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Comments

The Rhode Island Student Loan Bill of Rights Act—Far More Than "An Aspirational Document"

Edward A. Gencarelli, Jr.*

INTRODUCTION

In order to attend the University of Connecticut and Columbia University between 1988 and 2005, Miguel Rivera incurred over $120,000 in federal student loan debt.[1] In 2007, shortly after completing his education, Rivera pooled his many individual student loans together into two consolidated federal loans to streamline his repayment, a move that resulted in Navient Solutions becoming Rivera's student loan servicer.[2] As a result of the 2008 financial crisis and the ensuing recession, Rivera struggled to find and retain meaningful employment and found himself on increasingly tenuous economic footing.[3] Fortunately,

* Candidate for Juris Doctor, Roger Williams University School of Law, 2022; Janet D. Steiger Fellow, Rhode Island Office of the Attorney General, 2020. I would like to thank Professor Carl T. Bogus for his invaluable guidance and support; David Marzilli for his insight and encouragement to write this Comment; and my family, friends, and editors for their support and kindness throughout the writing process. I would also like to stress that the views expressed and conclusions reached in this Comment are mine alone.

1. *See* Rivera v. Navient Sols., L.L.C., No. 20-cv-1284 (LJL), 2020 WL 4895698, at *3 (S.D.N.Y. Aug. 19, 2020).

2. *See id.*

3. *See id.* at *3–5.

however, the terms of his loan agreement with Navient allowed Rivera to forbear loan payments multiple times until 2013.[4] Yet, Rivera's economic struggles persisted and he ultimately applied for an Income-Based Repayment plan that, at certain times from 2015 through 2019, reduced his monthly payment to zero dollars.[5]

Troublingly, from July 2015 until October 2019—and even when Rivera qualified for a zero-dollar monthly payment—Navient erroneously overcharged Rivera by $23.39 each month, an amount reflecting a single late fee that Rivera incurred in April of 2015.[6] Fearing that he would lose his eligibility for his reduced monthly payment plan if he failed to pay the extra $23.39 each month, Rivera, who had suffered a debilitating compound fracture to his ankle, "traveled by wheelchair, then by walker, and then by cane, to deposit the $23.39 to his bank account to pay Navient."[7] However, instead of properly directing Rivera's overpayment toward the recurring late fee, Navient inappropriately treated the overpayment as a prepayment of future interest on Rivera's loans, allowing the fictitious late fee to be recharged each month and resulting in Rivera overpaying Navient by a startling $1,099.33.[8]

Rivera is just one of many student loan borrowers who have experienced frustration with—and mistreatment at the hands of—federal student loan servicing companies in recent years.[9] Many of these companies, with whom the United States Department of Education (ED) contracts to service its massive student loan portfolio, have developed a reputation for employing deceptive or otherwise unfair practices toward the borrowers they serve.[10] Aside from charging erroneous late fees,[11] some servicers have

4. *See id.* at *3.
5. *See id.* at *4.
6. *See id.*
7. *Id.* at *4–5.
8. *Id.*
9. *See, e.g.*, CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB PRIVATE EDUCATION LOAN OMBUDSMAN 10 (2020), https://files.consumerfinance.gov/f/documents/cfpb_annual-report_private-education-loan-ombudsman_2020.pdf [perma.cc/4ZCA-X64N] [hereinafter CFPB REPORT].
10. *See* David S. Rubenstein, *The Student Loan Crisis Through an Administrative Federalism Lens*, 44 ADMIN. & REG. L. NEWS 8, 8 (2019).
11. *See Rivera*, 2020 WL 4895698, at *4.

inappropriately directed borrowers into deferments[12] or forbearances[13] on their loans,[14] and most have made loan forgiveness effectively impossible for borrowers to achieve.[15] These practices, coupled with ED's failure to properly police them, present a growing risk of harm to student loan borrowers throughout the United States.

In response to that risk, some of the more progressive states and jurisdictions have codified certain rights for all student loan borrowers in their interactions with federal student loan servicers.[16] In 2019, Rhode Island joined those states by enacting

12. A deferment is a temporary postponement of student loan payments during which interest generally does not accrue on certain types of federal loans. *Glossary: Deferment*, U.S. DEP'T OF EDUC., https://studentaid.gov/help-center/answers/topic/glossary/article/deferment [https://perma.cc/RK3S-DHDZ] (last visited May 18, 2021).

13. A forbearance is a temporary postponement of, or reduction to, scheduled student loan payments, during which interest does accrue on the affected loans and is typically capitalized—that is, added to the principal balance of the affected loans—at the end of the forbearance period. *Glossary: Forbearance*, U.S. DEP'T OF EDUC., https://studentaid.gov/help-center/answers/topic/glossary/article/forbearance [perma.cc/PF8X-YACN] (last visited May 18, 2021). Though forbearances can be helpful for many borrowers with short-term cash flow issues, the capitalization of the interest that accrues during the forbearance period can result in higher monthly payments for the borrower after the forbearance expires and can prolong the amount of time it takes for the borrower to repay the loans or qualify for many of ED's student loan forgiveness programs. *See id.*

14. *See, e.g.*, Pennsylvania v. Navient Corp., 967 F.3d 273, 280–81 (3d Cir. 2020); Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639, 644 (7th Cir. 2019). While deferments or forbearances can help borrowers in certain circumstances, a blanket policy that steers borrowers into forbearances instead of income-based repayment plans, where the latter would be more appropriate, generally profits the servicers—and, by extension, the federal government—at the borrowers' expense. *See Nelson*, 928 F.3d at 644 (improper direction into forbearance and deferment by a servicer operating off of a script); *Navient*, 967 F.3d at 280–81 (steering borrowers into forbearance because it was administratively easier for Navient to do so).

15. *See, e.g.*, Andrew Keshner, *Education Department explains why only 1% of people who applied for public-loan forgiveness were accepted*, MARKETWATCH (Sept. 22, 2019, 9:27 AM), https://www.marketwatch.com/story/education-dept-admits-much-criticized-loan-forgiveness-program-has-obstacles-for-borrowers-2019-09-20 [perma.cc/AF4G-BVYA].

16. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 36a-846–859 (West, Westlaw through 2021 Reg. Sess.); D.C. CODE §§ 31-106.01–106.03 (2020); 110 ILL. COMP. STAT. ANN. 992/1-1–99-99 (West, Westlaw through P.A. 101-651).

the Rhode Island Student Loan Bill of Rights Act (SLBORA).[17] Among its many borrower protection measures, SLBORA requires student loan servicers to register with the Rhode Island Department of Business Regulation (DBR), make certain annual disclosures to the DBR related to their core business practices, and refrain from engaging in certain prohibited student loan behaviors.[18] In addition, SLBORA authorizes the Rhode Island Attorney General to enforce violations of the statute as unfair or deceptive acts or practices under the state's more traditional consumer protection statute.[19]

Although the Attorney General has yet to bring a case against a servicer under SLBORA, servicers elsewhere have challenged other states' statutes on constitutional preemption grounds, invoking ED's argument that such state laws conflict with or otherwise obstruct ED's regulation of the federal student loan program.[20] This argument has succeeded in some jurisdictions and in certain contexts and has failed in others.[21] But, if the servicers were to bring such a challenge to Rhode Island next, how would SLBORA fare?

Despite challenges to similar statutes in other states, the majority of SLBORA should survive a servicer's preemption challenge because the statute does not involve a servicer licensing scheme, its reporting requirements derive from constitutional authority, and its prohibited conduct provisions strive to protect Rhode Island consumers using the state's traditional police powers. Part I of this Comment will provide some relevant background surrounding the origins of SLBORA and survey the landscape of state laws regulating student loan servicer conduct. Part II will detail how the federal courts have evaluated two of SLBORA's out-of-state counterparts thus far, and extract from those evaluations

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17. *See* 19 R.I. GEN. LAWS §§ 19-33-1 to -16 (2020).

18. *See generally id.*

19. *See id.* § 19-33-13 (authorizing the Attorney General to police SLBORA violations using the Rhode Island Deceptive Trade Practices Act, 6 R.I. GEN. LAWS §§ 6-13.1-1 to -30 (2020)).

20. *See generally* 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, 10,619 (Mar. 12, 2018).

21. *See* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 75–76 (D.D.C. 2018) (preempted in part); Pa. Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112, 133–34 (D. Conn. 2020) (preempted).

the key tests that courts would likely apply to a preemption challenge to SLBORA. Part III will then utilize the available case law to distinguish SLBORA's operative components from those statutes found to be preempted in other jurisdictions while also detailing certain provisions within SLBORA that might not fare as well if subjected to a preemption challenge.

