansive preemption sought in Section 493E(d)) ensured that states would, in virtually all respects, continue to carry out their traditional enforcement responsibilities, and—as states regularly do for other financial transactions—protect students and borrowers from abuses in connection with student loans. This also ensured that the Department and other federal agencies could rely on the special capabilities of states and localities to police student loan-related abuses.

The Department consequently devised student loan regulations that contemplated and, indeed, invited a robust and ongoing role for states in overseeing and policing the activities of federal contractors originating, servicing, and collecting on student loans. *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). In the past,[3] the Department has recognized that state laws establishing increased oversight of student loan practices and additional safeguards for borrowers did not conflict with federal aims, but complemented them. *Cf.* 55 Fed. Reg. 40120 (concluding that the Department's regulations preempted only those state laws that were "contrary or inconsistent" or in "direct conflict" with federal law, such that a contractor could not accomplish both). In fact, over time, the Department drafted its contracts to specifically *require* its contractors to abide by all "state laws and regulations" and, as those laws changed, to ensure "that all aspects of the service continue to remain in compliance."[4]

Crucially, given the availability of state borrower protections and consumer protection laws, neither the Department nor any other federal agency has ever developed, nor consistently applied, a comprehensive set of borrower protections for student loans.[5] Nor has the Department developed meaningful capacity to address individual allegations of fraud and abuse from student

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[2] https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf ("Every state has a consumer protection law that prohibits deceptive practices, and many prohibit unfair or unconscionable practices as well.")

[3] On March 12, 2018, the Department published a "Notice of Interpretation" in the federal register announcing its position that certain state laws and state enforcement actions are preempted by the HEA. 83 Fed. Reg. 10619. Notably, even this position, which is at odds with prior Department interpretations of the HEA, does not assert the broad field preemption provided in Section 493E(d).

[4] *E.g.*, Department Contract with Nelnet, June 17, 2009, available at: https://www2.ed.gov/policy/gen/leg/foia/contract/nelnet-061709.pdf (Last viewed March 14, 2018).

[5] http://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf

loan borrowers. Consequently, eliminating state law and enforcement could—in the short- or longer-term—thrust the Department into an enlarged consumer protection role beyond its core mandate and leave student loan borrowers without adequate protections. The states have the institutional capacity, the legal framework, and the track record to protect their residents from abuses in the student loan market. The Department does not.

In short, Section 493E(d) would represent a stark departure from the traditional cooperative state-federal approach to enforcement—and would wrongly cast aside the long tradition of congressional deference to state prerogatives under the HEA. Congress, the Department, and the States have long reached the same conclusion: except in narrowly defined circumstances, student loan originators, servicers, and debt collectors are required to follow state as well as federal law. Given the broad implications for states' rights and federalism, there is no justification to upset this balance now.

II. The Student Loan Crisis Demands Sustained and Cooperative Action at State and Federal Levels of Government

As record numbers of Americans struggle to make their student loan payments each month, student loans in the United States are in a state of crisis. Just as in the Global Financial Crisis, when millions of Americans lost or were at risk of losing their homes, we need energetic leadership and oversight at all levels of government to protect students and borrowers from abusive practices. Section 493E(d) seeks to halt those efforts. There is no justification for this special treatment, especially in the middle of a crisis demanding cooperation across government.

Given the states' experience and history in protecting their residents from all manner of fraudulent and unfair conduct, they play an essential role in consumer protection in student loans and education. States are uniquely situated to hear of, understand, confront, and, ultimately, resolve the abuses their residents face in the consumer marketplace. Abuses in connection with schools or student loans are no different. As with other issues facing their citizens, state regulators bring a specialized focus to, and appreciation for, the daily challenges experienced by students and borrowers. Far from interfering with the Department and other federal efforts to rein in abuses, the record overwhelmingly demonstrates that state laws and state enforcement complement and amplify this important work.

The statistics on student loans should be quite familiar to you. As of the fourth quarter of 2017, U.S. borrowers owed an estimated $1.38 trillion in federal and private student loans—more than for auto loans, credit cards, or any other non-mortgage loan category.[6] Standing at 11%, the rate of delinquency and default for student loans exceeds that of any other loan category.[7] These numbers are particularly troubling given that many students became indebted paying tuition at

[6] https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2017Q4.pdf
[7] Strikingly, this figure *understates* the true student loan delinquency rate, excluding loans in deferment, in grace periods, or in forbearance.

