



STUDENT BORROWER
PROTECTION CENTER

PROTECT STUDENT BORROWERS

How Washington Can End Trump-Era Obstruction and
Demand Justice in 2021 and Beyond

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About this Report

For the last four years, Education Secretary Betsy DeVos has engaged in an unprecedented campaign to shield student loan companies from oversight. At every step, the U.S. Department of Education (ED) has obstructed efforts by law enforcement officials to protect borrowers, instead bringing the full weight of the federal government to bear on behalf of the student loan industry.¹ In courts across the nation, federal officials have supported student loan companies' efforts to escape accountability for abuses and denied borrowers' avenues to seek justice when industry breaks the law.²

At every step, the U.S. Department of Education has obstructed efforts by law enforcement officials to protect borrowers.

¹ *See, e.g.*, Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619 (Mar. 12, 2018), <https://www.federalregister.gov/documents/2018/03/12/2018-04924/federal-preemption-and-state-regulation-of-the-department-of-educations-federal-student-loan>; Memorandum from Patrick A. Bradfield, Dir., Fed. Student Aid Acquisitions, U.S. Dep't of Educ. (Dec. 27, 2017), <https://static.politico.com/51/1f/0f805fd04c2eb035bcd79f9200be/december-27-2017-servicer-memo.pdf>; Press Release, Ranking Member, U.S. Senate Comm. On Health, Educ., Labor & Pensions, Senate Democrats Urge DeVos to Hold Student Loan Companies Accountable, Increase Transparency to Ensure Companies are Following the Law (Dec. 6, 2018), <https://www.help.senate.gov/ranking/newsroom/press/senate-democrats-urge-devos-to-hold-student-loan-companies-accountable-increase-transparency-to-ensure-companies-are-following-the-law>; Letter from Attorneys General to Betsy DeVos, Sec'y, U.S. Dep't of Educ. (Apr. 4, 2019), <https://www.marylandattorneygeneral.gov/News%20Documents/Final%20AGs%20Letter%20to%20DOE%204.4.19.pdf>.

² *See, e.g.*, Statement of Interest of the United States, Pa. Higher Educ. Assistance Agency v. Perez, 416 F. Supp. 3d 75 (D. Conn. 2019) (No. 18-cv-1114), <https://www.courtlistener.com/recap/gov.uscourts.ctd.126659/gov.uscourts.ctd.126659.70.0.pdf>; Statement of Interest of the United States, Student Loan Servicing All. v. Taylor, 351 F. Supp. 3d 26 (D.D.C. 2018) (No. 18-cv-00640), https://www.courtlistener.com/recap/gov.uscourts.dcd.194585/gov.uscourts.dcd.194585.20.0_1.pdf; Statement of Interest by the United States, Massachusetts v. Pa. Higher Educ. Assistance Agency, 2018 WL 1137520 (Mass. Super. Ct. Mar. 1, 2018) (No. 1784-cv-02682), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2018/01/Statement-of-Interest.pdf>.

As the following report discusses in detail, a new administration must take immediate action to restore consumer protections and oversight to the \$1.7 trillion student loan market.³ Without a decisive response by the administration, the student loan industry will continue to deceive borrowers and treat them unfairly, piling billions of dollars in unnecessary student debt onto the backs of millions of people. The following analysis offers a brief overview of the unprecedented actions taken by the Trump Administration in an attempt to shield bad actors from the consequences of their abuses. Further, this report includes a series of specific, immediate administrative actions to empower law enforcement officials to police the student loan market and hold companies accountable for their treatment of 45 million Americans with a federal student loan.⁴

³ Of the \$1.7 trillion in outstanding student debt, more than \$1.4 trillion is held by the federal government in a portfolio managed by the U.S. Department of Education. This portfolio is serviced and collected by private-sector financial services firms under contract with ED's Office of Federal Student Aid. These private-sector firms have historically been subject to regulation and oversight by federal and state enforcement authorities and have been the target of an increasing number of consumer protection enforcement actions and lawsuits in federal and state courts over the past decade. *See, e.g.*, Press Release, Fed. Deposit Ins. Corp., FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act (May 13, 2014), <https://www.fdic.gov/news/news/press/2014/pr14033.html>; Press Release, U.S. Dep't of Just., Nearly 78,000 Service Members to Begin Receiving \$60 Million Under Department of Justice Settlement with Navient for Overcharging on Student Loans (May 28, 2015), <https://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement>.

⁴ This memo does not capture the full scope of reforms necessary to ED, which will include oversight of for-profit schools, campus banking products, debt collectors, and more. This memo will focus solely on the tools necessary for robust federal and state law enforcement of student loan servicers.

Ending Trump-Era Obstruction and Demanding Justice in 2021 and Beyond

Nearly 45 million Americans owe student debt.⁵ Each of these borrowers depend on a student loan company to manage this debt—companies that send borrowers bills, advise borrowers about their repayment options, and enroll borrowers in benefits and protections established by Congress, including Income-Driven Repayment (IDR) and Public Service Loan Forgiveness (PSLF).⁶ These private-sector companies, known as student loan servicers, are typically hired by the creditor that owns a borrower's student loans, whether the owner is a private lender, a trust, or the U.S. Department of Education.⁷ Over the last decade, student loan servicing companies have been accused by law enforcement officials of engaging in illegal practices that mirror the worst abuses by the mortgage servicing industry in the wake of the foreclosure crisis.⁸

These abuses are pervasive. For example, two of the largest student loan companies in America have allegedly engaged in years-long schemes to deny millions of borrowers their rights under the law, forcing borrowers in financial distress to forgo affordable loan payments and loan forgiveness and adding billions in unnecessary debt

⁵ *Federal Student Loan Portfolio by Borrower Age*, U.S. Dep't of Educ., <https://studentaid.gov/sites/default/files/fsawg/datacenter/library/Portfolio-by-Age.xls> [<https://perma.cc/PB4Y-CBK9>] (last accessed Oct. 5, 2020).

⁶ Consumer Fin. Prot. Bureau, *Student Loan Servicing: Analysis of Public Input and Recommendations for Reform* (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.

⁷ Joint Statement of Principles on Student Loan Servicing, 80 Fed. Reg. 67,389 (Nov. 2, 2015), <https://www.federalregister.gov/documents/2015/11/02/2015-27775/joint-statement-of-principles-on-student-loan-servicing>.

⁸ Gretchen Morgensen, *A Student Loan System Stacked Against the Borrower*, N.Y. Times (Oct. 9, 2015), <https://www.nytimes.com/2015/10/11/business/a-student-loan-system-stacked-against-the-borrower.html>; Consumer Fin. Prot. Bureau, *Student Loan Servicing*, *supra* note 6.

in the process.⁹ Similar abuses have been alleged in lawsuits filed against student loan companies in courtrooms across the country by law enforcement officials and by private litigants, as described in further detail below.¹⁰

In response, state lawmakers, law enforcement officials, and regulators of both parties have exercised their historic police powers—specifically the consumer protection function performed by state governments for more than a century—taking sweeping actions to rein in these abuses through legislation, litigation, regulation, and oversight.¹¹ It was the long-held position of both Democratic and Republican administrations that the federal government must support and respect the consumer protection function delegated to the states, particularly

⁹ See, e.g., *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 17-cv-00101, 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. Aug. 4, 2017); *New York v. Pa. Higher Educ. Assistance Agency*, No. 19-cv-9155; 2020 U.S. Dist. LEXIS 77655 (S.D.N.Y. May 1, 2020); see also Press Release, Fed. Deposit Ins. Corp., *supra* note 3; Press Release, U.S. Dep't of Just., Nearly 78,000 Service Members to Begin Receiving \$60 Million Under Department of Justice Settlement with Navient for Overcharging on Student Loans (May 28, 2015), <https://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement>; Press Release, Am. Fed'n of Teachers, Class-Action Lawsuit Launched Against Student Loan Servicer Navient over PSLF (Oct. 3, 2018), <https://www.aft.org/press-release/class-action-lawsuit-launched-against-student-loan-servicer-navient-over>.