I. STUDENT LOANS—SERVICER MISCONDUCT AND THE STATES' RESPONSE

The federal government's massive student loan system is a complex beast and a proper discussion of its many intricacies lies far beyond the scope of this Comment. Thus, Part I of this Comment will describe the impetus for states to enact their own student loan borrower protection statutes; briefly discuss three state-level student loan borrower protection statutes, including SLBORA; and introduce the grounds upon which a constitutional challenge to SLBORA could foreseeably arise.

A. *Student Loans in Brief—Size and Scope*

As a result of expansive growth in its federal student loan portfolio over the past decade, ED has become a behemoth, trillion-dollar lending institution.[22] As of February 2020, the total size of ED's student loan portfolio reached a staggering $1.67 trillion.[23] Just two years earlier, ED's student loan portfolio accounted for nearly half of the federal government's assets.[24]

ED has offered myriad student loan types over the years, and the composition of its student loan portfolio is rather complex.[25] Since 2010, the federal government has originated the vast majority of new federal student loans under its Federal Direct Loan Program (FDLP), through which student loan borrowers take out

22. *See, e.g.*, Samantha L. Bailey & Christopher J. Ryan, Jr., *The Next "Big Short": COVID-19, Student Loan Discharge in Bankruptcy, and the SLABS Market*, 73 SMU L. REV. 809, 814–15 (2020).

23. *See* Zack Friedman, *Student Loan Debt Statistics in 2020: A Record $1.6 Trillion*, FORBES (Feb. 3, 2020, 6:51 PM), https://www.forbes.com/sites/zackfriedman/2020/02/03/student-loan-debt-statistics/?sh=47286963281f [perma.cc/6YH5-Y5DU].

24. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 39.

25. *See id.* at 38.

loans from ED directly.[26] Prior to 2010, the Higher Education Act also permitted the federal government to reinsure loans that private lenders originated under the Federal Family Education Loan Program (FFELP).[27] In addition, one of Congress's many statutory responses to the 2008 financial crisis allowed ED to purchase FFELP loans from private lenders within a short window, which effectively made the federal government the lender of whichever loans ED purchased.[28] Those FFELP loans that the federal government did not purchase during its statutory window remain held by private lenders and reinsured by the federal government.[29]

So, for the purposes of this analysis and for the sake of simplicity, federal student loans can be consolidated into three separate categories: (1) FDLP Loans, which the government owns outright; (2) the FFELP loans that the government purchased from private lenders in response to the financial crisis (Government-Owned FFELP Loans); and (3) the original FFELP loans, which remain owned by private lenders and reinsured by the federal government (Commercial FFELP Loans).[30] For context, as of February 2020, student loan borrowers owed about $1.2 trillion in FDLP Loans, and about $261.6 billion in FFELP Loans.[31]

B. *Student Loan Servicers and Imprudent Loan Management*

A massive service industry has blossomed to assist the federal government with the management of its complex loan portfolio. Known as student loan servicers, these commercial entities essentially serve as intermediaries between ED and federal student loan borrowers.[32] Servicers assist borrowers with the repayment of their loans, provide guidance or information with respect to the

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26. *See id.*
27. *See id.*
28. *Id.* (discussing the Ensuring Continued Access to Student Loans Act of 2008, Pub. L. 110–227, 122 Stat. 740)). ED purchased about $94 million worth of FFELP loans under this program—a mere drop in the bucket compared to the overall FFELP program, which totals about $261.6 billion. *Id.; see also* Friedman, *supra* note 23 (detailing federal student loan balances in 2020).
29. *Student Loan Servicing All.*, 351 F. Supp. 3d at 38.
30. *Id.*
31. *See* Friedman, *supra* note 23.
32. *Student Loan Servicing All.*, 351 F. Supp. 3d at 39.

various repayment options available, and direct borrowers into deferments or forbearances when their individual situations demand.[33]

The Higher Education Act outlines a series of procedures to which student loan servicers must adhere and standards they must meet when servicing federal student loans.[34] The Higher Education Act also allows ED to contract directly with student loan servicers to manage its FDLP and Government-Owned FFELP Loans.[35] Although the Higher Education Act requires ED to adhere to certain standards when selecting the servicers with whom it wishes to contract,[36] the law also gives ED wide leeway to set the terms of those contracts.[37]

Further, the Higher Education Act authorizes ED to promulgate regulations establishing "minimum standards with respect to sound [servicer] management and accountability," particularly, though not exclusively, with respect to servicers with whom private lenders contract to service Commercial FFELP Loans.[38] ED has used this regulatory authority to set financial and administrative standards for servicers who wish to contract with ED or a private lender to service federal student loans.[39] ED also manages the Office of Federal Student Aid, which contains the Ombudsman Group that is dedicated to resolving borrower disputes and complaints related to the servicing of its loans.[40] Notably, the Higher Education Act does not provide a private cause of action against a servicer for harmful or deceptive conduct.[41]

Naturally, such a large loan portfolio and network of servicers presents the government with a slew of operational efficiency challenges. Despite ED's regulatory scheme, student loan servicers have become notorious for imprudent management of federal

33. *Id.*
34. *Id.*
35. *Id.*
36. *See* 20 U.S.C. § 1087f (2018).
37. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 39.
38. *See id.* at 39 & n.6 (citing 20 U.S.C. § 1082(A)(1)).
39. *See id.* at 39.
40. *Id.* at 39–40.
41. *Id.* at 40 & n.8.

student loans.[42] In fact, between September 1, 2019, and August 31, 2020, the Consumer Financial Protection Bureau fielded nearly 7,000 borrower complaints related to student loans generally.[43] Nearly seventy percent of complaints filed after March 1, 2020, pertained to issues "dealing with [a borrower's] lender or servicer"[44] while the lion's share throughout the reporting period involved receiving "bad information about [a] loan" or "[t]rouble with how payments are being handled [by a servicer]."[45]

Some aggrieved borrowers have taken their complaints to the courts as well. According to recent court filings, some servicers have developed internal programs to purposefully steer borrowers otherwise eligible for income-based repayment plans into forbearances or deferments.[46] This practice often leads to borrowers paying more for their loans over a longer period of time, resulting in larger overall profits for the servicers while often delaying or otherwise complicating borrowers' eligibility for ED's various student loan forgiveness programs.[47] Servicers have also misapplied or made affirmative misrepresentations about borrowers' loan payments, often leading folks already on the brink of economic turmoil to endure further hardship while attempting to repay their loans.[48]

Even outside of the courtroom, the servicers' dubious practices have resulted in their popular reputation for prolonging the amount of time it takes for borrowers to repay their debts and for helping ED make loan forgiveness nearly impossible for eligible borrowers

42. *See* Rubenstein, *supra* note 10, at 8.

43. *See* CFPB REPORT, *supra* note 9, at 10. In addition to the 7,000 complaints that the CFPB fielded, ED directly receives approximately 30,000 student loan complaints on an annual basis. *Id.* at 10 n.6.

44. *See id.* at 15.

45. *See id.* at 16. The reporting period spanned from September 1, 2019, through August 31, 2020. *Id.*

46. *See* Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639, 644 (7th Cir. 2019) (improper direction into forbearance and deferment by a servicer operating off of a script).

47. *See id.; see also* Pennsylvania v. Navient Corp., 967 F.3d 273, 280–81 (3d Cir. 2020) (discussing forbearance steering and its impact on borrower eligibility for federal student loan forgiveness programs).

48. *See* Rivera v. Navient Sols., LLC, No. 20-cv-1284 (LJL), 2020 WL 4895698, at *3–5 (S.D.N.Y. Aug. 19, 2020) (affirmative misrepresentations).

to achieve.[49] Adding to the frustration, the federal government has failed to effectively police the errant behaviors of student loan servicers under the Trump administration,[50] despite having the ability to do so under various federal consumer protection statutes.[51] This failure has prompted some jurisdictions to enact so-called student loan bill of rights statutes to expand their general consumer protection powers.

C. *Surveying the State Law Landscape*

At least facially, state statutes governing federal student loan servicer conduct serve to supplement the federal consumer protection laws and ED's servicer regulations.[52] Connecticut and the District of Columbia both enacted legislation of this type recently, and a brief survey of their approaches will provide a useful glimpse into state servicer regulations outside of Rhode Island.

1. Borrower Protections in D.C. and Connecticut

In 2016, the District of Columbia enacted a law seeking to protect and better educate its student loan borrowers in their interactions with student loan servicers.[53] Interestingly, the D.C. law created the district's own Ombudsman, a position responsible for processing and attempting to resolve borrower complaints surrounding student loans.[54] The Ombudsman also works to educate borrowers on their rights and responsibilities under the terms of their federal student loans.[55]

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49. *See* Keshner, *supra* note 15 (noting that, as of 2018, ED rejected a staggering 99% of borrowers who applied for student loan forgiveness under its Public Service Loan Forgiveness Program).

