DEPARTMENT OF EDUCATION

34 CFR Chapter VI

[Docket ID ED-2021-OS-0107]

Federal Preemption and Joint Federal-State Regulation and Oversight of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers

AGENCY: Office of the Secretary, Department of Education.

ACTION: Final interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this final interpretation, which revises and supersedes its interpretation published on August 12, 2021 (the 2021 interpretation). This interpretation revises and clarifies the Department's position on the legality of State laws and regulations that govern various aspects of the servicing of Federal student loans, such as preventing unfair or deceptive practices, correcting misapplied payments, or addressing refusals to communicate with borrowers. The Department concludes that these State laws are preempted by the Higher Education Act of 1965, as amended (HEA) and other applicable Federal laws only in limited and discrete respects, as further discussed in this interpretation. This interpretation will help facilitate close coordination between the Department and its State partners to further enhance both servicer accountability and borrower protections.

DATES: This final interpretation is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Background:

On August 12, 2021, the Department published the 2021 interpretation in the *Federal Register.* We invited comment on this interpretation because we value the public's input and perspective on these critical issues. We considered all the comments we received, and we decided to revise the 2021 interpretation in certain respects, as discussed below. This interpretation revises and supersedes the 2021 interpretation with respect to State regulation of the servicing of loans under both the William D. Ford Federal Direct Loan Program (Direct Loans) and the Federal Family Education Loan Program (FFEL Loans).

Public Comment: In response to our invitation to comment on the 2021 interpretation, 14 parties submitted substantive comments, and we received 1 comment that was unrelated to the interpretation.

Analysis of Comments and Changes: An analysis of the comments and any changes in the interpretation since publication of the 2021 interpretation follows. We do not address comments that raised concerns not directly related to the 2021 interpretation. Various technical and typographical edits have also been made as needed.

Comments: Several commenters suggested that we should specify that the revised interpretation supersedes not only the 2018 interpretation but also any statements by the Department either before or since that are inconsistent with this interpretation.

Discussion: We note that after publication of the 2018 interpretation there were statements by Department officials which were consistent with that interpretation. While those statements do not have any current legal import, we agree with the commenters that it is important to make clear that this interpretation supersedes any of those statements that are not consistent with this interpretation to ensure an accurate and consistent presentation of the Department's interpretation on preemption.

Changes: We have modified the interpretation to specifically note that it supersedes prior statements by the Department that are not consistent with this final interpretation.

Comments: Several commenters suggested that the 2021 interpretation was focused too narrowly on State laws affecting "affirmative misrepresentations" as not being subject to preemption and should also specifically address other types of State laws relating to loan servicers' conduct, such as State laws governing dispute resolution procedures for loan servicers or state laws governing licensure.

Discussion: Both the 2021 interpretation and this final interpretation address state laws governing licensure of student loan servicers. Otherwise, we have retained the broad discussion of state laws governing servicer conduct rather than specifically address specific types of those laws. An interpretation that focuses on preemption of specific types of state laws could be read as more narrow than intended and result in further litigation between states and servicers.

Changes: None

Comments: One commenter noted that the revised interpretation did not address every court decision on the preemption of State laws relating to student loan servicing.

Discussion: The 2021 interpretation discussed the court decisions which the Department determined are most pertinent to and most persuasive on the issues addressed in

the interpretation. The revised interpretation is in accord with those decisions.

Changes: None

Comments: Several commenters suggested that the 2021 interpretation did not appropriately describe the standard for conflict preemption.

Discussion: We believe that the discussion of conflict preemption in the 2021 interpretation appropriately described the legal standard. However, we acknowledge that the discussion could be made clearer and have done so in this final interpretation.

Changes: We have modified the discussion of conflict preemption to more clearly describe the applicable legal standard.

The Department's interpretation is presented here in its final form.

Final Interpretation

A. General Preemption Principles

The Supreme Court has established fundamental principles of Federal preemption doctrine over more than two centuries. Throughout the history of our country, the Court has repeatedly emphasized that claims of preemption of State law are construed to reflect "'the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). And

where, as here, Congress legislates in a field traditionally occupied by the States, the Court at times has held that the presumption against preemption "applies with particular force." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008); *see, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev't Comm'n*, 461 U.S. 190 (1983) (Federal licensing of safety designs for nuclear power plants did not preempt State action suspending construction of such plants on economic grounds).