¹⁰ See Complaint, *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-cv-00101-RDM (M.D. Pa. Jan. 18, 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf; Complaint, *Pennsylvania v. Navient Corp.*, No. 3:17-cv-1814-RDM (M.D. Pa. June 19, 2019), <https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf>; Complaint, *California v. Navient Corp.*, No. CGC-18-567732 (Cal. Super. Ct. Oct. 16, 2018), https://oag.ca.gov/system/files/attachments/press_releases/CA%20AG%20First%20Amended%20Complaint%20-%20Navient.pdf; Complaint, *Illinois v. Navient Corp.*, No. 2017-CH-00761 (Ill. Cir. Ct. July 10, 2018), https://illinoisattorneygeneral.gov/pressroom/2017_01/NavientFileComplaint11817.pdf; Complaint, *Mississippi v. Navient Corp.*, No. G2108-98203 (Miss. Ch. Ct. July 24, 2018), <https://www.scribd.com/document/384612507/Navient-Complaint-Filed>; Complaint, *Washington v. Navient Corp.*, No. 17-2- 01115-1 SEA (Wash. Super. Ct. Jan. 18, 2017), <https://www.classaction.org/media/state-of-washington-v-navient-corporation-et-al.pdf>; see also Complaint, *Hyland v. Navient Corp.*, No. 1:18-cv-09031 (S.D. N.Y. Oct. 3, 2018), https://www.aft.org/sites/default/files/hyland-navient-complaint_100318.pdf.

¹¹ Brief for New York et al. as Amici Curiae Supporting Defendants at 6, *Student Loan Servicing All. v. Taylor*, 351 F. Supp. 3d 26 (2018) (No. 18-640), https://ag.ny.gov/sites/default/files/ny_state_preemption_amicus.pdf (suggesting states must be able to use their “historic police powers to protect consumers, including student-loan borrowers”).

when regulating financial services firms that are not banks.¹² Across the student loan market, state actions repeatedly received the explicit backing of the U.S. Department of Education and its Office of General Counsel—an acknowledgement that states have a critical role to play to protect borrowers from abuses by the student loan industry wherever they occur.¹³

Recent actions by state governments to protect borrowers straddle the Obama and Trump Administrations, increasing in frequency and scope as state officials have exposed a decade of abuses by the student loan industry. These actions include:

- **State “Student Borrower Bills of Rights.”** Since 2015, nearly a dozen states have passed “Student Borrower Bills of Rights,” updating their banking regulator’s supervisory and licensing authority to include student loan servicers, providing a key building block to engage in regular oversight and take

¹² Letter from Conference of State Banking Supervisors to Monica Jackson, Office of the Exec. Sec’y, Consumer Fin. Prot. Bureau, Request for Information Regarding Bureau’s Supervision Program (May 21, 2018), <https://www.csbs.org/policy/comment-letter-request-information-regarding-bureaus-supervision-program> (“[State banking agencies are] the primary regulators of over 20,000 non-depository financial services providers.”). See also Written Statement of the Nat’l Govs. Ass’n to House Comm. on Oversight and Gov’t Reform, Federalism Implications of Treating States as Stakeholders (Feb. 27, 2018), <https://republicans-oversight.house.gov/wp-content/uploads/2018/02/National-Governors-Association-Statement.pdf> (“Regarding federal preemption, governors recognize the need for federal intervention should states fail to act collectively on issues of legitimate concern. Preemption of state laws, however, should be the exception rather than the rule. This is especially true in areas of primary state responsibility, including, but not limited to: education, insurance regulation, criminal justice, preservation of the dual banking system, preservation of state securities regulation, and the management of state personnel programs.”).

¹³ Letter from Vanessa A. Burton, Att’y, Div. of Postsecondary Educ., U.S. Dep’t of Educ., to Jedd Bellman, Assistant Comm’r, Md. Dep’t of Labor, Licensing & Regul. (Jan. 21, 2016), https://na-production.s3.amazonaws.com/documents/Dept_of_Ed_Response.1.21.2016_dORyoLm.pdf; Statement of Interest of the United States, Sanchez et al. v. ASA College, Inc., et al, 2015 WL 3540836 (S.D.N.Y., June 5, 2015) (No. 14-CIV-5006), <https://www.courtlistener.com/recap/gov.uscourts.nysd.429318/gov.uscourts.nysd.429318.64.0.pdf>.

early action to identify and halt illegal practices that plague the student loan industry.¹⁴ In many cases, these laws also create strong new rights for individual student loan borrowers—setting new standards for the student loan industry where federal lawmakers and regulators have failed to act.¹⁵

- **Investigations and litigation against the student loan industry by state attorneys general.** Student loan servicers have also been targets in a wave of public enforcement actions by state attorneys general—actions that have alleged that these firms committed a wide range of abuses.¹⁶ These actions, for example, have sought to halt abuses that have prevented millions of borrowers experiencing financial

¹⁴ See Student Loan Servicing Act, ch. 824, 2016 Cal. Stat. 90 (codified as amended at Cal. Fin. Code §§ 28100-28182 (2016)), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2251; An Act Concerning a Student Loan Bill of Rights, Pub. Act No. 15-162, 2015 Conn. Acts 656 Reg. Sess., <https://cga.ct.gov/2015/ACT/pa/pdf/2015PA-00162-R00HB-06915-PA.pdf>; Regulate Student Education Loan Servicers, S.B. 19-002 (Colo. 2019), <https://leg.colorado.gov/bills/sb19-002>; Student Loan Ombudsman Establishment and Servicing Regulation Amendment Act of 2016, Pub. Act No. 21-571, 63 D.C. Reg. 15334, <https://code.dccouncil.us/dc/council/laws/21-214.html>; An Act Concerning Education, Pub. Act No. 0540, 2017 Ill. Laws 10, <https://www.ilga.gov/legislation/publicacts/100/PDF/100-0540.pdf>; An Act to Establish a Student Loan Bill of Rights to License and Regulate Student Loan Servicers, ch. 431, 2019 Me. Laws 431 (2020), https://legislature.maine.gov/legis/bills/bills_129th/chapters/PUBLIC431.asp; An Act Establishing the Office of the Student Loan Ombudsman, No. 4707, 2019 N.J. Laws 200, https://www.njleg.state.nj.us/2018/Bills/PL19/200_.HTM; Act of Jan. 18, 2019, 2019 N.Y. Laws 1958, https://assembly.state.ny.us/leg/?default_fld=&bn=S01958&term=2019&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y; Student Loan Bill of Rights Act, ch. 33, 2019 R.I. Pub. Laws 33, <http://webserver.rilin.state.ri.us/BillText/BillText19/HouseText19/H5936A.pdf>; An Act Relating to Establishing a Student Loan Bill of Rights, ch. 62, 2018 Wash. Sess. Laws. 6029, 65th Leg. Reg. Sess., <http://lawfilesexet.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6029-S2.SL.pdf#page=1>; Code of Va. § 6.2-2600 (2021), <https://law.lis.virginia.gov/vacode/title6.2/chapter26/section6.2-2600/>; Cal. Civ. Code § 1788.100 (2020), http://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200AB376&showamends=false.

¹⁵ *Id.*

¹⁶ See Complaint, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Pa. Jan. 18, 2017), https://files.consumerfinance.gov/f/documents/201701_cfbp_Navient-Pioneer-Credit-Recovery-complaint.pdf; Complaint, Pennsylvania v. Navient Corp., No. 3:17-cv-1814-RDM (M.D. Pa. June 19, 2019), <https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf>; Complaint, California v. Navient Corp., No. CGC-18- 19 567732 (Cal. Super. Ct. Oct. 16, 2018), https://oag.ca.gov/system/files/attachments/press_releases/CA%20AG%20First%20Amended%20Complaint%20-%20Navient.pdf; Complaint, Illinois v. Navient Corp., No. 2017-CH-00761 (Ill. Cir. Ct. July 10, 2018), https://illinoisattorneygeneral.gov/pressroom/2017_01/NavientFileComplaint11817.pdf; Complaint, Mississippi v. Navient Corp., No. G2108-98203 (Miss. Ch. Ct. July 24, 2018), <https://www.scribd.com/document/384612507/Navient-Complaint-Filed>; Complaint, Washington v. Navient Corp., No. 17-2- 01115-1 SEA (Wash. Super. Ct. Jan. 18, 2017), <https://www.classaction.org/media/state-of-washington-v-navient-corporation-et-al.pdf>; see also Complaint, Hyland v. Navient Corp., No. 1:18-cv-09031 (S.D. N.Y. Oct. 3, 2018), https://www.aft.org/sites/default/files/hyland-navient-complaint_100318.pdf.