50. *See, e.g.*, Andrew Kreighbaum, *Warren to DeVos: Drop Navient's Contract*, INSIDE HIGHER ED (Oct. 17, 2019), https://www.insidehighered.com/news/2019/10/17/warren-calls-trump-administration-fire-loan-servicer-navient [perma.cc/U49T-VN86]

51. *See generally* Jeffrey P. Naimon, Sasha Leonhardt & Sarah B. Meehan, *School of Hard Knocks: Federal Student Loan Servicing and the Looming Federal Student Loan Crisis*, 72 ADMIN. L. REV. 259, 286–90 (2020).

52. *See id.* at 290.

53. *See* D.C. CODE §§ 31-106.01–106.03 (2020).

54. *Id.* § 31-106.01(c).

55. *See id.* § 31-106.01(c)(4).

Most critically, the D.C. law requires federal student loan servicers to obtain a license from the Department of Insurance, Securities, and Banking (DISB) prior to servicing the loans of D.C. residents.[56] In order to qualify for a license, the servicer must submit an application that DISB promulgates, three years of audited financial statements, and "[a]ny other information [DISB] considers necessary and appropriate."[57] Although the statute compels DISB to issue a license if the application meets all necessary requirements, DISB retains discretion to revoke a license after notice and a hearing if a servicer engages in any of a series of practices that DISB prohibits under the D.C. law or its implementing regulations.[58]

Connecticut enacted similar student loan borrower protection legislation in 2015.[59] Much like its D.C. counterpart, the Connecticut statute requires student loan servicers to obtain a license through its Department of Banking (DOB).[60] However, the process of obtaining a license in Connecticut is a bit more involved than in D.C., and the DOB wields more statutory power than its counterpart in D.C.[61] For example, after a servicer completes the requisite application, the DOB may issue a license only after "investigat[ing] the [servicer's] financial condition and responsibility, financial and business experience, [and] character and general fitness" for business in Connecticut.[62] The statute also

56. *Id.* § 31-106.02(a).

57. *Id.* § 31-106.02(c)(1); *see also* D.C. CODE MUN. REGS. tit. 26-C3002 (LexisNexis through D.C. Reg., Vol. 68, Issue 7) (outlining required application components).

58. D.C. CODE § 31-106.02(h)(1).

59. *See* CONN. GEN. STAT. ANN. §§ 36a-846–859 (West, Westlaw through 2021 Reg. Sess.).

60. *Id.* § 36a-847(a)(1).

61. *Compare id.* § 36a-847, *with* D.C. CODE § 31-106.02 (2020). However, the D.C. law empowers DISB to promulgate rules to further the D.C. law's implementation, and DISB has used that authority to effectively grant itself a review power similar to that wielded by its Connecticut counterpart. D.C. CODE § 31-106.03 (2020); Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 62 (D.D.C. 2018) (discussing the fitness assessment built into DISB's application requirements); s*ee also* D.C. CODE MUN. REGS. tit. 26-C3002.2(c) (LexisNexis through D.C. Reg., Vol. 68, No. 2) (outlining application components giving DISB fitness assessment authority).

62. CONN. GEN. STAT. ANN. § 36a-847(c) (West, Westlaw through 2021 Reg. Sess.).

requires licensees to maintain detailed records of each transaction with Connecticut borrowers, and to disclose those records to the DOB on demand[63]

In keeping with the consumer protection spirit of the law, Connecticut's statute delineates a series of prohibited student loan servicer activities, including the utilization of any unfair or deceptive practice in the servicing of student loans and the knowing misapplication or reckless application of borrower's loan payments.[64] Should a student loan servicer engage in any such activity, the statute authorizes the DOB to conduct wide-ranging investigations of the servicer[65] and permits the DOB to suspend or revoke an errant servicer's license.[66]

D. *Rhode Island's Approach—The Student Loan Bill of Rights Act*

In 2019, Rhode Island joined D.C. and Connecticut by passing legislation to protect student loan borrowers from the errant conduct of federal student loan servicers.[67] Spearheaded by Attorney General Peter F. Neronha, the Rhode Island General Assembly enacted SLBORA to secure important borrower rights and protections for "[m]ore than 130,000 Rhode Islanders [who] owe more than $4.5 billion in student loan debt."[68]

Pursuant to SLBORA, all student loan servicers wishing to do business with Rhode Island borrowers must *register* with the DBR annually[69] and pay an annual registration fee.[70] Importantly, unlike its counterparts in Connecticut and D.C., SLBORA does not require a servicer to obtain a license from the DBR to operate within

63. *Id.* § 36a-849.
64. *Id.* § 36a-850.
65. *Id.* § 36a-851.
66. *Id.* § 36a-852.
67. *See* PETER F. NERONHA, R.I. ATT'Y GEN., STUDENT LOAN BORROWER RELIEF DURING THE COVID-19 PANDEMIC: THE CARES ACT AND OTHER ASSISTANCE 1 (May 19, 2020), http://riag.ri.gov/documents/Guidance%20for%20Student%20Loan%20Borrowers%20on%20CARES%20Act.pdf [perma.cc/V375-Q8RY].
68. *See id.*
69. 19 R.I. GEN. LAWS § 19-33-4(g) (2020) (emphasis added).
70. *Id.* § 19-33-4(c)(2).

the state.[71] As will become apparent later, this distinction will ultimately prove critical to the statute's efficacy.[72]

In addition to the registration requirement, SLBORA requires servicers to maintain "complete records of each student education loan transaction, including recordings of communications with borrowers," and to make those records available to the state upon request and within five days of such a request.[73] Further, each servicer must file an annual report with the DBR, "giving any relevant information that [the DBR] may reasonably require concerning the business and operations [of the servicer] during the preceding calendar year."[74]

To properly protect borrowers from errant servicer conduct, SLBORA outlines a series of practices that all servicers must employ in their interactions with Rhode Island borrowers[75] and expressly prohibits certain types of servicer conduct.[76] Should it appear that a servicer is in breach of SLBORA, the statute offers three main enforcement measures. First, the DBR may conduct an examination of any person or entity registered as a servicer pursuant to SLBORA at any time.[77] Second, SLBORA authorizes the Rhode Island Attorney General to police violations of the statute as unfair or deceptive acts under the Rhode Island Deceptive Trade Practices Act.[78] Lastly, unlike the federal Higher

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71. *Compare id.* § 19-33-4, *with* CONN. GEN. STAT. ANN. § 36a-847 (West, Westlaw through 2021 Reg. Sess.) *and* D.C. CODE § 31-106.02 (2020).

72. *See* discussion *infra* Section III.A.

73. 19 R.I. GEN. LAWS § 19-33-6 (2020).

74. *Id.* § 19-33-7.

75. *See id.* § 19-33-8.

76. *See id.* § 19-33-12. For example, SLBORA prohibits servicers from employing "any scheme, device, or artifice to defraud or mislead student loan borrowers." *Id.* § 19-33-12(1). For a disturbing example of a servicer employing just such a scheme, see *Pennsylvania v. Navient Corp.*, 967 F.3d 273, 280–81 (3d Cir. 2020).

77. 19 R.I. GEN. LAWS §§ 19-33-9(a), -9(c).

78. *Id.* § 19-33-13. The legislature's express authorization for the Attorney General to use the Deceptive Trade Practices Act (DTPA) within section 19-33-13 stems from a decades-old Rhode Island Supreme Court decision, *State v. Piedmont Funding Corp.*, which held that individuals or businesses subject to regulation by state or federal agencies were exempt from DTPA enforcement actions—irrespective of whether the conduct triggering that enforcement action was permitted under those regulations or not. *See* 382 A.2d 819, 822 (R.I.

Education Act, SLBORA provides borrowers with a private right of action against a servicer who violates the statute.[79]

E. *Foreseeable Harm to the Statute—Why Constitutionality is Questionable*

To the untrained eye, SLBORA and its out-of-state counterparts may seem like a proverbial slam dunk for each state's respective student loan borrowers. However, the federal government views this category of statutes in a far different light. In March of 2018, ED issued an informal notice directly challenging the viability of state regulation of federal student loan servicer conduct.[80] In that notice, ED took the position that state student loan servicer regulations like SLBORA interfere with ED's uniform

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1978); s*ee also* Lynch v. Conley, 853 A.2d 1212, 1215 (R.I. 2004) (reaffirming *Piedmont*). As *Piedmont* and its progeny would likely allow the heavily regulated student loan servicers to claim exemption from any DTPA enforcement action, the express authorization for the Attorney General to use the DTPA within SLBORA apparently strives to prevent the servicers from derivatively claiming exemption from a SLBORA enforcement action. However, a servicer could still foreseeably argue that section 19-33-13 of SLBORA does nothing more than expressly equip the Attorney General with a broken weapon in light of the *Piedmont* decision and the DTPA's exemption provision. Stated differently, if a gun has a broken trigger assembly, simply authorizing someone to fire it—without making any repairs to it—will not make the gun functional. A proper evaluation of both of these arguments, however, lies outside the scope of this Comment.