In 2015, Connecticut became the first State to enact a law requiring licensure and oversight of student loan servicers operating in the State. In its wake, a growing number of States have followed suit by enacting their own laws or adopting their own regulations. These laws or regulations provide for licensure and oversight of student loan servicers. They also typically confer or confirm protections for citizens against prohibited acts such as engaging in unfair, deceptive, or fraudulent acts or practices; misapplying payments; reporting inaccurate information to credit bureaus; or refusing to communicate with an authorized representative of the student loan borrower.

The States that have created these regulatory regimes assert that they are acting under their general police powers for the purpose of protecting their citizens. That

is a zone in which preemption is at its weakest. Particularly "in a field which the States have traditionally occupied," *Wyeth*, 555 U.S. at 565, the Supreme Court has emphasized the need to begin "with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516. One area that states have traditionally occupied is consumer protection, which has traditionally been regulated by the States, with more limited and occasional Federal involvement. *See, e.g., California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963).

B. Field Preemption

The 2018 interpretation opined that "the statutory and regulatory provisions and contracts governing the Direct Loan Program preclude State regulation, either of borrowers or servicers." 83 *Fed. Reg.* at 10,621. It further stated that "the HEA and Department regulations governing the FFEL Program preempt State servicing laws that conflict with, or impede the uniform administration of, the program." *Id.*

This broad assertion of power—that Federal law preempts the entire field of law relating to Federal student loan servicing—has largely been rejected by the courts. That is particularly the case where Congress has considered the matter and expressly preempted specific but

limited areas of State law, as discussed below. Indeed, "no circuit court that has considered the issue has found field preemption" to apply in the context of the HEA. *Lawson-Ross* v. *Great Lakes Higher Educ. Corp.,* 955 F.3d 908, 923(11th Cir. 2020); *see also Nelson v. Great Lakes Educ. Loan Services, Inc.*, 928 F.3d 639, 652 (7th Cir. 2019) ("Courts have consistently held that field preemption does not apply to the HEA, and we do as well."); *Chae v. SLM Corp.*, 593 F.3d 936, 941-42 (9th Cir. 2010) (same); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125-26 (11th Cir. 2004) (same); *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (same).

At no time prior to the issuance of the 2018 interpretation did the Department take the view that field preemption applied to the servicing and collection of Federal student loans, and the courts have held that the Department did not provide persuasive reasons for its new position. After reexamining the issue, the Department rejects the analysis included in the 2018 interpretation. The Department concludes, in line with its position prior to the 2018 interpretation, that field preemption does not apply to the servicing and collection of Federal student loans.

C. Express Preemption

The 2018 interpretation further asserted broad preclusion of State student loan servicing laws on the ground that any State efforts to require Federal student loan servicers to reveal facts or information not required by Federal law are expressly preempted under the HEA. *See* 83 *Fed. Reg.* at 10,621. By painting with such a broad brush, the 2018 interpretation failed to consider more carefully the specific terms of applicable Federal laws and how they apply to State regulatory efforts.

In fact, the HEA does contain some specific provisions that explicitly preempt certain areas of State law, but those provisions are limited and selective. They include restrictions on such matters as the application of State usury laws, *see* 20 U.S.C. 1078(d), of State statutes of limitation, *see* 20 U.S.C. 1091a(a)(2), of the State-law defense of infancy, *see* 20 U.S.C. 1091a(b)(2), of State wage garnishment laws, *see* 20 U.S.C. 1095a(a), of State laws on certain costs and charges, *see* 20 U.S.C. 1091a(b), and of State disclosure requirements that conflict with 20 U.S.C. 1083, *see* 20 U.S.C. 1098g. These provisions, granular as they are, reinforce the point that Congress consciously opted to displace State authority only in these limited particulars and did not intend or provide for broad field preemption of State laws governing student loan servicing. *See, e.g.*, *Nelson*, 928 F.3d at 650 ("The number of those provisions and their specificity show that

Congress considered preemption issues and made its decisions. Courts should enforce those provisions, but we should not add to them on the theory that more sweeping preemption seems like a better policy."). They also undermine any broad finding of express preemption, which requires courts to "identify the domain expressly preempted by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). In the HEA, Congress identified a series of pinpoints rather than casting a wide blanket over the entire area, and its actions must be respected in determining the scope of preemption of State law. *See id.* at 485 (intent of Congress is the "ultimate touchstone" of preemption analysis).