hardship from obtaining affordable loan payments, damaged the credit of thousands of disabled veterans, and blocked teachers and other public service workers from accessing loan forgiveness.¹⁷

- **Supervisory and enforcement actions by state banking regulators.** State financial regulators have also used supervision and enforcement to highlight and stamp out illegal activities across the student loan market, halting student loan servicing and debt collection practices that cost borrowers billions of dollars and bringing the student finance companies that prop up unscrupulous schools out of the shadows.¹⁸
- **Enforcement actions against predatory schools.** Attorneys general have also taken other high-profile enforcement actions, including actions against the corporations that operate predatory for-profit colleges, wiping out hundreds of millions of dollars in student loan debt.¹⁹

¹⁷ *Id.*

¹⁸ *See, e.g.*, Consent Order, TFC Credit Corp. of Cal., NMLS 1708442 (Ct. Banking Comm'r May 28, 2019), <https://portal.ct.gov/-/media/DOB/Enforcement/Consumer-Credit/2019-CC-Orders/TFC-Credit-Corporation-CO.pdf?la=en>; Consent Order, Tuition Options LLC & EDvantage LLC (N.Y. State Dep't of Fin. Servs. Aug. 14, 2019), https://dfs.ny.gov/system/files/documents/2019/08/ea190815_tuition_options.pdf; *see also* Press Release, N.Y. Atty Gen., Attorney General James and Superintendent Vulla Announce \$9 Million Settlement of Federal Student Loan Servicing Claims with Acs Education Services (Jan. 4, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-and-superintendent-vullo-announce-9-million-settlement>; Press Release, Linda A. Lacewell, Fin. Servs. Superintendent, N.Y. State Dep't of Fin. Servs. DFS Superintendent Linda A. Lacewell Announces Settlement with National Student Loan Servicer of For-Profit Schools (Aug. 15, 2019), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1908151; Press Release, Minn. Comm. Dep't, Minnesota Commerce Department Announces Action Against Improper Student Loan Debt Collections (Aug. 11, 2017), <https://mn.gov/commerce/media/news/?id=17-307713> ("Minnesota Commerce [Department] . . . and regulators in four other states have reached a \$500,000 joint settlement with two subsidiaries of iQor Holdings Inc. for improper debt collection practices, including making abusive and harassing phone calls to increase student loan payments.").

¹⁹ *See, e.g.*, Jillian Berman, *Former For-Profit College Students Will Have \$168 Million in Student Debt Cancelled*, MarketWatch (June 17, 2019, 3:35 PM), <https://www.marketwatch.com/story/former-for-profit-college-students-will-have-168-million-in-student-debt-cancelled-2019-06-14>; Ian Stewart, *Nearly 180,000 Students Won't Have to Repay Loans From For-Profit Higher Ed Company*, NPR (Jan. 3, 2019, 7:17 PM), <https://www.npr.org/2019/01/03/682057881/nearly-180-000-students-wont-have-to-repay-loans-from-for-profit-higher-ed-compa>; Press Release, Or. Dep't of Just., AG Roseblum Announces \$192 Million Aequitas Settlement; \$2.1 Million for Oregon Students (Aug. 17, 2017), <https://www.doj.state.or.us/media-home/news-media-releases/ag-rosenblum-announces-192-million-aequitas-settlement-2-1-million-oregon-students/>; Felicia Mello, *As Trump Rolls Back Student Loan Protections, an Obama-era Watchdog Brings the Fight to California*, CalMatters (Apr. 23, 2019), <https://calmatters.org/politics/2019/04/student-loans-debt-for-profit-college-trump-obama-california/>.

The Trump/DeVos Era: Rolling Back Federal Protections and Blocking Oversight

Since the start of the Trump Administration, Secretary DeVos implemented a series of unprecedented and legally dubious policies to shield private companies from oversight and accountability, denying borrowers' rights and obstructing federal and state law enforcement efforts.²⁰ These specific actions combine to slow the gears of government consumer protection and block actions to protect borrowers. For example:

- **Forcing state consumer protection officials into court to combat federal obstruction.** In more than half a dozen lawsuits, examinations, and investigations, the Trump Administration has forced state regulators and enforcement officials to seek court orders to access documents and records in the possession of private-sector student loan companies—key evidence that these officials are entitled to access under state and federal law.²¹ These attempts to obstruct enforcement and oversight have slowed officials and delayed—or in some cases denied—justice for student loan borrowers.
- **Blocking state licensing and oversight of federal contractors.** In three critical federal court cases described below, student loan companies have worked hand in glove with the Trump Administration to secure court judgements partially blocking state laws that would have required ED's contracted student loan servicers to submit to state oversight.²² These cases have partially halted oversight regimes put in place by regulators in Connecticut, California, and in the District of Columbia, creating unnecessary and

²⁰ See *supra* note 1. Readers should note that beyond the specific actions discussed in this report aimed at shielding the student loan industry from scrutiny by state and federal regulators and enforcement officials, Secretary DeVos has also engaged in an equally brazen effort to shield predatory for-profit colleges from accountability. See, e.g., Andrew Kreighbaum, *DeVos Issues Final Repeal of Gainful Employment*, Inside Higher Ed (July 2, 2019), <https://www.insidehighered.com/quicktakes/2019/07/02/devos-issues-final-repeal-gainful-employment>; Adam S. Minsky, *Veterans' And Consumer Groups "Heartbroken" After Trump Vetoes Student Loan Relief Bill*, Forbes (May 30, 2020, 9:44 AM), <https://www.forbes.com/sites/adamminsky/2020/05/30/veterans-and-consumer-groups-heartbroken-after-trump-vetoes-student-loan-relief-bill/#7dc0af147ecf>.

²¹ Tamara Cesaretti, *New Navient Investigations Shed Light on How Courts Continue to Reject DeVos's Efforts to Shield Student Loan Companies*, Student Borrower Prot. Ctr. (Nov. 22, 2019), <https://protectborrowers.org/new-navient-investigations-shed-light-on-how-courts-continue-to-reject-devoss-efforts-to-shield-student-loan-companies/>.

²² See Statement of Interest of the United States, *Student Loan Servicing All. v. Taylor*, 351 F. Supp. 3d 26 (D.D.C. 2018) (No. 18-cv-00640), https://www.courtlistener.com/recap/gov.uscourts.dcd.194585/gov.uscourts.dcd.194585.20.0_1.pdf; Statement of Interest by the United States, *Massachusetts v. Pa. Higher Educ. Assistance Agency*, 2018 WL 1137520 (Mass. Super. Ct. Mar. 1, 2018), <https://www.consumerfinance.com/wp-content/uploads/sites/14/2018/01/Statement-of-Interest.pdf>.

resource-intensive obstacles for consumer protection officials and empowering the worst actors in the student loan industry.²³

- **Halting independent federal oversight.** For half a decade, the Consumer Financial Protection Bureau (CFPB) has supervised the entire student loan servicing industry, including ED's contracted student loan servicers. This independent oversight scheme has halted abuses across the student loan industry, including, for example, illegal practices by the government's student loan contractors that routinely denied borrowers access to affordable loan payments.²⁴ Since the start of the Trump Administration, ED has engaged in a far-reaching scheme to block this independent oversight and empower its contractors to trample on borrowers' rights. For example, in 2018 and 2019, ED successfully blocked an effort by the CFPB to supervise the handling of the scandal-plagued Public Service Loan Forgiveness program by the student loan industry, leaving borrowers at the mercy of companies alleged to routinely deny borrowers' access to loan forgiveness.²⁵

As this report discusses in detail, any effort to restore the federal government's historic commitment to consumer protection must leverage the insight and expertise of state law enforcement and regulators. The actions outlined below will restore and reaffirm state governments' critical role protecting their citizens from predatory financial

²³ Readers should note that unlike court orders in Connecticut and the District of Columbia, California's state financial regulator, the Department of Business Oversight, retains broad, market-wide enforcement authority over the entire student loan industry including federal contractors. In this important respect, California law is stronger than laws passed in DC and CT and the effect of this decision is more limited. *See* Pa. Higher Educ. Assistance Agency v. Perez, 416 F. Supp. 3d 75 (D. Conn. 2019), https://www.courtlistener.com/recap/gov.uscourts.ctd.126659/gov.uscourts.ctd.126659.78.0_1.pdf; Student Loan Servicing All. v. Taylor, 351 F. Supp. 3d 26 (D.D.C. 2018), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2018cv0640-39; California v. Pa. Higher Educ. Assistance Agency, No. 3:20-cv-03150, 2020 WL 5877669 (N.D. Cal. Oct. 2, 2020), <https://www.courtlistener.com/recap/gov.uscourts.cand.359233/gov.uscourts.cand.359233.27.0.pdf>