79. 19 R.I. GEN. LAWS § 19-33-14 (2020); *see also* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 40–41 (D.D.C. 2018) (noting no private right of action for federal student loan borrowers under the Higher Education Act).

80. *See* 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, 10,619 (Mar. 12, 2018). This Trump-era interpretation was still in place as of early April 2021, but eleven state financial regulators—including the Rhode Island Department of Business Regulation—recently called on the Biden administration to rescind it, calling the regulation "legally dubious." Aarthi Swaminathan, *"Misguided and Unsound": States Call on New Education Secretary to Stop Protecting Student Loan Servicers*, YAHOO (Mar. 9, 2021), https://www.yahoo.com/now/states-call-on-education-secretary-to-stop-protecting-student-loan-servicers-150103632.html [perma.cc/AVT5-LZLS]. Irrespective of whether ED's interpretation changes, however, case law that lends considerable credence to the Trump-era interpretation and its underlying arguments already exists. *See* discussion *infra* Part II.

administration of the federal student loan program and are therefore preempted.[81]

ED used three main points to make this argument. Foremost, ED argued that state statutes mandating that servicers obtain a license to operate are invalid because they attempt to second-guess a servicer's viability to contract with the federal government.[82] This argument attacks the licensing scheme that lies at the core of many state statutes in this area. Second, ED argued that the Higher Education Act expressly preempts state statutes requiring servicers to make disclosures not required by federal law, which attempts to dismantle the various reporting and disclosure requirements embedded within the relevant state statutes.[83] And finally, ED argued that existing federal borrower protections, such as the Federal Student Aid Ombudsman Group and ED's servicer contracting standards, adequately protect federal student loan borrowers from errant servicer conduct.[84] According to ED, these protections reduce state-level borrower protections to nothing more than duplicative obstacles to the uniformity that Congress intended federal regulations to construct under the Higher Education Act.[85]

After ED issued its informal notice, student loan servicers quickly began challenging state student loan servicer regulations, arguing that such statutes are unconstitutional and preempted by the federal government's regulation of the space in lockstep with ED's guidance. In fact, servicers successfully challenged SLBORA's counterparts in both D.C. and Connecticut on preemption grounds.[86] So, if a federal student loan servicer were to challenge SLBORA on similar grounds, how would SLBORA fare?

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81. Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. at 10,619–20.

82. *Id.* at 10,620. Specifically, ED posits that "[a] State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions." *Id.* (quoting Sperry v. Florida, 373 U.S. 379, 385 (1963)).

83. *Id.* at 10,621 (citing 20 U.S.C. § 1098g (2018)).

84. *Id.* at 10,622.

85. *Id.* at 10,621–22.

86. *See* Pa. Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112, 133–34 (D. Conn. 2020) (preempted); Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 76 (D.D.C. 2018) (preempted in part).

II. EVALUATING THE CONSTITUTIONALITY OF STATE STUDENT LOAN SERVICER REGULATIONS

Determining whether SLBORA could survive a preemption challenge is no small task. However, each of the cases that deemed SLBORA's out-of-state counterparts unconstitutional provides critical insight into how the federal courts have evaluated the question thus far. This Part will explore those cases in detail and extract therefrom the relevant tests that the federal courts apply to state student loan borrower protection statutes when those statutes face preemption challenges.

A. *The D.C. Case—A Comprehensive and Persuasive Test*

In 2018, the Student Loan Servicing Alliance (Servicing Alliance), a membership organization comprised of twenty-four federal student loan servicers who together service the vast majority of federal student loans,[87] sought a declaratory judgment that the D.C. law, which required servicers to obtain a license before operating within the district,[88] was preempted by federal law.[89] Specifically, the Servicing Alliance challenged the D.C. law "under all three theories of preemption—express, field, and conflict preemption."[90] The Servicing Alliance also invoked ED's informal notice in support of its preemption arguments and asserted that the notice should be treated as conclusive.[91]

Recognizing that his decision in the case could have significant implications for other states with laws similar to D.C.'s, United States District Judge Paul L. Friedman analyzed each possible component of the Servicing Alliance's preemption argument in great detail, and laid out a roadmap for other courts to follow when faced with similar arguments in the future.[92] A high-level voyage

87. The various members of the Servicing Alliance "service over 95 percent of the outstanding [FDLP] and [FFELP] student loans." *Student Loan Servicing All.*, 351 F. Supp. 3d at 41.

88. *See* D.C. CODE § 31-106.02(a) (2020); *see also* discussion *supra* Section I.C.1.

89. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 41–42.

90. *Id.* at 47.

91. *Id.* (arguing that ED's informal preemption notice deserved judicial deference).

92. *See id.* at 36.

through the various stops along that roadmap will prove helpful in determining whether SLBORA has constitutional staying power.

1. Does ED's Guidance Deserve Judicial Deference?

Given the comprehensive and forceful argument against state regulation of student loan servicers that ED made in its informal notice,[93] the Servicing Alliance certainly had a strong incentive to invoke the guidance in its challenge to the D.C. law, as would any servicer who might challenge SLBORA.[94] In so doing, the Servicing Alliance asserted that, although its argument could stand alone on its merits, the court should defer to ED's guidance in its analysis of the preemption issue.[95] However, as is often the case in the law, a court cannot simply accept such assertions prima facie.[96]

To determine whether the statutory interpretations of a federal agency regarding its governing statute warrant judicial deference, courts generally apply one of two tests.[97] When an agency issues a rule that reasonably interprets an ambiguity in its governing statute after properly navigating a rulemaking process, courts will accord the rule *Chevron* deference and treat the rule as all but conclusive on the matter it governs.[98] However, where the agency instead issues non-binding guidance—like an advisory opinion or notice—that fails to go through the proper rulemaking process, the court may instead accord the guidance *Skidmore* deference: a test which affords the court discretion to evaluate the guidance for its inherent persuasiveness and rule accordingly.[99]

Here, as ED failed to undertake the proper rulemaking procedures when issuing its notice, the court had no trouble deeming ED's guidance worthy of only a *Skidmore* deference

93. *See* 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, 10,619–22 (Mar. 12, 2018).

94. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 48.

95. *Id.*

96. *See id.* at 48–51.

97. *Id.* at 48–49.

98. *See id.* at 48 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)).

99. *See id.* at 48–49 (citing Skidmore v. Swift & Co., 323 U.S. 134, 138, 140 (1944)).

analysis.[100] Yet, even under that analysis, the court found ED's guidance far too conclusory and inconsistent with the agency's earlier position on the Higher Education Act's express preemption provision to deserve *Skidmore* deference.[101] Thus, the combination of ED's conclusory statements, an unsupported deviation from its original position on preemption, and an inherent lack of thoroughness within its guidance reduced the informal notice to mere opinion worthy of no judicial deference.[102]

At bottom, despite the facial clarity and strength of ED's informal notice with respect to preemption, the court held that the Servicing Alliance—and, inferentially, prospective challengers elsewhere—could not use ED's notice as a trump card in an argument against the constitutionality of state regulation of federal student loan servicers.[103] So, while any prospective challenge to SLBORA would likely reference ED's notice, the notice itself should not alone decide SLBORA's fate.

2. Express Preemption and the D.C. Law's Disclosure Requirements

The Servicing Alliance next argued that § 1098g of the Higher Education Act expressly preempted the D.C. law's servicer reporting requirements—one of the law's main methods for monitoring servicers' business practices—effectively rendering the D.C. law bloodless.[104] Section 1098g provides that "[l]oans made, insured, or guaranteed pursuant to a program authorized by Title IV of the [Higher Education Act] *shall not be subject to any disclosure requirements of any State law*."[105] As the vast majority of federal student loans are issued pursuant to Title IV of the Higher Education Act, § 1098g would, according to the Servicing

100. *See id.* at 49.

101. *See id.* at 50 (citing Wyeth v. Levine, 555 U.S. 555, 577 (2009)). Prior to issuing its informal guidance, ED made statements "that explicitly rejected the preemptive effect of the [Higher Education Act]." *Id.*

102. *See id.* at 50–51.

103. *See id.* at 49–51.

104. *See id.* at 51.

105. *See id.* (emphasis added) (citation omitted) (quoting 20 U.S.C. § 1098g (2018)).