The 2018 interpretation put special emphasis on the HEA provision addressing State "disclosure requirements." *See* 83 *Fed. Reg.* at 10,621. It observed that this provision specified "what information must be provided in the context of the Federal loan programs," and expanded upon the provision by stating that it also nullified any State "prohibitions on misrepresentation or the omission of material information." *Id.* But the courts have generally rejected this approach. First, this provision of the HEA covers information conveyed to the borrower before the disbursement of loan proceeds, before repayment of the loans begins, and during repayment of the loans. The information disclosed is "intended to ensure that consumer-

borrowers have accurate, relevant information and can make their own informed choices about their financial affairs." *Nelson*, 928 F.3d at 647. Notably, the HEA provision on disclosure requirements does *not* cover explicit or implicit misrepresentations, which are not about conveying either *more* or *less* information, but instead are simply about conveying *accurate* information so as not to mislead or defraud the borrower. The courts found this distinction between misrepresentations and failure to disclose to be deeply grounded in basic principles of the common law of torts, which sharply distinguish failure-to-disclose claims from claims for affirmative misrepresentation. *See, e.g.*, *Lawson-Ross*, 955 F.3d at 917-19; *Nelson*, 928 F.3d at 647-49.

Second, the 2018 interpretation purported to rely on the Ninth Circuit's decision in the *Chae* case, which concerned the failure to disclose information in the specific ways required in Federal law, such as in billing statements. But the findings in *Chae* do not preclude State regulation of affirmative misrepresentations or deceptive acts or practices about information that the servicer was not required to disclose or other types of misconduct. *See Chae*, 593 F.3d at 943. Nor can such actions plausibly be reframed as a mere "failure to disclose" correct information. *Pennsylvania v. Navient Corp.*, 967 F.3d 273, 289-90 (3d Cir. 2020). The *Chae* court drew this same

distinction, holding that the "use of fraudulent and deceptive practices apart from the billing statements" are not preempted by Federal law. *See Chae*, 593 F.3d at 943; *see also Lawson-Ross*, 955 F.3d at 919 (discussing *Chae*); *Nelson*, 928 F.3d at 649-50 (same).

For these reasons, the Department finds that, except in the limited and specific instances set forth in the HEA itself, State measures to engage in oversight, require actions of, or otherwise regulate the conduct of Federal student loan servicers are not expressly preempted by the HEA. Accordingly, in reconsidering the issue of express preemption the Department does not find the conclusions reached in the 2018 interpretation to be persuasive. Likewise, the courts generally have not been persuaded when these issues have been presented to them. *See, e.g., Student Loan Servicing Alliance*, 351 F. Supp. 3d at 51-55; *Lawson-Ross*, 955 F.3d at 916-20; *Nelson*, 928 F.3d at 647-50.

D. Conflict Preemption

When, as here, both the Federal government and the States have legitimate interests in the same areas of governance, courts frequently implement constitutional principles of federalism by seeking to balance and respect those mutual interests. Where the two exercises of authority collide in irremediable conflict, then State law must yield to the superior force of the Supremacy Clause.

But courts often have sought to harmonize Federal and State power where they find that they can do so. Therefore, implied conflict preemption has been regarded as only nullifying State action if "it is impossible for a private party to comply with both state and federal law" or if State law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Although the 2018 interpretation laid out some generalized grounds on which Federal and State regulations of student loan servicers could be found to clash, the courts have rejected these arguments. They have noted the Supreme Court's overarching point that where the enacted legislation explicitly addressed the issue of preemption, as is true of the HEA, "there is no need to infer congressional intent to preempt State laws from the substantive provisions of the legislation." *Cipollone*, 505 U.S. at 517; *see also Navient,* 967 F.3d at 292-93; *Lawson-Ross*, 955 F.3d at 920; *Nelson*, 928 F.3d at 648.