²⁴ *See, e.g.*, Consumer Fin. Prot. Bureau, Supervisory Highlights (Fall 2016), https://www.consumerfinance.gov/documents/1389/Supervisory-HighlightsIssue_13_Final_10.31.16.pdf. (Illegal practices include unfairly denying, or failing to approve, income-driven repayment plan applications that should have been approved on a regular basis, causing borrowers to make higher payments and subjecting them to unnecessary interest capitalization, failing to provide an effective choice on how payments should be allocated among multiple loans where the lack of choice can cause a financial detriment to consumers, and deceiving borrowers who have made extra payments on their loans about how much interest would accrue or had accrued and how that would affect the application of consumers' payments when the borrower began making payments again.) For further discussion, *see* Seth Frotman, *Every Tool at its Disposal: The Case for a Student Loan Servicing Rulemaking*, 31 Loy. Consumer L. Rev. 551 (2019), <https://lawecommons.luc.edu/lclr/vol31/iss3/6>.

²⁵ Chris Arnold, *CFPB Chief Says Education Department Is Blocking Student Loan Oversight*, NPR (May 16, 2019, 5:00 AM), <https://www.npr.org/2019/05/16/723568597/cfpb-chief-says-education-department-is-blocking-student-loan-oversight>.

firms. It will also ensure the administration has the support it needs to fix a badly broken student loan system and obtain justice for student loan borrowers across the country.

Immediate Actions to Reverse the Trump-Era Campaign to Obstruct Justice for Student Loan Borrowers

The actions outlined below will restore and reaffirm state governments' critical role protecting their citizens from predatory financial firms.

Beginning just months after assuming office, the Trump Administration has engaged in a series of regulatory, policy, and legal maneuvers that have sought to shield the student loan industry from accountability for a decade of abuse.²⁶ These efforts have delayed or derailed law enforcement officials and denied justice for millions of student loan borrowers.

Reaffirm that state consumer laws protect student loan borrowers and are not preempted by federal law

On March 12, 2018, ED published a notice in the Federal Register titled "Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers."²⁷ This notice attempted to immunize the student loan industry, including the government's contracted student loan servicers, from efforts by law enforcement officials and individual borrowers to enforce state consumer protection laws. In effect, the federal government declared that these companies could cheat their customers with impunity, free from any restrictions or consequences imposed under state law. Industry has routinely invoked this interpretation

²⁶ See, e.g., Danielle Douglas-Gabriel, *DeVos Dials Back Consumer Protections for Student Loan Borrowers*, Wash. Post (Apr. 11, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/04/11/devos-dials-back-consumer-protections-for-student-loan-borrowers/>.

²⁷ Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10,619 (Mar. 12, 2018), <https://www.federalregister.gov/documents/2018/03/12/2018-04924/federal-preemption-and-state-regulation-of-the-department-of-educations-federal-student-loan>.

in its efforts to block individual borrowers from fighting for justice for themselves and as part of a coordinated effort to fight back against state efforts to police this marketplace.²⁸

This interpretation was widely criticized by a bipartisan coalition of stakeholders at the time it was published. For example, a bipartisan group of 25 state attorneys general called on Secretary DeVos to change course and preserve states' historic rights to guard against abuses by student loan servicers and debt collectors.²⁹ Similarly, the Conference of State Bank Supervisors,³⁰ the National Governors Association,³¹ and Members of Congress from both parties called on Secretary DeVos to withdraw this interpretation.³² Additionally, since this interpretation was published, judges across the country have either expressly rejected industry efforts to rely upon this notice or have rejected industry arguments rooted in the same legal interpretation.³³ These recent court

²⁸ See, e.g., Memorandum of Law in Support of Defendant's Motion to Dismiss Complaint, *New York v. Pa. Higher Educ. Assistance Agency*, No. 19-cv-9155 (S.D.N.Y. 2020), <https://www.courtlistener.com/recap/gov.uscourts.nysd.523926/gov.uscourts.nysd.523926.41.0.pdf> (where PHEAA invokes the notice but where DOJ does not file a SOI); Memorandum of Points and Authorities in Support of Demurrer to Defendants' Verified Amended Answer, *California v. Navient Corp.*, 2018 Cal. Super. LEXIS 7109 (Cal. Super. Ct. Sept. 24, 2018) (No. CGC-18-567732) (where Navient invokes the notice but where DOJ does not file a SOI).

²⁹ Letter from Eric T. Schneiderman, Att'y Gen., New York, to Betsy DeVos, Sec'y, U.S. Dep't of Educ. (Oct. 23, 2017), https://ag.ny.gov/sites/default/files/devos_letter.pdf (asking that DeVos "reject an ongoing campaign by student loan servicers and debt collectors to secure immunity for themselves from state-level oversight and enforcement"); see also The Editorial Board, *The Student Loan Industry Finds Friends in Washington* (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/opinion/student-loans-devos.html> ("Ms. DeVos' eagerness to shill for those corporate interests is apparent in a craven new policy statement from the Education Department. The document claims that the federal government can pre-empt state laws that rein in student loan servicing companies if such a law "undermines uniform administration of" the student loan program.").

³⁰ Letter from John Ryan, President and CEO, Conf. of State Bank Supervisors, to Betsy DeVos, Sec'y, U.S. Dep't of Educ. (Mar. 2, 2018), <https://www.csbs.org/csbs-opposes-department-education-plan-preempt-state-authority-student-loans> ("This effort at preemption by regulatory fiat runs counter to the Congressionally mandated state-federal balance in financial regulation and exceeds the Department's authority.").

³¹ Press Release, Nat'l Governors Ass'n, *Governors Voice Concerns Over New Student Borrower Proposal* (Mar. 12, 2018), <https://www.nga.org/news/press-releases/governors-voice-concerns-over-new-student-borrower-proposal/> ("States have stepped up to fill the void left, we believe, by the absence of federal protections for student loan borrowers, from potential abusive practices by companies servicing student loans.").

³² Letter from Suzanne Bonamici et al., Cong. of the U.S., to Betsy DeVos, Sec'y, U.S. Dep't of Educ. (May 16, 2018), https://bonamici.house.gov/sites/bonamici.house.gov/files/documents/180516LTR_EDStatePreemption.pdf ("The Department's interpretation attempts to create broad new legal standards not intended by Congress under the Higher Education Act and undermines state efforts to protect tens of millions of Americans with student debt.").

³³ Press Release, Office of U.S. Representative Susanne Bonamici, *Bipartisan Lawmakers Challenge Education Department's Attempt to Block State Consumer Protection Laws* (May 16, 2018), <https://bonamici.house.gov/media/press-releases/bipartisan-lawmakers-challenge-education-department-s-attempt-block-state>.

victories for borrowers include cases decided by federal Courts of Appeals in the 11th³⁴, 7th³⁵, and 3rd Circuits.³⁶ In its unanimous decision rejecting this interpretation, the U.S. Court of Appeals for the 11th Circuit explained, citing an earlier federal District Court decision that adopted similar reasoning, “that the Notice should be given little weight because ‘it is not particularly thorough and it “represents a stark, unexplained change” in the Department’s position.’”³⁷

As these examples demonstrate, there is a broad consensus that Secretary DeVos’s interpretation is a brazen and potentially unlawful exercise of the Secretary’s authority. The administration should immediately rescind this interpretation and empower state consumer protection officials and private litigants to stand up for student loan borrowers.

End the obstruction of state consumer protection officials’ examinations, investigations, and litigation

The Office of Federal Student Aid (FSA) is the unit of the Department of Education responsible for administering the \$1.4 trillion federal student loan portfolio—an entity previously described by the Trump Administration as “the equivalent of the largest special-purpose consumer bank in the world.”³⁸ On December 27, 2017, it issued a memorandum to its student loan contractors asserting, for the first time and in direct conflict with the agency’s past position, that the federal Privacy Act of 1974 bars these firms from producing any documentation to state or federal regulators or law enforcement officials unless these officials first obtain express approval from ED.³⁹ Citing this memorandum, student loan servicers, including both Navient and the Pennsylvania Higher Education

³⁴ Press Release, Student Def., 11th Circuit Rules For Student Defense Clients In Landmark Decision (Apr. 10, 2020), <https://www.defendstudents.org/news/11th-circuit-rules-for-student-defense-clients-in-landmark-decision>.