Alliance, prevent most federal loans from exposure to any state law disclosure requirements.[106]

However, neither § 1098g nor any other component of the Higher Education Act expressly define what the term "disclosure requirements" means in the context of federal student loan servicing.[107] In light of scant evidence to suggest that Congress intended the broadest possible interpretation to apply, the court declined to interpret the statute broadly.[108] Despite the Servicing Alliance's argument to the contrary, the court saw no reason to read § 1098g as preventing states from regulating all servicer communications that exceed those required under the Higher Education Act.[109] In other words, with respect to regulating a servicer's disclosures to parties other than student loan borrowers, federal law represents a floor, not a ceiling, and does not expressly preempt the third party reporting requirements within the D.C. law.[110] Further still, the court found no reason to hold that the short sentence contained within § 1098g reflected Congress's clear intent "to invalidate an entire state regulatory scheme that would require reporting."[111]

So, while § 1098g expressly preempts any state laws regulating servicer-borrower communications with respect to federal student loans, it does not expressly preempt state laws that regulate communications between the student loan servicers and parties other than federal student loan borrowers. And importantly, § 1098g also does not alone invalidate entire state regulatory schemes—like SLBORA—simply because they involve reporting requirements.[112] Therefore, it would seem that SLBORA can at

106. *Id.*

107. *See id.* According to the Servicing Alliance, Congress intended the courts to interpret § 1098g's prohibition against disclosures broadly, including any disclosures to borrowers not contemplated by federal law and disclosures to third-party state agencies. *See id.* D.C., on the other hand, argued that the court should interpret the preemption provision narrowly to prohibit only state regulation of servicer-to-borrower disclosures, leaving the states free to regulate servicers' other disclosures, such as those that the D.C. law contemplated. *See id.* at 51–52.

108. *See id.* at 53–54.

109. *Id.* at 54.

110. *Id.* at 54–55.

111. *See id.* at 55 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 487 (1996)).

112. *See id.*

least safely require servicers operating within Rhode Island to make disclosures to third party state agencies like the DBR under Judge Friedman's framework.[113]

3. Field Preemption

The Servicing Alliance next argued that the D.C. law should be invalidated under the doctrine of field preemption.[114] Under this doctrine, even a state law that compliments a federal law may be invalidated when Congress clearly intends the federal law to occupy the entire field of regulation over the relevant subject matter.[115] At the outset, the court determined that regulation of student loan servicers represented the field of regulation relevant to its analysis, as those servicers stood as the D.C. law's primary "target."[116] And while no court had opined on whether federal law occupied the regulation of federal student loan servicers theretofore, the court here noted that other federal courts "have consistently held that the [Higher Education Act writ large] does not have field preemptive effect," reasoning that "Congress could not have intended to occupy the field because the [Higher Education Act] requires adherence to state law in particular provisions and explicitly preempts state law in others."[117]

After framing the issue generally, the court then evaluated the two field preemption arguments that the Servicing Alliance advanced. The Servicing Alliance first argued that, taken together, the relevant federal laws and regulations "fully occupy" the field of student loan servicer regulation such that no room exists for state law supplementation.[118] The court, however, disagreed.[119] It noted

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113. *See id.* For an analysis of SLBORA's disclosure provisions, see discussion *infra* Section III.C.2.

114. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 55.

115. *See id.* (citing Sickle v. Torres Advanced Enter. Sols., L.L.C., 884 F.3d 388, 347 (D.C. Cir. 2018)). The requisite Congressional intent to occupy a field "can be inferred from [either] (1) a framework of regulation . . . so pervasive that it leaves no space for state supplementation, or [2] where the federal interest is so dominant that the existence of a federal scheme can be assumed to preclude enforcement of state laws on the same subject." *Id.* at 55–56 (quoting *Sickle*, 884 F.3d at 347 (internal citation and quotations omitted)).

116. *Id.* at 56.

117. *Id.* (citations omitted).

118. *Id.*

119. *Id.* at 57.

that the promulgation of extensive regulations alone cannot evidence occupation of the entire field of servicer regulation, as such an assumption "would be inconsistent with the federal-state balance embodied in [the Supreme Court's] Supremacy Clause jurisprudence."[120] In addition, the court reiterated that Congress intended that ED establish only "*minimum* standards" to which servicers must adhere under the Higher Education Act.[121] Thus, to this court anyways, Congress left the states plenty of room to enact supplementary regulations over student loan servicers.

Next, the Servicing Alliance argued that the federal government's interests in its massive student loan portfolio, and in its rights and obligations in its contracts with the student loan servicers, are so dominant as to preclude parallel state laws in the field.[122] Yet, notwithstanding those enormous interests, the court found them to be outweighed by D.C.'s interest in protecting its consumers from deceptive or otherwise unfair servicer conduct.[123]

Thus, despite the wide-ranging federal regulation of student loans generally and the federal government's trillion-dollar interest in its student loan portfolio, a servicer's field preemption argument against a state law regulating servicers yielded as a matter of law to the jurisdiction's quasi-sovereign interest in protecting its consumers in this case.[124] For states enacting consumer protection laws like SLBORA, this portion of the court's holding lends credence to the argument that state supplementation of federal student loan servicer regulations is not only valid, but critically important.[125]

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120. *Id.* (quoting Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 717 (1985)). As another point of inconsistency, the court called attention to the Consumer Financial Protection Bureau's earlier conclusion that no comprehensive federal regulatory framework exists to govern federal student loan servicing. *Id.* at 58 (citing Request for Information Regarding Student Loan Servicing, 80 Fed. Reg. 29302-01, 29305 (May 21, 2015)).

121. *Id.* at 57 (quoting 20 U.S.C. § 1082(a)(1) (2018) (emphasis added)).

122. *See id.* at 58.

123. *See id.* at 58–59.

124. *See id.* at 59; *see also* Friedman, *supra* note 23 (describing size of the federal government's student loan portfolio).

125. *See* Pennsylvania v. Navient Corp., 967 F.3d 273, 284–87 (3d Cir. 2020) (noting that the federal Consumer Protection Act patently allows states to bring concurrent claims against servicers using the states' own consumer protection laws).

4. Impossibility Preemption

Next, the Servicing Alliance pulled yet another arrow out of its seemingly capacious quiver to attack the constitutionality of the D.C. law: the doctrine of impossibility preemption. One of the two subcategories within the broader doctrine of conflict preemption, impossibility preemption comes into play where federal and state laws directly and actually conflict such that "compliance with both . . . [laws] is a physical impossibility."[126] In this light, the Servicing Alliance argued that compliance with the D.C. law's reporting requirements would force them to violate federal laws that prevent the disclosure of borrower identification information.[127]

However, the court described that argument as presenting a "false conflict."[128] Despite the Servicing Alliance's contention, the rules promulgated under the D.C. law contain an express exemption encouraging servicers to provide the relevant records "except to the extent prohibited by federal law."[129] So, even if ED needs to review all of D.C.'s document requests for compliance with federal law as the Servicing Alliance contended, the D.C. law does nothing to prevent that process, and instead allows any documents which may contain information that violates federal laws to simply be redacted to comport with those laws.[130]

Thus, despite some facial overlap between the D.C. law and other federal laws governing certain servicer reporting requirements, the actual operation of the D.C. law's reporting requirements does not conflict with its federal counterparts such that a servicer's compliance with all of the relevant laws would be "a physical impossibility."[131] The reporting requirements so common within state laws of this type seem to have survived yet another attack.

126. *Student Loan Servicing All.*, 351 F. Supp. 3d at 59 (quoting Fla. Avocado & Lime Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

127. *Id.* at 60.

128. *Id.*

129. *Id.* (quoting D.C. CODE MUN. REGS. tit. 26-C, § 3018.1 (LexisNexis through D.C. Reg., Vol. 68, No. 2)).

130. *Id.* at 60–61.

131. *Id.* at 59, 61 (quoting *Fla. Avocado & Lime Growers, Inc.*, 373 U.S. at 142–43).

5. Obstacle Preemption—The Servicing Alliance Lands a Material Blow

So far, the D.C. law had withstood each of the preemption-based challenges that the Servicing Alliance leveled against it. ED's conclusory guidance deserved no judicial deference;[132] the Higher Education Act's express preemption provision applied only to servicer-borrower communications, which the D.C. law did not attempt to police;[133] no evidence existed to suggest that Congress intended to occupy the entire field of student loan servicer regulation;[134] and no actual conflict existed between the D.C. law and its federal counterparts such that servicer compliance with all relevant laws was impracticable.[135] However, the Servicing Alliance delivered a fairly crippling blow to the D.C. law with its final—but strongest—preemption argument: obstacle preemption.[136]

Obstacle preemption, the second of the two conflict preemption subcategories, comes to the fore where a state law "actually conflicts with federal law [by standing] 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[137] Because an obstacle preemption analysis requires a more granular comparison of the D.C. law against the Higher Education Act, the court applied the obstacle preemption doctrine to each of the three categories of federal student loans separately.[138] As the analysis yielded the same result for both FDLP Loans and Government-Owned FFELP Loans, those loan categories are grouped together below.