When the court in *Student Loan Servicing Alliance* considered the District of Columbia's procedures for protecting privacy, resolving complaints, and mandating compliance with timelines, it concluded that "[u]pon closer inspection of the state and federal provisions, it is

apparent that there is no actual conflict on the grounds of impossibility." 351 F. Supp. 3d at 60. The court determined that each objection raised by the plaintiff about the supposed inability to harmonize Federal and State procedures posited "a false conflict" and could be accommodated by officials who are willing to work together in taking reasonable steps to do so. *Id.* at 60-61.

The most recent courts to consider these issues under the rubric of conflict preemption have consistently determined that the HEA places no emphasis on maintaining uniformity in Federal student loan servicing and thus they have upheld State authority to root out fraud and affirmative misrepresentations in the Federal student aid program. *See, e.g., Navient*, 967 F.3d at 292-94 (explicitly rejecting *Chae* on this point); *Lawson-Ross*, 955 F.3d at 920-23 (same); *Nelson*, 928 F.3d at 650-51 (same).

Courts have generally found conflict preemption to apply to State laws requiring licensing of the Department's student loan servicers in the limited circumstances where the licensing scheme purported to disqualify a Federal contractor from working within the State's boundaries. It is well-established that States cannot impede the Federal Government's selection of contractors through the imposition of a licensing requirement. In *Leslie Miller Inc. v. Arkansas*, 352 U.S. 187 (1956) (per curiam), the Supreme Court held that Federal bidding statutes and

regulations requiring the selection of "responsible bidder[s]" for Federal contracts would be frustrated by "giv[ing] the State's licensing board a virtual power of review over the federal determination" about selecting its own contractors. *Id.* at 190.

Two recent Federal court decisions have concluded that this well-established precedent applies to a State's refusal to license Federal student loan servicers. In *Student Loan Servicing Alliance*, the Court concluded that the District of Columbia's licensing scheme was preempted because it would bar Federal student loan contractors from working within the District. *See* 351 F. Supp. 3d at 61-72, 75-76. Similarly, in *Pennsylvania Higher Education Assistance Agency v. Perez*, 457 F. Supp. 3d 112, 122-25 (D. Conn. 2020), the Court concluded that the State's authority to grant or withhold a license to a Federal student loan servicer was preempted because it could disqualify Federal student loan contractors from operating within the State. Notably, neither of these decisions relied on the 2018 interpretation in concluding that State laws relating to licensing were preempted; and in fact, in *Student Loan Servicing Alliance,* the court explicitly rejected the preemption analysis in the 2018 interpretation.

E. Direct Loan Program and Preemption

The Direct Loan program, which was created as part of the Student Loan Reform Act of 1993 (Pub. L. 103-66), poses

some specific statutory and regulatory issues of preemption. In this program, the Federal government makes loans directly to the borrower and is responsible for all aspects of the loan from origination through repayment, including servicing and collection. Congress also provided that the Department could use contractors to service the loans and for any other purposes deemed "necessary to ensure the successful operation of the program." 20 U.S.C. 1087f(b)(4). When procuring such services, the Department must comply with all applicable Federal laws and regulations and design its program so that the loan servicing is "provided at competitive prices." 20 U.S.C. 1087f(a)(1). And the Department specifies in some detail "the responsibilities and obligations of the servicers for Direct Loans." 2018 interpretation, 83 *Fed. Reg.* at 10,620.

The 2018 interpretation observed that in some instances, these provisions would operate to preempt State requirements that directly conflicted with requirements imposed under Federal law. For example, as discussed above, an attempt by a State to revoke a license granted to a Federal contractor by the Federal government for purposes established under Federal law would be invalid. *Leslie Miller*, 352 U.S. at 190. Yet this does not imply that a State cannot act to impose reasonable, generally applicable conditions on entities (including Federally licensed

contractors) operating within the bounds of the State, as authorized under its police powers exercised on behalf of its citizens. As courts addressing this issue have correctly concluded: "Properly understood, state law and federal law can exist in harmony here" under the HEA. *Nelson*, 928 F.3d at 651; *see also Navient*, 967 F.3d at 293-94 (quoting *Nelson*). *Cf. California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) ("Rather than evidencing an intent to preempt such state regulation, the Forest Service regulations appear to assume compliance with state laws.").