³⁵ *Nelson v. Great Lakes*, Student Def., <https://www.defendstudents.org/cases/nelson-v-great-lakes> (summarizing the case and linking to a variety of filings).

³⁶ *Pennsylvania v. Navient Corp.*, 967 F.3d 273 (3d Cir. 2020), https://www.courtlistener.com/pdf/2020/07/27/commonwealth_of_pennsylvania_v._navient_corp.pdf.

³⁷ *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908 (11th Cir. 2020), https://www.courtlistener.com/opinion/4744197/amanda-lawson-ross-v-great-lakes-higher-education-corp/?q=Lawson-Ross%20v.%20Great%20Lakes&type=o&order_by=score%20desc&stat_Precedential=on&court=ca11.

³⁸ Press Release, U.S. Dep’t of Educ., Secretary DeVos Announces Intent to Enhance FSA’s Next Generation Processing and Servicing Environment (Aug. 1, 2017), <https://www.ed.gov/news/press-releases/secretary-devos-announces-intent-enhance-fsas-next-generation-processing-and-servicing-environment>.

³⁹ Memorandum from Patrick A. Bradfield, Dir., Fed. Student Aid Acquisitions, U.S. Dep’t of Educ. (Dec. 27, 2017), <https://static.politico.com/51/1f/0f805fd04c2eb035bcd79f9200be/december-27-2017-servicer-memo.pdf>.

Assistance Agency (PHEAA), have repeatedly refused to produce records and documents demanded by enforcement officials and regulators, significantly impeding, delaying, or limiting oversight and forcing these officials to sue to overcome this obstruction.⁴⁰

For example, earlier in 2020, the state of California sought records from PHEAA related to the company's mismanagement of a federal grant and loan program for teachers—records that would have allowed California to assess whether PHEAA continued to deny these teachers access to their rights under the law.⁴¹ California sued PHEAA for access to these records, forcing the state to litigate this case for more than six months.⁴² On October 2, 2020, a federal district court judge in California rejected the state of California's initial effort, instead siding with PHEAA and indicating that continued litigation will be necessary for the state of California to access these records.⁴³ This obstruction is not limited to state agencies. This memorandum has also been used as a legal justification to obstruct federal investigations and oversight.⁴⁴

A bipartisan effort in Congress sought to shine a spotlight on this scheme to block oversight by state and federal consumer protection officials. In 2018, U.S. Senators Patty Murray and Roy Blunt passed legislation compelling ED to explain whether it has routinely blocked these so-called "enforcement disclosures."⁴⁵ In response, Secretary DeVos confirmed that the Privacy Act was the legal basis to withhold critical documents during state

⁴⁰ Tamara Cesaretti, *New Navient Investigations Shed Light on How Courts Continue to Reject DeVos's Efforts to Shield Student Loan Companies*, Student Borrower Prot. Ctr. (Nov. 22, 2019), <https://protectborrowers.org/new-navient-investigations-shed-light-on-how-courts-continue-to-reject-devos-efforts-to-shield-student-loan-companies/>; see also *California v. Pa. Higher Educ. Assistance Agency*, No. 3:20-cv-03150 (N.D. Cal. 2020), <https://www.courtlistener.com/docket/17141032/people-of-the-state-of-california-v-pennsylvania-higher-education/>.

⁴¹ Press Release, Cal. Dep't of Bus. Oversight, California Department of Business Oversight Sues Student Loan Servicer PHEAA/FedLoan (Apr. 2, 2020), <https://dbo.ca.gov/2020/04/02/california-department-of-business-oversight-sues-student-loan-servicer-pheaa-fedloan/>.

⁴² *Id.*

⁴³ *California v. Pa. Higher Educ. Assistance Agency*, No. 3:20-cv-03150, 2020 WL 5877669 (N.D. Cal. Oct. 2, 2020), <https://www.courtlistener.com/recap/gov.uscourts.cand.359233/gov.uscourts.cand.359233.27.0.pdf>.

⁴⁴ Chris Arnold, *Exclusive: Turf War Blocked CFPB From Helping Fix Student Loan Forgiveness Program*, NPR (Oct. 15, 2019, 10:52 AM), <https://www.npr.org/2019/10/15/769326896/exclusive-turf-war-blocked-cfpb-from-helping-fix-student-loan-forgiveness-progra>.

⁴⁵ Consolidated Appropriation Acts 2018, Pub. L. No. 115-141, 132 Stat. 348, <https://www.congress.gov/bill/115th-congress/house-bill/1625/text>; Press Release, Ranking Member, U.S. Senate Comm. On Health, Educ., Labor & Pensions, Senate Democrats Urge DeVos to Hold Student Loan Companies Accountable, Increase Transparency to Ensure Companies are Following the Law (Dec. 6, 2018), <https://www.help.senate.gov/ranking/newsroom/press/senate-democrats-urge-devos-to-hold-student-loan-companies-accountable-increase-transparency-to-ensure-companies-are-following-the-law>.

and federal investigations of student loan companies—effectively admitting to obstructing oversight and acknowledging the sweeping effects this maneuver has had on state and federal officials.⁴⁶ For example, as part of this 2019 explanation, Secretary DeVos revealed that the Education Department was continuing to block an effort by North Carolina Attorney General Josh Stein to obtain data about student loan servicers' mishandling of the Public Service Loan Forgiveness Program and whether industry abuses had denied North Carolina teachers' access to their rights under the law.⁴⁷

Public warnings from lawmakers and law enforcement officials continue to mount, as court filings show how FSA's December 2017 memorandum continues to drive federal obstruction. For example, in April 2019, 21 state attorneys general called for ED to end this practice of obstruction in order for states to protect consumers from abuses in the student loan industry.⁴⁸

For nearly three years, FSA's December 2017 memorandum has served as the pretext to delay or derail state efforts to oversee the student loan market. The administration must immediately retract this memorandum and authorize state officials to independently access documents and records in the possession of the student loan industry, unencumbered by artificial procedural hurdles or impediments. Further, FSA should immediately amend all contracts with student loan servicers to clarify that compliance with state consumer protection laws—including laws that require these firms to be licensed to operate within a state's borders—is a prerequisite for any of these firms to do business with FSA.⁴⁹

⁴⁶ Letter from Diane Auer Jones, Principal Deputy Under Sec'y, Dep't of Educ., to Patty Murray, U.S. Senator (June 24, 2019), <https://www.help.senate.gov/imo/media/doc/Enforcement%20Disclosure%2006-24-19%20.pdf>.

⁴⁷ *Id.*

⁴⁸ Letter from Attorneys General to Betsy DeVos, Sec'y, U.S. Dep't of Educ. (Apr. 4, 2019), <https://www.marylandattorneygeneral.gov/News%20Documents/Final%20AGs%20Letter%20to%20DOE%204.4.19.pdf>.

⁴⁹ In limiting the scope of state licensing and oversight requirements in Connecticut, D.C., and California, as described above, three different federal judges relied on a line of cases that hold that state law is preempted where a state requires a federal contractor to obtain a license. *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) ("Subjecting a federal contractor to the [state] license requirements would give the [s]tate's licensing board a virtual power of review over the federal determination."). The student loan industry has exploited this line of cases to maximum effect because the federal government has declined to expressly require state licensure as a prerequisite for its contractors. Where a federal agency chooses to establish state licensure as a contractual requirement, similar challenges will fail, and state oversight will be able to proceed unimpeded. *See, e.g.*, Memorandum re: Restec Contractors, Inc, File No. B-245862, Office of the Comptroller General (Feb. 6, 1992), <https://www.gao.gov/assets/510/503152.pdf> ("Agencies may, however, through solicitation provisions require the possession of state licenses even though they are not legally required to accomplish the necessary work. 53 Comp. Gen. 51 (1973). Accordingly, since the agency adopted the provision by incorporating it into the solicitation, we expect that it will be enforced like any other performance requirement.").