132. *See id.* at 48–51 (discussing ED's guidance).
133. *See id.* at 51–55 (discussing express preemption).
134. *See id.* at 55–59 (discussing field preemption).
135. *See id.* at 60–61 (discussing impossibility preemption).
136. *Id.* at 61.
137. *Id.* (quoting Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (internal citation omitted)).
138. *Id.* For reference, the three categories of student loans relevant to this analysis are FDLP Loans, Government-Owned FFELP Loans, and Commercial FFELP Loans. *See id*; *see also* discussion *supra* Section I.A.

a. *FDLP Loans and Government-Owned FFELP Loans—The D.C. Law Fails*

According to the Servicing Alliance, the D.C. law's licensing scheme, which required servicers to obtain a license prior to servicing student loans within the district, stood as a direct obstacle to ED's authority to select and contract with servicers directly for FDLP Loans, and for the FFELP Loans which the government purchased in the wake of the 2008 financial crisis.[139] Stated differently, by creating additional hoops for student loan servicers to jump through in order to operate pursuant to their contracts with the federal government, D.C's licensing scheme "impermissibly second-guesse[d] the federal government's decisions to contract with [federal student loan] servicers."[140]

As noted earlier, the Higher Education Act authorizes ED to contract directly with the servicers it plans to use to service its FDLP Loans, and other federal law delegates similar, singular authority to ED with respect to the servicing of Government-Owned FFELP Loans.[141] On the other hand, the D.C. law's licensing scheme empowers the District to grant or deny a license to operate there only after an initial evaluation of a servicer's financial responsibility and character and general fitness for business within the district.[142] The D.C. licensing scheme also enables the District to revoke a license "for a number of reasons, including if the servicer has '[d]emonstrated incompetency and untrustworthiness to act as a licensee.'"[143] These elements of the licensing scheme, according to the court, proved fatal to its constitutionality.[144]

By effectively second-guessing "the reliability of persons and companies contracting with the Federal Government" to service FDLP Loans and Government-Owned FFELP Loans, the D.C. law's

139. *Student Loan Servicing All.*, 351 F. Supp. 3d at 62 (FDLP Loans); *id.* at 65 (Government-Owned FFELP Loans). For more information regarding the Government's post-2008 purchase of Commercial FFELP Loans in the wake of the financial crisis, see *id.* at 38 (discussing the Ensuring Continued Access to Student Loans Act of 2008, Pub. L. 110–227, 122 Stat. 740).

140. *Id.* at 62.

141. *See id.* at 62 (regarding FDLP Loans); *id.* at 65 (regarding Government-Owned FFELP Loans).

142. *Id.* at 62 (quoting D.C. CODE MUN. REGS. tit. 26-C § 3002.2(c)).

143. *See id.* (quoting D.C. CODE § 31-106.02(h)(1)(E) (2020)).

144. *Student Loan Servicing All.*, 351 F. Supp. 3d at 63.

licensing scheme stood as an obstacle to the federal government's delegation of authority to ED to enter such contracts, and failed constitutional scrutiny as a matter of law as applied to those loans.[145] To the court, this conclusion held true even if D.C.'s evaluation of student loan servicers resulted in the same outcome as the federal government's evaluation—the risk that D.C.'s evaluation *could* come out differently was alone enough to render the D.C. law's licensing scheme preempted as it applied to FDLP and Government-Owned FFELP Loans.[146] Contrary to the rest of Judge Friedman's opinion, this holding dealt a particularly strong blow to the overall efficacy of the D.C. law.[147] And under Judge Friedman's framework, similar laws in other jurisdictions—at least insofar as such laws involve a similar licensing scheme—likely stand on shaky constitutional ground.[148]

b. *Commercial FFELP Loans—The D.C. Law Lives On (At Least Partially)*

After the court invalidated the D.C. law's licensing scheme as it applied to FDLP Loans and Government-Owned FFELP Loans, one might reasonably assume that the D.C. law ought to fail in its entirety.[149] However, the court did not subject the D.C. law to the same fate when it analyzed the law as it applied to Commercial FFELP Loans,[150] the other main component of the federal government's student loan portfolio.[151] As noted earlier, the federal government does not issue or otherwise assume the obligations of Commercial FFELP Loans; it acts only as a reinsurer or guarantor of the loans, which are instead issued and managed by private

145. *See id.* at 62, 65–66 (quoting Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 190 (1956)). The court relied heavily on the *Leslie Miller* preemption analysis to reach this conclusion. *See id.* at 62–66. However, as will become evident later in this Comment, the *Leslie Miller* analysis did not apply to invalidate the D.C. law as it applied to Commercial FFELP Loans—contracts to which the federal government is not a party. *See* discussion *infra* Section II.A.5.b.

146. *Student Loan Servicing All.*, 351 F. Supp. 3d at 63.

147. *See id.* at 65.

148. *See id.* at 63.

149. *See id.* at 65.

150. *See id.* at 67.

151. *See* Friedman, *supra* note 23.

lenders.[152] As a result, student loan servicers contract directly with private lenders—and not the federal government—to service Commercial FFELP Loans.[153] This distinction—that is, that the federal government is not a party to the contracts between the issuers of the loans and the servicers—spares the D.C. law from the *Leslie Miller* preemption analysis that proved fatal to the D.C. law as it applied to FDLP Loans and Government-Owned FFELP Loans.[154]

Yet, even after employing a more traditional obstacle preemption analysis to the D.C. law, the court still held that the D.C. law could be fairly applied to Commercial FFELP Loans.[155] To Judge Friedman, the D.C. law's licensing scheme—which served only to supplement the *minimum* standards for servicer qualifications that Congress intended ED to promulgate under the Higher Education Act—could not possibly stand as an obstacle to the effectuation of Congress's underlying purpose for the FFELP program.[156] And, although promoting regulatory uniformity was at least somewhat of a purpose behind the Higher Education Act, its core purpose remained the promotion of borrower access to federal loans.[157] Thus, the D.C. law did not prevent the proper effectuation of Congress's core purpose for the FFELP program as that purpose appeared from the statute's legislative history.[158]

Despite this unfavorable legislative history, the Servicing Alliance argued that the Ninth Circuit's holding in *Chae v. SLM*

152. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 66. For a discussion of the Commercial FFELP Loan program generally, see discussion *supra* Section I.A.

153. *Student Loan Servicing All.*, 351 F. Supp. 3d at 66.

154. *See id*; *see also* discussion *supra* Section II.A.5.a.

155. *Student Loan Servicing All.*, 351 F. Supp. 3d at 66–67, 72. This more traditional analysis involved an evaluation of the congressional purpose underlying the relevant federal statutes or regulations, followed by a determination as to whether the state law at issue obstructed the accomplishment of that congressional purpose. *See id.*

156. *Id.* at 69–70. According to the court, Congress's main purpose for the Higher Education Act with respect to the FFELP program was "to simplify the FFELP program for student borrowers in order to further its foundational objective—improving access to higher education for all borrowers—nothing more." *Id.* at 69.

157. *See id.* at 67–69.

158. *Id.* at 71.

Corporation still supported its assertion that the D.C. law and federal law could not coexist in this area.[159] Once again, the court disagreed.[160] *Chae*, the court held, dealt with state law claims that threatened to interfere with *how* federal student loan servicers conduct their work in a manner that impermissibly conflicted with the uniform administration of the FFELP program.[161] The D.C. law and its component licensing scheme, on the other hand, were designed to regulate *who* might be eligible to service the federal student loans of the district's residents.[162] Because the latter type of regulation does not interfere with the Higher Education Act's underlying purpose—that is, it does not prevent or hinder borrowers' access to student loans—the court held that the D.C. law need not be preempted as it applies to Commercial FFELP Loans.[163]

6. Summarizing the D.C. Roadmap

Though incredibly long and complex, Judge Friedman's opinion in *Student Loan Servicing Alliance* provides detailed insight into how other federal courts might evaluate similar constitutional challenges that servicers could foreseeably bring against state servicer regulation laws like SLBORA.[164] According to the roadmap that the opinion provides, the servicers cannot rely entirely on ED's informal guidance when bringing such a challenge against a state statute.[165] In addition, the Higher Education Act's express preemption provision applies only to servicer-borrower communications, and scant evidence exists to support the charge that Congress intended the numerous, relevant federal regulations

159. *See id.* at 70. In *Chae*, the Ninth Circuit found that certain state law claims against a servicer (which went to the heart of how servicers manage their loan portfolios) were preempted as an obstacle to the uniform administration of the FFELP program. *See* Chae v. SLM Corp., 593 F.3d 936, 950 (9th Cir. 2010).