Where the States impose conduct requirements that prohibit misrepresentations and other types of misconduct by student loan servicers, many of those measures are not preempted by general disclosure requirements in Federal law. *See, e.g., Cipollone*, 505 U.S. at 529 ("State-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards."). Notably, the courts have repudiated the expansive approach taken in the 2018 interpretation, which was premised on the claim that the purpose of the Direct Loan program was to "establish a uniform, streamlined, and simplified lending program managed at the Federal level." 83 *Fed. Reg.* at 10,621. *See, e.g., Navient*, 967 F.3d at 293 (finding no legislative support for uniformity here); *Lawson-Ross*, 955 F.3d at 921-22 (same); *Nelson*, 928 F.3d at 651 (same);

College Loan Corp. v. SLM Corp., 396 F.3d 588, 597 (4th Cir. 2005) (same). Indeed, it is telling that Congress's own stated purposes in the HEA itself make no mention of uniformity, *see Lawson-Ross*, 955 F.3d at 921, and the Supreme Court has held that courts are not to infer preemption merely from the comprehensive nature of Federal regulation. *See New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973).

The cases rejecting the claims made in the 2018 interpretation about the need for uniformity also point out that "[e]ven if we assume that uniformity is a purpose of the HEA, [claims about affirmative misrepresentations by loan servicers] would not conflict with that purpose." *Lawson-Ross*, 955 F.3d at 922-23. Even such uniformity as does exist in the program "is not harmed by prohibiting unfair or deceptive conduct in the operation of the program that is not explicitly permitted by the HEA." *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 553 (M.D. Pa. 2018), *aff'd*, 967 F.3d 273 (3d Cir. 2020).

For similar reasons, the arguments in the 2018 interpretation that accompany the arguments for uniformity, which relate to reducing costs and treating borrowers equitably while not confusing them, *see* 83 *Fed. Reg.* at 10,620-21, are likewise unavailing. Reducing costs by making fraudulent or false statements to student loan borrowers or engaging in other misconduct is indefensible

as a tactic; and allowing such misconduct to be perpetrated on a mass scale would neither foster equitable treatment for borrowers nor spare them any confusion. In addition, relieving Federal contractors of *any* exposure to liability for fraud, false statements, or other actions that harm borrowers would save them money, to be sure, but it would be a breathtakingly broad assertion of preemption, given that such contractors are routinely subject to liability for violating State tort laws.

F. FFEL Program Loans and Preemption

As with the Direct Loan program, the FFEL program poses some specific statutory and regulatory issues of preemption. The general treatment of these issues runs parallel to the discussion for Direct Loans, in that some specific Federal laws and regulations preempt State laws that conflict squarely on matters such as timelines and other particulars of debt collection and loan servicing. But here, too, the grounds for preemption of State laws are narrow and liability under State law for many other matters such as dispute resolution processes, affirmative misrepresentations, or other types of misconduct that harm loan borrowers would not be preempted.

In the past, the Department had identified specific types of State laws that are preempted because they would frustrate the operation and purposes of the Federal student loan programs. On October 1, 1990, for instance, the

Department issued a notice interpreting its regulations governing the FFEL program (then known as the Guaranteed Student Loan program), which require guaranty agencies and lenders to take certain actions to collect FFEL program loans. The Department's position in that interpretive notice was that the regulations requiring those activities preempt State laws regarding those very same activities. *See* 55 *Fed. Reg.* 40,120. More specifically, the Department explained that its regulations establish minimum collection actions required on all FFEL obligations, which preempt contrary or inconsistent State laws that would prevent compliance with the Federal regulations. *See id.* at 40,121. These regulations for the FFEL Program are now codified at 34 CFR 682.410(b)(8) and (o).

The 2018 interpretation identified additional categories of State laws that it viewed as inconsistent with specific Federal measures. These included laws creating deadlines for servicers to respond to borrower inquiries or disputes; deadlines for notifying borrowers of loan transfers between servicers; and a few other miscellaneous items. *See* 83 *Fed. Reg.* at 10,621-22. According to the 2018 interpretation, if those specific State laws directly contradicted an equally specific Federal law, they were preempted.