certain for-profit schools that were found to be deficient or deceptive. Indeed, state successes in reining in certain underlying abuses by some for-profit education companies illustrate the effectiveness of state-level action. By working individually and in cooperation with the federal government, state attorneys general have successfully taken action to end widespread deceptive practices, such as the misrepresentation of job opportunities and falsification of job placement rates.[8] State attorneys general have also successfully obtained millions of dollars in restitution and loan forgiveness. For example, state attorneys general obtained over $100 million in loan forgiveness as part of a multi-state settlement with Education Management Corporation stemming from allegations that the school misled students about program costs, graduation rates, and job placement rates. The FTC, the New York state attorney general, and other state regulators obtained over $100 million in refunds and debt relief for former students of DeVry University.[9] In 2015, the Department worked with the California state attorney general to make findings entitling former Corinthian Colleges student borrowers to federal student loan relief.[10] Just recently, a coalition of state and federal agencies reached a nationwide settlement with Aequitas Capital Management, a firm which had provided loans to the now defunct Corinthian Colleges.[11]

Over the past several years, the practices of student loan servicers and debt collectors have come under increased scrutiny from consumer advocates and government agencies. In 2014, the National Consumer Law Center reported on potential abuses by student debt collectors reminiscent of the robo-signing frauds seen several years ago in the mortgage sector, including seeking to collect on student debt they may not own.[12] The 2015 and 2016 Government Accountability Office reports on student loan servicing later identified various deficiencies in loan servicing practices, including failures to provide information to borrowers about their repayment options and difficulties in contacting servicers through the servicer call centers.[13] And, in its annual reports, the Student Loan Ombudsman at the CFPB has tracked a phenomenon we have seen in our own offices: an increasing number of students and borrowers complaining of potentially illegal

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[8] These include enforcement actions against American Career Institute; Ashford University/Bridgepoint Education, Inc.; Corinthian Colleges, Inc.; Career Education Corporation; Education Management Corporation; DeVry University; and ITT Tech, among others.

[9] https://www.ftc.gov/enforcement/cases-proceedings/refunds/devry-refunds-debt-forgiveness; https://ag.ny.gov/press-release/ag-schneiderman-announces-restitution-hundreds-students-duped-devry-university

[10] https://www.ed.gov/news/press-releases/department-education-and-attorney-general-kamala-harris-announce-findings-investigation-wyotech-and-everest-programs

[11] https://texasattorneygeneral.gov/news/releases/ag-paxton-4500-texans-to-receive-17.6-million-in-student-loan-relief; https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-will-provide-24-million-loan-forgiveness-and-debt

[12] NCLC Report, Going to School on Robo-signing: How to Help Borrowers and Stop the Abuses in Private Student Loan Collection Cases, April 2014, available at www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/robo-signing-2014.pdf (Last viewed: September 10, 2017).

[13] Government Accountability Office Report, Federal Student Loans: Education Could Do More to Help Ensure Borrowers Are Aware of Repayment and Forgiveness Options, available at https://www.gao.gov/assets/680/672136.pdf; Government Accountability Office Report, Federal Student Loans: Education Could Improve Direct Loan Program Customer Service and Oversight, available at http://www.gao.gov/assets/680/677159.pdf (Last viewed: September 6, 2017).

practices by the companies servicing their student loans or collecting student debts, including improper steering of borrowers away from options like income-based repayment that could help them make their monthly payments.

Cooperation at the state and federal level enhances enforcement and better protects the millions of Americans with outstanding student loans. One example is the enforcement actions filed by the attorneys general of Illinois, Pennsylvania and Washington State against the largest servicer of federal student loans, Navient Corporation, and certain subsidiaries (collectively, "Navient").[14] Other states continue to investigate Navient, and there are active state investigations or pending lawsuits concerning the student loan servicing and debt collection practices of other key players in this area, including National Collegiate Student Loan Trusts.[15]

These state law enforcement efforts have been joined with legislative reforms that, for example, seek to improve oversight of student loan servicers and debt collectors, including through licensing programs. *See, e.g.*, Conn. Gen. Stat. §§ 36a-846-854; Cal. Fin. Code §§ 28100-28182; Ill. Public Act 100-540 (Enacted Nov. 7, 2017). Just as with state licensing of other industries, including mortgage brokers and debt collectors more broadly, these state rules seek to set basic standards and prevent issues before they emerge. For example, the Connecticut Student Loan Service Standards require that student loan borrowers are "conspicuously and timely notified" when their loan servicer changes and that servicers maintain "records that clearly identify amounts and dates of payments received from borrowers . . . ."[16] These are common-sense requirements that neither conflict with federal rules nor place any undue burden on loan servicers.

There is no need for Congress to undermine state authority or annul complementary state disclosure requirements just as our combined federal-state efforts against abusive practices in the student loan servicing industry is bearing fruit. Nor is there any justification to seek to interfere with the traditional police power of states to protect their own residents from abuses in the marketplace.