Immediately release all documents and records withheld from regulators and enforcement officials

As described in detail above, new evidence obtained by the U.S. Senate and court filings in litigation pursued by the State of California reveal that state regulators and enforcement officials continue to face ongoing obstruction related to open investigations and examinations. These state agencies require immediate action by the administration to restore access to documents and records necessary to protect borrowers. Retracting FSA's December 2017 Privacy Act memorandum, as proposed above, is a necessary first step but is insufficient to repair the damage caused by Secretary DeVos's scheme to obstruct oversight. The administration must also immediately process all delayed requests and review all other requests denied since this memorandum was first issued by FSA in 2017. As part of this lookback, ED must immediately instruct the student loan industry to independently and promptly produce all documents and records directly to the state or federal agency that made such a demand. Absent these actions, high-profile investigations may be limited, and borrowers harmed by industry abuses may never receive justice.

By combining both the retraction of the December 2017 FSA memorandum and a comprehensive effort to undo all individual instances of government obstruction, the administration can ensure that officials bringing enforcement and regulatory actions are able to carry out their consumer protection missions and that borrowers are able to obtain justice for abuses by the student loan industry.

Unwind the Department of Justice's intervention on the side of industry in consumer protection litigation

Building on ED's 2018 interpretation on preemption and FSA's 2017 Privacy Act memorandum, the U.S. Department of Justice (DOJ) has filed "statements of interest" in student loan consumer protection cases in Massachusetts, Washington, D.C, and Connecticut. For example, on January 8, 2018, DOJ submitted a statement of interest in a Massachusetts state court case, *Massachusetts v. Pennsylvania Higher Education Assistance Agency*, arguing that federal law preempted the Massachusetts Attorney General from asserting state consumer law claims against the student loan servicer.⁵⁰ In this case, the Massachusetts Attorney General accused PHEAA of cheating Massachusetts teachers and public service workers out of their rights to loan forgiveness under

⁵⁰ Statement of Interest by the United States, *Massachusetts v. Pa. Higher Educ. Assistance Agency*, 2018 WL 1137520 (Mass. Super. Ct. Mar. 1, 2018), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2018/01/Statement-of-Interest.pdf>.

federal law.⁵¹ Similarly, DOJ submitted a statement of interest in the 2018 federal court case *Student Loan Servicing Alliance v. Taylor*, where the federal government argued that state lawmakers are unable to authorize state banking departments to license, oversee, or regulate the student loan industry—explicitly pointing to the preemption notice described above as pretext for this position.⁵² In that case, a bipartisan coalition of 16 state attorneys general submitted an *amicus curiae* brief asserting the opposite position—instead arguing that state oversight is legally permitted, necessary, and essential as a result of ED’s lack of effective oversight of the student loan industry.⁵³

These cases have continuing implications for all states’ ability to perform oversight and investigate abuses by these companies. Further, the student loan industry has used these statements of interest as exhibits in other litigation, representing to judges that the federal government remains student loan companies’ strongest ally in their efforts to escape justice. For example, in 2019, PHEAA notified the judge hearing New York State’s lawsuit against the company, providing the Statements of Interest filed in the Massachusetts and D.C. cases as evidence of the administration’s steadfast commitment to blocking state consumer protection efforts.⁵⁴

For these reasons, it is critical that the Department of Justice immediately notify state attorneys general in Massachusetts, Connecticut, and D.C. of the federal government’s return to its historical position supporting independent oversight and accountability, including state oversight and enforcement, in the student loan market.⁵⁵ In consultation with the attorneys general in each of these states, DOJ should take all necessary action to unwind the lasting effects of the Trump Administration’s intervention in these cases. Further, DOJ should adopt a new, proactive *amicus curiae* strategy to intervene on the side of enforcement officials and student loan

⁵¹ *Id.*

⁵² Statement of Interest of the United States, *Student Loan Servicing All. v. Taylor*, 351 F. Supp. 3d 26 (D.D.C. 2018) (No. 18-cv-00640), https://www.courtlistener.com/recap/gov.uscourts.dcd.194585/gov.uscourts.dcd.194585.20.0_1.pdf.

⁵³ Brief for New York et al. as Amici Curiae Supporting Defendants at 6, *Student Loan Servicing All. v. Taylor*, 351 F. Supp. 3d 26 (2018) (No. 18-640), https://ag.ny.gov/sites/default/files/ny_state_preemption_amicus.pdf.

⁵⁴ Declaration of Thomas F. Burke in Support of Defendant PHEAA’s Reply in Support of Motion to Dismiss, *New York v. Pa. Higher Educ. Assistance Agency*, No. 19-cv-9155 (S.D.N.Y. 2020), <https://www.courtlistener.com/recap/gov.uscourts.nysd.523926/gov.uscourts.nysd.523926.53.0.pdf>.

⁵⁵ Readers should also note that there is recent precedent for the withdrawal of a Statement of Interest previously filed by the federal government in civil litigation. See David Perry, *Both Sides Air Views on DOJ Action to Withdraw Statement in Dumping Case*, Furniture Today (May 6, 2020), <https://www.furnituretoday.com/international/both-sides-air-views-on-doj-action-to-withdraw-statement-in-dumping-case/>.

borrowers in litigation where student loan companies are alleged to have violated consumer protection laws or where state consumer protection laws are challenged on preemption grounds.⁵⁶

Prohibit contractors from invoking “derivative sovereign immunity” and “intergovernmental immunity” to escape liability for abuses

Derivative sovereign immunity, also known as *Yearsley* immunity, is a legal doctrine that may be raised by government contractors in defense of litigation to avoid responsibility for their actions.⁵⁷ A wide range of industries, from private prisons to munitions manufacturers, have argued that, because of their status as government contractors, they are entitled to immunity from liability under both federal and state law when their actions harm people—that, in effect, no laws apply to their actions other than those executed by the federal agency hiring the contractor.⁵⁸ Similarly, the doctrine of intergovernmental immunity has been invoked to shield contractors from claims arising under state laws—asserting that only federal law can regulate the conduct of federal contractors and state requirements are tantamount to unconstitutional state regulation of the federal government itself.⁵⁹

In the student loan context, PHEAA invoked both of these arguments in an attempt to throw out the New York Attorney General’s lawsuit alleging that the firm cheated teachers and other public service workers out of their rights to loan forgiveness, violating both federal and state consumer protection laws in the process.⁶⁰ In its motion to dismiss this consumer protection action, PHEAA claimed that because it is a federal government contractor it is entitled to derivative sovereign immunity and that no state or federal law enforcement agency has the standing to discipline its conduct in court.⁶¹ In the alternative, PHEAA also argued that the more limited doctrine of intergovernmental immunity shields the company from state law enforcement, claiming that as a

⁵⁶ See, e.g., Statement of Interest of the United States, *Sanchez et al. v. ASA College, Inc., et al*, 2015 WL 3540836 (S.D.N.Y., June 5, 2015) (No. 14-CIV-5006), <https://www.courtlistener.com/recap/gov.uscourts.nysd.429318/gov.uscourts.nysd.429318.64.0.pdf>.

⁵⁷ David S. Rubenstein, *Supremacy, Inc.*, 67 UCLA L. Rev. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479991.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Memorandum of Law in Support of Defendant’s Motion to Dismiss Complaint, *New York v. Pa. Higher Educ. Assistance Agency*, No. 19-cv-9155 (S.D.N.Y. 2020), <https://www.courtlistener.com/recap/gov.uscourts.nysd.523926/gov.uscourts.nysd.523926.41.0.pdf>.

⁶¹ *Id.* (“[T]he doctrine of derivative sovereign immunity shields PHEAA from suit for complying with the Department’s directives and its Servicing Contract with the Department.”)

contractor for the federal government, its activities are only governed by federal law.⁶² Although PHEAA failed to convince the judge in this case of either argument, it offers a clear sign that the student loan industry is prepared to marshal these extreme legal arguments to escape accountability unless the administration takes action.

Fortunately for student loan borrowers, the federal government can—and must—quickly clarify that FSA's student loan contracts do not convey immunity from civil liability under either state or federal law to those contractors hired to perform financial services for the federal government. The government can do this both by including this clarification explicitly in the contracts it signs with student loan companies and publishing policy guidance to this effect. Because student loan servicers are private-sector companies, they can and should be held accountable by both state and federal law enforcement officials and by private individuals when these companies' practices harm consumers and violate consumer protection laws.

A new administration must also take affirmative steps to protect borrowers from industry abuse and restructure the student loan system itself.