However, and as discussed above, preemption issues are necessarily contextual and fact-specific and cannot be

determined without analysis of specific State requirements and the equally specific Federal measures with which they purport to conflict. Moreover, mere inconsistency is not the test for preemption; instead, these specific State laws are only preempted where "it is impossible . . . to comply with both state and federal law" or if State law poses "an obstacle" to accomplishing the full purposes of Congress. *Crosby*, 530 U.S. at 373. Simply because some provisions of Federal and State law may not be precisely the same in every respect does not mean they cannot be applied in a coordinated manner as a cooperative regulatory regime.

As with Direct Loans, moreover, the limits of preemption are reached when the discussion moves beyond simply setting specific details of such "administrative mechanisms." *Nelson*, 928 F.3d at 651. At the heart of State laws and regulations in this area are measures designed to protect consumers. There may be many such measures that are not preempted by the general disclosure requirements in Federal law, such as State measures that prohibit affirmative misrepresentations by loan servicers. *See, e.g., Lawson-Ross*, 955 F.3d at 922-23. But this interpretation should not be read to suggest that *only* State laws and regulations relating to affirmative misrepresentation are not preempted. States may consider and adopt additional measures which protect borrowers and can be harmonized with Federal law. These measures can be

enforced by the States, and the Department can and will work with State officials to root out all forms of fraud, falsehood, improper conduct, and other harms to borrowers that may occur in the Federal student aid programs.

G. Enhanced Borrower Protections Through Federal-State Cooperation

The final section of the 2018 interpretation cautioned that broad preemption of State student loan servicer laws would not leave borrowers unprotected, and it elaborated ways that the Department "continues to oversee loan servicers to ensure that borrowers receive exemplary customer service and are protected from substandard practices." 83 *Fed. Reg.* at 10,622. In this interpretation, the Department reaffirms these important objectives and its determination to hold servicers accountable for failing to meet these standards and expectations. Indeed, this approach is embodied in the newest contracts that the Department has executed with its loan servicers, which include provisions to improve performance, accountability, and transparency. The contracts also include requirements that the loan servicers must comply with applicable State laws, which embodies the Department's recognition that State laws are generally not preempted.

Yet the Department also finds that broad preemption of State student loan servicer laws would disserve these

objectives for two reasons. First, State officials serve as an essential complement to the Federal government in protecting their citizens from substandard or improper practices. Second, as explained below, the Department has concluded that close coordination with its State partners will further enhance both servicer accountability and borrower protections.

Accordingly, the Department has considered the matter further and finds that the approach taken in the 2018 interpretation is seriously flawed. For all the reasons stated in this interpretation, the Department is affirmatively changing its approach to preemption of State student loan servicing laws that was laid out in the 2018 interpretation. To the extent that the final section of the 2018 interpretation purported to provide additional factual material intended to justify its position, those underpinnings are examined more carefully below, and the Department concludes that they do not support the 2018 interpretation either as a historical matter or, as a factual matter, in the likelihood that such an exclusionary approach will succeed in attaining its stated objectives. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (agency may change prior policy without being subject to any more searching judicial review where the agency acknowledges the change of position and accounts for any claimed factual underpinnings of the prior policy).

As a historical matter, the Federal government and the States have sought to work closely and cooperatively in certain areas of shared responsibility, such as law enforcement and consumer protection. All parties recognize that the country is vast, its population has grown to immense proportions, and public resources are limited. Administration of Federal student loans involves managing customer relationships for tens of millions of borrowers in a variety of circumstances and for distinct loan programs with different requirements that have grown up over the past several decades. The complexity and scope of the task is shown by the Department's longstanding practice of engaging large private contractors operating nationwide to service millions of borrowers with cumulative debts that in the aggregate now exceed $1.5 trillion. Managing these outside contractors to assure that the student loan program operates effectively and in line with its intended objectives is a substantial undertaking, and the oversight challenges are evident and significant.