* * *

For all these reasons, we urge you to affirm traditional states' rights and reject language to bar states from protecting their residents from student loan abuses.

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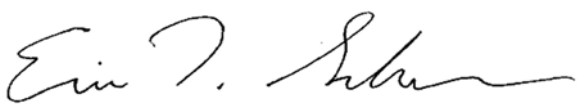
[14] The Illinois complaint also alleges various misdeeds in connection with the origination of those loans by Sallie Mae.

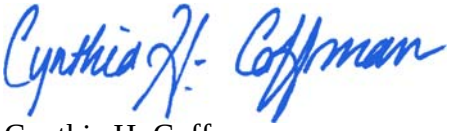
[15] https://www.nytimes.com/2017/07/19/business/dealbook/new-york-inquiry-national-collegiate-student-loan-trusts.html.

[16] State of Connecticut, Department of Banking, Student Loan Service Standards, available at http://www.ct.gov/dob/lib/dob/consumer_credit_nonhtml/student_loan_standards_7-1-17.pdf (Last viewed: September 13, 2017).

Respectfully submitted,

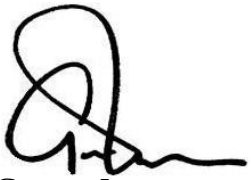


Eric T. Schneiderman
New York Attorney General



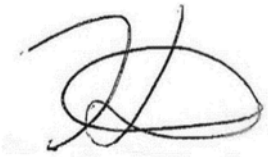
Cynthia H. Coffman
Colorado Attorney General

Xavier Becerra
California Attorney General

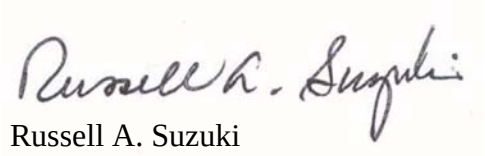


George Jepsen
Connecticut Attorney General

Matthew P. Denn
Delaware Attorney General

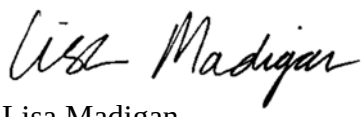


Karl A. Racine
District of Columbia Attorney General



Russell A. Suzuki
Hawaii Attorney General (Acting)

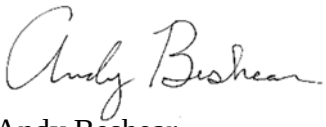
Stephen H. Levins
Executive Director, Hawaii Office of
Consumer Protection



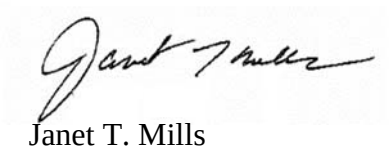
Lisa Madigan
Illinois Attorney General

Thomas J. Miller
Iowa Attorney General

Derek Schmidt
Kansas Attorney General



Andy Beshear
Kentucky Attorney General



Janet T. Mills
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Brian E. Frosh
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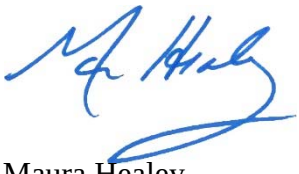

Maura Healey
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Lori Swanson
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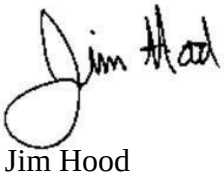

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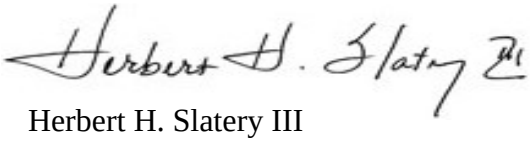
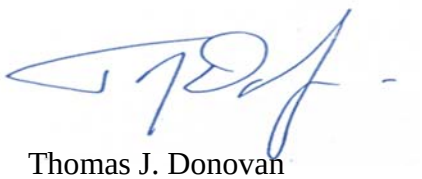
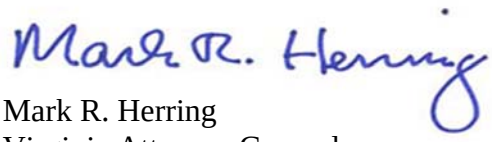


Herbert H. Slatery III
Tennessee Attorney General

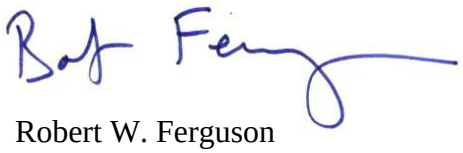
Sean D. Reyes
Utah Attorney General



Thomas J. Donovan
Vermont Attorney General



Mark R. Herring
Virginia Attorney General



Robert W. Ferguson
Washington State Attorney General