Adopting an Affirmative Vision for Consumer Protection in the Student Loan Market

In addition to taking immediate action to dismantle the Trump Administration's scheme to obstruct justice, a new administration must also take affirmative steps to protect borrowers from industry abuse and restructure the student loan system itself. Importantly, even where a new administration takes the actions outlined above, a robust, market-wide set of consumer protections will still be missing for student loan borrowers—the type of

⁶² *Id.* ("PHEAA also is immune from suit as a matter of intergovernmental immunity, which prohibits state efforts to directly regulate the federal government.")

protections that are already guaranteed to consumers in other markets.⁶³ The following recommendations offer a roadmap for a new administration to implement new, far-reaching reforms to address one of the key drivers of the student debt crisis—predatory practices by unscrupulous actors across the student loan system.

Issue a new presidential memorandum on a Student Borrower Bill of Rights

Beyond the necessary, immediate actions described above, the administration must also take affirmative steps to ensure all levers of the federal government can work in tandem to protect borrowers in coordination with state attorneys general and regulators. The administration can achieve this goal by directing the Secretary of Education and the Secretary of the Treasury, in consultation with the Consumer Financial Protection Bureau, the Federal Trade Commission, and state consumer protection officials, to develop a plan to protect borrowers from abuses by the student loan industry. This presidential memorandum should spur new regulation of student loan companies, overdue reforms to ED's contracting process, and research into the effects of student debt on borrowers' lives and the economy. It can also offer a new opportunity for enforcement and regulators officials at every level of government to establish a coordinated process for oversight and for implementation of new state-level "Student Borrower Bills of Rights" laws.

The federal government successfully undertook a similar effort in 2015, when President Obama signed a presidential memorandum on a Student Aid Bill of Rights.⁶⁴ As a result of this framework, on September 29, 2015, the CFPB, ED, and the Department of Treasury issued a joint statement of principles to reform student loan

⁶³ See, e.g., Consumer Fin. Prot. Bureau, Student Loan Servicing, *supra* note 6. ("[P]olicymakers have undertaken broad-based legislative and regulatory efforts to strengthen applicable federal consumer financial laws protecting consumers in the servicing of mortgages and credit cards. However, for student loan borrowers, there is no existing, comprehensive federal statutory or regulatory framework providing consistent standards for the servicing of all student loans."); Letter from Conn. Dep't of Banking Counsel Bruce H. Adams to the Consumer Fin. Prot. Bureau in response to a Request for Information Regarding Student Loan Servicing, CFPB-2015-0021-0381 (July 13, 2015), <https://www.regulations.gov/contentStreamer?documentId=CFPB-2015-0021-0381&attachmentNumber=1&contentType=pdf>; Letter from Ill. Att'y Gen. Lisa Madigan, et al. to the Consumer Fin. Prot. Bureau in response to a Request for Information Regarding Student Loan Servicing, CFPB-2015-0021-0376 (July 14, 2015), <https://www.regulations.gov/contentStreamer?documentId=CFPB-2015-0021-0376&attachmentNumber=1&contentType=pdf> ("Unlike in similar financial service industries, there is little regulation of specific student loan servicer conduct, such as the handling and application of payments."); Letter from Congresswoman Susan Davis to Director Cordray in response to a Request for Information Regarding Student Loan Servicing, CFPB-2015-0021-0379 (July 13, 2015), <https://www.regulations.gov/contentStreamer?documentId=CFPB-2015-0021-0379&attachmentNumber=1&contentType=pdf> ("[I]t is important the Bureau also put in place strong rules for all borrowers, regardless of loan type or who owns their loans. As a prime example, the Bureau should look to our work in the CARD Act to help inform how they should best protect borrowers. . .").

⁶⁴ Memorandum from Office of the Press Sec'y, The White House, Presidential Memorandum — Student Aid Bill of Rights (March 10, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/03/10/presidential-memorandum-student-aid-bill-rights>.

servicing following the release of a report by the CFPB highlighting servicing failures across the marketplace.⁶⁵ These principles include creating consistent, industry-wide standards for the entire servicing market, taking action to hold servicers accountable, providing access to clear and timely information, and improving publicly available data.⁶⁶ Following these principles, the Obama-era Department of Education issued a policy memorandum to Federal Student Aid outlining the administration's policy direction on federal student loan servicing.⁶⁷

Because the end result of the prior memorandum was not a series of rulemakings by participating agencies, the Trump Administration was able to unilaterally and quickly suspend these policies in 2017 and 2018 as part of its effort to shield the student loan industry from accountability and oversight.⁶⁸ The administration should quickly act to reinstate an interagency and intergovernmental effort to reverse course and establish an affirmative and enduring vision for consumer protection in the \$1.7 trillion student loan market.

Issue regulations codifying that the Higher Education Act permits states to protect student borrowers

As described above, the administration must take immediate action to reaffirm that it is the federal government's position that the Higher Education Act does not preempt state enforcement and regulation of the private-sector firms in the student loan industry.⁶⁹ The preceding recommendation to withdraw the ill-conceived 2018 notice

⁶⁵ Statement from U.S. Dep't of the Treasury, U.S. Dep't of Educ., & Consumer Fin. Prot. Bureau, Joint Statement of Principles on Student Loan Servicing (Sept. 28, 2015), https://files.consumerfinance.gov/f/201509_cfpb_treasury_education-joint-statement-of-principles-on-student-loan-servicing.pdf; see also Press Release, U.S. Dep't of Educ., Department of Education, Department of Treasury and the Consumer Financial Protection Bureau Issue Joint Principles on Student Loan Servicing (Sept. 29, 2015), <https://www.ed.gov/news/press-releases/department-education-department-treasury-and-consumer-financial-protection-bureau-issue-joint-principles-student-loan-servicing>.

⁶⁶ Press Release, Consumer Fin. Prot. Bureau, CFPB Concerned About Widespread Servicing Failures Reported by Student Loan Borrowers (Sept. 29, 2015), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-concerned-about-widespread-servicing-failures-reported-by-student-loan-borrowers/>.

⁶⁷ Memorandum from Ted Mitchell, Under Sec'y, U.S. Dep't of Educ., to James Runcie, Chief Operating Officer, Federal Student Aid (July 20, 2016), https://files.consumerfinance.gov/f/documents/20160620_US-Department-of-Education_loan-servicing-policy-memo.pdf.

⁶⁸ Press Release, Consumer Fed'n of Am., White House and CFPB Scrap Plans for New Student Loan Consumer Protections (May 10, 2018), https://consumerfed.org/press_release/white-house-and-cfpb-scrap-plans-for-new-student-loan-consumer-protections/.

⁶⁹ See Michael Stratford, *How the student loan industry lobbied DeVos to fight state regulations*, Politico (Aug. 15, 2019), <https://www.politico.com/story/2019/08/15/student-loan-devos-lobbying-1464926>.

and interpretation on preemption is an important first step, but the administration must also take additional steps to codify this policy shift, structuring regulatory action to ensure courts will defer to the government's interpretation in future litigation.⁷⁰ The administration can best achieve this goal by issuing a new regulation narrowly interpreting the express preemption provision of the Higher Education Act that relates to state-law disclosure requirements.⁷¹ In particular, such a regulation should clarify that the Higher Education Act does not preempt state laws that prohibit deception, misrepresentations, or omissions, whether those state laws apply narrowly to student loan companies or generally to all companies engaged in commerce. Further, the administration should assess how to use a rulemaking to provide certainty for state officials and borrowers as it relates to new state consumer protection laws enacted over the past five years—explicitly clarifying that where the Higher Education Act does not expressly preempt a so-called “disclosure” requirement, states remain free to legislate and regulate the conduct of the private-sector firms engaged in student loan servicing. These new laws include important protections for borrowers who are misled by the customer service representatives employed by private-sector student loan companies—a key locus of consumer harm and a place where Congress never intended to infringe on borrowers' rights under state law.⁷²

At critical junctures over the past three years, industry has sought to escape accountability for deceiving borrowers or omitting key information when counseling borrowers about student loan repayment options. In defense of lawsuits brought by state law enforcement officials and private litigants, student loan companies routinely argue that they are not liable for these abuses under state law because Section 1098g of the Higher

⁷⁰ *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001); *White v. Scibana*, 390 F.3d 997, 1000 (7th Cir. Dec. 2, 2004), *rehearing en banc denied* (February 9, 2005), *as amended* (February 14, 2005) (“Not all agency interpretations of ambiguous statutes are entitled to full *Chevron* deference; some are treated as persuasive only, based upon the form, content, circumstances, and reflected expertise of the interpretation.”).