The Department recognizes that collaboration with the States can supply the means to ensure better oversight of these contractors and provide more protection for student loan borrowers. Not all States have invested resources in overseeing loan servicers, but to the extent that they have, some State attorneys general and State student loan servicing regulators, with their own capacities and

personnel, are able to maintain a closer watch over how these loan servicers operate in their States, including how borrowers are being treated and how their needs are being met. Although the 2018 interpretation strove to justify how the Department could perform this oversight task adequately on its own, the Department now finds that a different approach is more likely to succeed: a coordinated partnership of interested Federal and State officials will produce a more robust system of supervision and enforcement to monitor and improve performance under this far-flung system.

In the 2018 interpretation, the Department explained as a factual matter how it would seek to monitor servicer compliance with contractual requirements related to customer service, including call monitoring, process monitoring, and servicer auditing. *See* 83 *Fed. Reg.* at 10,622. It also described how it uses contracting requirements to incentivize improved customer service and maintain mechanisms for reviewing and responding to complaints about customer service. But the Department's limited resources for compliance monitoring must also encompass various other issues unrelated to customer service, such as compliance with billing practices and other related operational issues. And many of the recently enacted State laws are designed to focus squarely on customer service issues: servicers engaging in unfair,

deceptive, or fraudulent acts or practices; servicers misapplying payments; servicers reporting inaccurate information on borrower performance to credit bureaus; and servicers refusing to communicate with borrowers' authorized representatives. *See, e.g.*, Conn. Gen. Stat. § 36a-850 (2016); 110 Ill. Comp. Stat. 992/20-20(i) (2018); Colo. Rev. Stat. § 5-20-109 (2019). Notably, a growing number of States are enacting these laws because of the documented need for more attention to problems adversely affecting their citizens. Rather than viewing this activity by the States as inconvenient or detrimental to its objectives, the Department now recognizes that State regulators can be additive in helping to achieve the same objectives championed in the 2018 interpretation. Rather than expending time and effort contesting the authority of the States in unproductive litigation, the Department intends to work with the States to share the burdens and costs of oversight to ensure that loan servicers are accountable for their performance in better serving borrowers.

Indeed, a collaborative approach where Federal and State officials work together to achieve shared objectives will likely produce a sum that is greater than its individual parts. The Department's budget is not unlimited and maintaining effective oversight of student loan servicers that deal with tens of millions of borrower

accounts is a mammoth task. Further examples discussed in the 2018 interpretation only underscore this point. For instance, the Department has built incentives into the servicer contracts to favor better-performing servicers at the expense of poorer-performing ones, to attain higher levels of customer satisfaction. *See id.* But by the same token, regulatory oversight by the States is likewise intended and designed to secure higher levels of servicer performance and to limit instances of poor customer service and other abuses through different mechanisms and channels. The same is true of the other example highlighted in the 2018 interpretation, which explains how the Department's formal complaint process can help borrowers elevate customer service issues for heightened attention and prompt resolution. *See id.* But as with the Department itself, State regulators and State attorneys general have staff members who are typically available to field and respond to complaints. Here again, the cumulative force of combining these joint efforts augments, rather than detracts from, the goal of improving customer service.

The concept of "cooperative federalism" laid out here can and should also lead to mutual efforts to make improvements in other areas of student loan servicing that support greater access to higher education. The core purpose of State laws and regulations overseeing student loan servicers is to protect their citizens who are

borrowers of student loans and their families. The reason they took out those loans in the first place was to secure the benefits of higher education and to cope with the financial costs involved. Consideration of these broader objectives reveals many opportunities for productive cooperation that can be fruitfully pursued between Federal and State officials who share these objectives and are interested in pursuing them jointly. In short, an approach that is marked by Federal-State cooperation is likely to secure better implementation of student aid programs as well as better service to borrowers and their families. Out of this cooperation may come a broader understanding of how these mutual efforts can advance the central goal of facilitating affordable access to higher education for students in every part of the country. For these reasons, the Department issued the 2021 interpretation with the explicit purpose of revoking and superseding the 2018 interpretation. Now, the Department confirms that this interpretation supersedes prior statements by the Department that are not consistent with this final interpretation.

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Miguel A. Cardona,
Secretary of Education.

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