⁷¹ 20 U.S.C. § 1098g (1982).

⁷² For further discussion, see Brief of Appellant and Required Short Appendix, *Nelson v. Great Lakes Educ. Loan Services, Inc.*, 928 F. 639 (7th Cir. 2019) (No. 18-1531), <https://www.defendstudents.org/cases/nelson-v-great-lakes/document/NSLDN-Nelson-Brief.pdf> (“The legislative history of § 1098g confirms that Congress did not intend to disrupt traditional consumer protection law in this context. Section 1098g was codified as Congress exempted federal student loans from the disclosure requirements of the Truth in Lending Act (“TILA”) and state disclosure requirements. At the time, TILA, and its implementing regulation, required a creditor, for each transaction, to disclose its identity, the amount being financed, any finance charges, the annual percentage rate, any variable rate, the payment schedule, the total amount of payments to be made, any demand features, and additional information about prepayment, late payments, and assumption. Congress was concerned about lenders and servicers being required to provide duplicative disclosures, since TILA’s coverage overlapped with comparable disclosures required under the HEA for federal student loans.”).

Education Act preempts these state law claims.⁷³ Industry has raised this defense repeatedly in cases that, for example, allege that these firms failed to disclose the availability of affordable loan payments and drove borrowers into more expensive repayment options as a result.⁷⁴ Courts have seriously weighed these arguments against the specific facts alleged in each case, often casting doubt on the applicability of state prohibitions on deception while allowing litigants to enforce state bans on affirmative misrepresentations.

ED must act to reaffirm states' and borrowers' rights to hold industry accountable for abuses, irrespective of whether a company's bad practice is an omission or a lie. For example, a teacher who has been denied access to loan forgiveness due to a company's failure to disclose the program's specific requirements faces the same harm as one who was told incorrect information—in both cases abuses by the student loan industry have potentially cost the borrower thousands or tens of thousands of dollars. ED must issue regulations to ensure that all borrowers, regulators, and law enforcement officials have the legal tools they need to police abuses wherever they occur. Issuing a new rule interpreting Section 1098g of the Higher Education Act is a critical step to achieve this end.

⁷³ See, e.g., *Nelson v. Great Lakes*, Student Def., <https://www.defendstudents.org/cases/nelson-v-great-lakes> (summarizing the case and linking to a variety of filings); *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908 (11th Cir. 2020), https://www.courtlistener.com/opinion/4744197/amanda-lawson-ross-v-great-lakes-higher-education-corp/?q=Lawson-Ross%20v.%20Great%20Lakes&type=o&order_by=score%20desc&stat_Precedential=on&court=ca11; *Pennsylvania v. Navient Corp.*, 967 F.3d 273 (3d Cir. 2020), https://www.courtlistener.com/pdf/2020/07/27/commonwealth_of_pennsylvania_v_navient_corp.pdf.

⁷⁴ See, e.g., *New York v. Pa. Higher Educ. Assistance Agency*, No. 19-cv-9155; 2020 U.S. Dist. LEXIS 77655 (S.D.N.Y. May 1, 2020), <https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2019cv09155/523926/58/0.pdf?ts=1588422005> ("The Court, however, agrees with PHEAA that the NYAG's state law claims that PHEAA allegedly 'steer[ed] borrowers into less-favorable repayment options such as forbearance,' . . . are preempted by the HEA . . . The Complaint, therefore, makes clear that the allegation is premised on a failure to disclose certain information, rather than an affirmative misrepresentation, and would impose additional disclosure requirements beyond those in the HEA.").

Establish an interagency task force to protect borrowers of color from discrimination and abuses by the student loan industry

In 2018, then-acting CFPB Director Mick Mulvaney abandoned planned efforts by the independent financial watchdog to police discrimination by the student loan servicing industry.⁷⁵ This is one of the most visible signs of a broad policy shift that took place during the Trump Administration, deprioritizing the rights and needs of borrowers of color in the student loan market.

This policy shift ignores a growing body of evidence that shows the disparate effects of student debt. There is a stark disparity in loan performance between Black and Latinx borrowers and their white peers. For example, Black and Latinx borrowers have long experienced student loan default at higher rates than white borrowers.⁷⁶ Further, disparities in enrollment and persistence in federal programs like Income-Driven Repayment—the most generous debt relief option for most student loan borrowers—have been linked to higher delinquency and default rates for Black and Latinx borrowers.⁷⁷ Taken together, this data suggests that student loan industry practices may systematically deny borrowers of color their rights under the law—evidence of potential widespread violations of federal fair lending laws.

The costs and consequences of abuses by student loan companies are greater for Black and Latinx borrowers, who use loans to finance higher education at greater rates than their white peers.⁷⁸ This includes potential acts of discrimination and other violations of federal fair lending laws but also includes many of the broader schemes and practices described in the preceding sections of this report. For these reasons, an

⁷⁵ See Kate Berry, *Where Have all the CFPB Fair-Lending Cases Gone?*, Am. Banker (Dec. 16, 2019) <https://www.americanbanker.com/news/where-have-all-the-cfpb-fair-lending-cases-gone>; Danielle Douglas-Gabriel, *Government watchdog investigating discrimination in student loan servicing*, Wash. Post (Apr. 14, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/04/14/government-watchdog-investigating-discrimination-in-student-loan-servicing/>; see also CFPB, *Fair Lending Report of the Consumer Financial Protection Bureau* (Apr. 2017), https://files.consumerfinance.gov/f/documents/201704_cfpb_Fair_Lending_Report.pdf.

⁷⁶ Andrew F. Haughwout et al., *Just Released: Racial Disparities in Student Loan Outcomes*, Fed. Res. Bank of N.Y.: Liberty St. Econ. (Nov. 13, 2019), <https://libertystreeteconomics.newyorkfed.org/2019/11/just-released-racial-disparities-in-student-loan-outcomes.html>.

⁷⁷ Kat Welbeck, *Communities of Color in Crisis: Examining Racial Disparities in Student Loan Debt and Borrower Outcomes*, Student Borrower Prot. Ctr. (Jan. 8, 2020), <https://protectborrowers.org/communities-of-color-in-crisis-examining-racial-disparities-in-student-loan-debt-and-borrower-outcomes/>; see also Student Borrower Protection Center, *Letter to Senator Doug Jones et. al* (Feb. 15, 2019) https://protectborrowers.org/wp-content/uploads/2019/09/Final_Jones-Letter_SBPC-1.pdf.

⁷⁸ Aissa Canchola & Seth Frotman, *The Significant Impact of Student Debt on Communities of Color*, Consumer Fin. Prot. Bureau (Sept. 15, 2016), <https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color/>.

aggressive effort to protect all borrowers must focus on and address the risks and experiences of Black and Latinx borrowers.⁷⁹

At every level of government, regulators and enforcement agencies that touch student loan laws and regulations—including DOJ, CFPB, and state attorneys general—must work together to properly identify and eliminate disparities in student loan outcomes and halt discrimination across the student loan system. This includes a new, robust data collection and analytics scheme to assess servicer performance based on either data on race, ethnicity, and gender where such data is available or, in the alternative, using widely accepted proxies to model the disparate impact of industry practices.

Armed with new data on the link between industry practices and student loan borrower outcomes, regulators will be empowered to combat discrimination across this \$1.7 trillion marketplace.

⁷⁹ See Student Borrower Protection Center, *Letter to Senator Doug Jones et. al, supra* note 77.

Conclusion

After four years of widespread, systematic efforts by the Trump Administration to dismantle the federal government's capacity to protect student loan borrowers and obstruct state-led efforts to step into the breach, a

new administration has an opportunity and an obligation to change course.

Nearly 45 million student loan borrowers depend on a new administration to act in their interests, working to ensure that federal and state law enforcement and regulatory agencies can use all of the tools at their disposal to deliver oversight across the \$1.7 trillion student loan marketplace.

By taking the steps outlined in this report, a new administration can repair a badly broken student loan system.

By taking the steps outlined in this report, a new administration can repair a badly broken student loan system, upholding borrowers' rights under the law and preserving access to justice for millions of Americans with student debt.