160. *Student Loan Servicing All.*, 351 F. Supp. 3d at 70.

161. *See id.*

162. *Id.*

163. *See id.* at 70, 72 (explaining that the D.C. law does not interfere with the Higher Education Act's objective and ultimately holding that the D.C. law is not preempted).

164. *See generally id.* at 46–76 (extensively analyzing each of the Servicing Alliance's several preemption challenges to the D.C. law).

165. *See generally id.* at 48–51 (discussing ED's guidance).

to occupy the field of servicer regulation entirely.[166] Further still, compliance with federal law, ED's regulations, and state servicer regulations is not necessarily physically impracticable for the servicers.[167] And most crucially, licensing schemes such as the one that the D.C. law created cannot constitutionally be applied to a servicer's FDLP Loans or Government-Owned FFELP Loans, but *can* be applied to a servicer's Commercial FFELP Loans.[168]

At bottom, the Servicing Alliance succeeded in stripping the D.C. law of the main tool it might use to police the errant servicing of loans within the FDLP program, the largest component of ED's student loan portfolio.[169] Unfortunately, the FDLP program also happens to be the only program under which the federal government has issued loans since 2010, and the only program under which it plans to continues issuing new loans going forward.[170] So, *Student Loan Servicing Alliance* dealt a truly crippling blow to the D.C. law, reducing the district's noble consumer protection law to what Judge Friedman dismissively described as "an aspirational document."[171] But, despite the unfavorable outcome in D.C., how have similar statutes in other states fared when subjected to similar scrutiny? As it turns out, not particularly well.

B. *The Connecticut Case—Another Failed Consumer Protection Attempt*

The D.C. law was not the only state (or at least non-federal) student loan borrower protection statute to face a preemption challenge in recent years. In 2018, the Pennsylvania Higher Education Assistance Agency (PHEAA), another student loan servicer who contracts with the federal government, challenged a document request that it received pursuant to Connecticut's

166. *See generally id.* at 51–55 (discussing express preemption); *id.* at 55–59 (discussing field preemption).

167. *See generally id.* at 60–61 (discussing impossibility preemption).

168. *See generally id.* at 61–72 (discussing obstacle preemption).

169. *See id.* at 65; *id.* at 38 (noting that ninety percent of new student loans are made through FDLP); *see also* Freidman, *supra* note 23 (ranking FDLP Loans as the largest Student Loan Program).

170. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 38.

171. *Id.* at 52.

student loan servicer licensing scheme.[172] Using a key component of its authority under that licensing scheme, the state sought to examine PHEAA's servicing practices surrounding Connecticut's borrowers eligible for ED's Public Service Loan Forgiveness Program—a program notoriously difficult for borrowers to complete.[173] When PHEAA forwarded the document request to ED (as PHEAA was required to do under the parties' contract), ED instructed PHEAA not to make the requested disclosure because doing so would violate both the parties' contract and the Federal Privacy Act.[174] In light of ED's instruction, and ED's further argument that the Connecticut licensing scheme ought to be preempted in its entirety, PHEAA sought a declaratory judgement as to whether the Connecticut law was, in fact, preempted by federal law.[175]

Notably, PHEAA's request of the United States District Court for the District of Connecticut was not all that different from the Servicing Alliance's request in the D.C. case.[176] And while the issues to be considered were nearly identical in the two cases, the outcome in Connecticut was even less favorable for the statute's constitutionality, even though the Connecticut court's holding applied a bit more narrowly.[177] A brief analysis of the Connecticut case should provide some additional insight into the constitutional validity of Rhode Island's SLBORA.

172. Pa. Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112, 115 (D. Conn. 2020). For a discussion of the Connecticut licensing scheme, see discussion *supra* Section I.C.1.

173. *See Perez*, 457 F. Supp. 3d at 118. *See also* CONN. GEN. STAT. ANN. § 36a-851 (West, Westlaw through 2021 Reg. Sess.) (outlining the Connecticut Department of Banking's servicer examination authority). On the appalling acceptance rate of borrower applications for Public Service Loan Forgiveness thanks, in large part, to servicer mismanagement of the program, see Keshner, *supra* note 15 (noting the program's one percent acceptance rate as of 2018).

174. *Perez*, 457 F. Supp. 3d at 115, 118.

175. *Id.* at 115.

176. *See* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 42 (D.D.C. 2018) (seeking declaratory judgment regarding constitutionality of D.C. law and its licensing scheme).

177. *See Perez*, 457 F. Supp. 3d at 125 (finding Connecticut's licensing scheme preempted as applied to FDLP Loans only).

1. Connecticut's Licensing Authority Fails the Conflict Preemption Test

Although Judge Friedman performed an exhaustive analysis of each possible preemption doctrine available to the Servicing Alliance in the D.C. case,[178] United States District Judge Michael P. Shea only visited the doctrine of conflict preemption—specifically, the subcategory of obstacle preemption—to determine that Connecticut's servicer licensing scheme was preempted.[179] In pertinent part, the obstacle preemption doctrine comes into play where "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[180]

According to Judge Shea, the Connecticut licensing scheme presented just such an obstacle to ED's ability to contract with servicers at its own discretion.[181] Federal law requires ED to thoroughly vet the servicers with whom it wishes to contract to ensure that those servicers meet certain business responsibility and aptitude requirements.[182] In essence, the Connecticut licensing scheme vested Connecticut with the authority to make its own determination of a federal contractor's suitability for contracting with the federal government and set additional standards that servicers must meet in order to do business within Connecticut.[183] In so doing, Connecticut's licensing scheme impermissibly granted the state "a virtual power of review" over ED's contracting decisions in such a manner as to render the licensing scheme unconstitutional and preempted as applied to FDLP Loans.[184] As such, PHEAA did not need to comply with

178. *See generally Student Loan Servicing All.,* 351 F. Supp. 3d at 46–76 (analyzing the D.C. law under the express, field, impossibility, and obstacle preemption doctrines).

179. *Perez*, 457 F. Supp. 3d at 122.

180. *Id.* at 121 (quoting Arizona v. United States, 567 U.S. 387, 399 (2012)).

181. *Id.* at 122.

182. *Id.* at 116.

183. *Id.* at 125.

184. *Id.* at 122. Unlike in *Student Loan Servicing Alliance*, the court here invalidated the Connecticut licensing scheme as it applied to FDLP Loans only, as the court's evaluation of the underlying document request at issue in the litigation did not require analysis of Connecticut's licensing scheme as it

Connecticut's document request, as the authority upon which the state based that request—that is, the licensing scheme—was rendered null and void by the court's preemption decision.[185]

Interestingly—and, for the purposes of this Comment, troublingly—the court found the Connecticut law to be preempted despite the strong presumption against preemption for state laws that attempt to exercise the states' traditional police power in the area of consumer protection.[186] According to the court, the relevant cases seeking to protect federal government contractors from exposure to state licensing schemes generally apply with equal force even when those schemes are rooted in the honorable goal of consumer protection.[187] And, in finding the Connecticut law preempted, Judge Shea noted that he "join[ed] the reasoning and conclusion reached as to [the D.C. law] in a thorough opinion by Judge Friedman."[188] The D.C. case, it seems, carried significant weight with Judge Shea and may be similarly persuasive for other members of the federal bench. But would it militate a similar outcome if it were invoked in a challenge to SLBORA?

III. Rhode Island's SLBORA—Key Distinctions that Should Save the Statute

In light of the decisions invalidating state-level student loan servicer regulations in both the District of Columbia[189] and Connecticut,[190] one might reasonably assume that the outlook for SLBORA is rather bleak. However, the structure of SLBORA differs from its counterparts in D.C. and Connecticut such that SLBORA remains more likely to survive a court's constitutional scrutiny. This final Part will identify a few of the essential

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applied to the other two loan categories. *See id.* However, as the reasoning applied here mirrors that employed in *Student Loan Servicing Alliance*, one can reasonably assume the Connecticut licensing scheme would suffer the same fate as the D.C. law did when applied to Government-Owned FFELP Loans. *See* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 75–76 (D.D.C. 2018). *See also* discussion *supra* Section II.A.5.a.

185. *See Perez*, 416 F. Supp. 3d at 129.

186. *Id.* at 122.

187. *See id.* at 125 (internal citations omitted).

188. *Id.* at 125 (citing *Student Loan Servicing All.*, 351 F. Supp. 3d at 62).

189. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 75–76 (deeming statute unconstitutional in part).

190. *See Perez*, 416 F. Supp. 3d at 125 (deeming statute unconstitutional).

distinctions between SLBORA and other statutes of its kind and will argue that these distinctions should be material enough to save the statute from the fate that its out-of-state counterparts suffered.

A. *SLBORA Does Not Involve a Servicer Licensing Scheme*

First—and perhaps most importantly—unlike its counterparts in D.C. and Connecticut, the foundational element of SLBORA does not involve a servicer licensing scheme.[191] Instead, SLBORA only requires student loan servicers wishing to do business with Rhode Island borrowers to *register* with the Rhode Island DBR.[192] Further, although the statute requires prospective registrants to complete an application for registration that the DBR promulgates, it provides no authority for the DBR to review the financial condition of student loan servicers as a precondition to approving such an application.[193] Moreover, aside from the requirement that student loan servicers renew their registration annually, the DBR is not authorized to revoke a previously approved registration.[194]

Those components are critical to SLBORA's survival. Unlike the licensing schemes that the D.C. and Connecticut statutes created,[195] SLBORA's registration scheme does not authorize the DBR to second-guess a servicer's overall fitness for business in Rhode Island.[196] Without sanctioning or encouraging that type of state-level second-guessing, SLBORA's registration requirement does not stand as an obstacle to a servicer fulfilling their contractual duties with the federal government in the way that a discretionary licensing scheme would.[197] And, because the registration process is far less intensive than seeking a license would be, servicers should have no problem complying with federal law, their contracts with the federal government, and SLBORA's

191. *Compare* 19 R.I. GEN. LAWS § 19-33-4 (2020) (requiring servicer registration), *with* D.C. CODE §31-106.02 (2020) (requiring servicer licensure), *and* CONN. GEN. STAT. ANN. § 36a-847 (West, Westlaw through 2021 Reg. Sess.) (requiring servicer licensure).

192. 19 R.I. GEN. LAWS § 19-33-4 (2020).

193. *See id.* § 19-33-4(c)(1).

194. *See generally id.* § 19-33-4.

195. *See* discussion *supra* Section I.C.

196. *See generally* 19 R.I. GEN. LAWS § 19-33-4 (2020).

197. *See generally* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 63 (D.D.C. 2018) (discussing obstacle preemption).

registration requirement.[198] Put simply, a servicer would struggle to make a successful impossibility preemption argument.[199]

So, because SLBORA's registration requirement does not interfere with the federal government's contracting decisions, it is likely that the *Leslie Miller* line of cases would not force a court to render the registration system, or the statute generally, preempted in its entirety under the obstacle preemption doctrine.[200] As such, a court would most likely not restrict SLBORA's application to only Commercial FFELP Loans.[201] Importantly, the lack of such a restriction would allow SLBORA to be fairly and constitutionally applied to the servicing of ED's entire student loan portfolio.[202]

However, a servicer could foreseeably raise the argument that a registration requirement is simply a licensing scheme in disguise. In fact, ED implicitly makes such an argument in its informal guidance, where it groups licensing schemes and registration requirements together in its blanket assertion that existing federal law preempts state laws governing servicer conduct.[203] Yet, despite ED's assertions, this argument is unlikely to succeed in court. As previously noted, SLBORA's registration requirement is far less onerous than the D.C. or Connecticut licensing schemes were—SLBORA does not provide the DBR with any authority to assess a servicer's fitness for business in Rhode Island before granting a registration and does not allow the DBR to second-guess ED's decision to contract with any servicer seeking to do business in the state.[204] And, as Judge Friedman persuasively opined, ED's conclusory guidance deserves no judicial deference.[205]

Therefore, at least with respect to the core component of SLBORA—its registration requirement—the statute appears to be

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198. *See id.* at 60–61 (discussing impossibility preemption).

199. *See id.*

200. *See id.* at 63; see *also* Pa. Higher Educ. Assistance Agency v. Perez, 416 F. Supp. 3d 112, 125 (D. Conn. 2020).

201. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 72.

202. *See id.*

203. *See* 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, 10,620 (Mar. 12, 2018).

204. *See* 19 R.I. GEN. LAWS § 19-33-4 (2020); *see also Perez*, 416 F. Supp. 3d at 125; *Student Loan Servicing All.*, 351 F. Supp. 3d at 63.

205. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 51.

well positioned to survive a servicer's foreseeable preemption arguments.[206]

B. *SLBORA's Examination Provisions Do Not Derive from Unconstitutional Authority*

SLBORA's registration requirement is just one of its many components—equally important to SLBORA are its examination provisions.[207] Similar to the Banking Commissioner's authority to conduct examinations of servicers under the Connecticut statute, which derived from the statute's licensing scheme, SLBORA authorizes the DBR to conduct examinations of all servicer-registrants in Rhode Island.[208] Unlike the Connecticut or D.C. statutes, however, the DBR's examination authority does *not* empower it to revoke or otherwise impact a servicer's registration as a result of such an examination.[209] As noted in the preceding section, this lack of revocation authority gives the DBR no power to second-guess a servicer's fitness for business in the state, and thus significantly weakens a servicer's prospective obstacle preemption argument.[210] So, assuming that the registration requirement meets constitutional muster, a servicer could not reasonably argue that the DBR's examination authority derives from an unconstitutional source.[211]

However, the examinations of servicer-registrants' business operations that the DBR can perform under SLBORA can be quite comprehensive.[212] Under SLBORA, the DBR is granted "free access to the offices and places of business, books . . . records [and] files" of all servicer-registrants in the state for examination purposes and may conduct such examinations "as often as is

206. *See* 19 R.I. GEN. LAWS § 19-33-4 (2020); *Student Loan Servicing All.*, 351 F. Supp. 3d at 63.

207. *See generally* 19 R.I. GEN. LAWS § 19-33-9 (2020).

208. *Compare* 19 R.I. GEN. LAWS § 19-33-9 (2020), *with* CONN. GEN. STAT. ANN. § 36a-851 (West, Westlaw through 2021 Reg. Sess.).

209. *Compare* 19 R.I. GEN. LAWS § 19-33-9 (2020), *with* CONN. GEN. STAT. ANN. § 36a-851 (West, Westlaw through 2021 Reg. Sess.) *and* D.C. CODE § 31-106.02 (2020).

210. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 63.

211. *See* Pa. Higher Educ. Assistance Agency v. Perez, 416 F. Supp. 3d 112, 122–29 (D. Conn. 2020).

212. *See* 19 R.I. GEN. LAWS § 19-33-9(c) (2020).

necessary, based upon all relevant factors, including the volume of [student loan servicing] activity within the state."[213]

To the extent that SLBORA's examination authority requires servicers to provide documents to the DBR that may violate federal law or their contracts with ED, a servicer may be able to level a successful preemption argument against such document requests.[214] However, this limitation does not exclude all possible document requests that the DBR could make of a servicer. So long as the DBR's document requests under SLBORA do not violate federal law, or a servicer's contract with ED, the statute can serve its intended purpose without being deemed unconstitutional.[215]

C. *SLBORA's Prohibitions Should Survive, But Its Responsibilities May Go Too Far*

The last two of SLBORA's main features are its enumerations of prohibited servicer conduct[216] and servicer responsibilities under the act.[217] The former of these two features appears generally safe from constitutional scrutiny while the latter may not fare quite as well under the frameworks discussed above and other pertinent case law. This subsection will address each of these important components in turn.

1. SLBORA's Prohibited Conduct Provisions

In accordance with its consumer protection spirit, SLBORA outlines various types of conduct in which student loan servicers must not engage while servicing Rhode Island borrowers' loans.[218] Specifically, SLBORA prevents servicers from "[d]irectly or indirectly employ[ing] any scheme, device, or artifice to defraud or mislead . . . borrowers,"[219] and prohibits servicers from making affirmative or negligent misrepresentations to borrowers

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213. *Id.* §§ 19-33-9(c)–(d).

214. *Perez*, 416 F. Supp. 3d at 129.

215. *See id.* at 122–29; *see also Student Loan Servicing All.*, 351 F. Supp. 3d at 60–61.

216. 19 R.I. GEN. LAWS § 19-33-12 (2020).

217. *Id.* § 19-33-8.

218. *See generally id.* § 19-33-12.

219. *Id.* § 19-33-12(1).

surrounding the repayment of their loans, among other noteworthy prohibitions.[220]

These types of prohibitions within the statute represent an exercise of Rhode Island's state police power to protect its consumers from businesses—in this case, student loan servicers—that choose to employ errant conduct within the state.[221] As a general matter, when conducting a preemption analysis, "courts should assume that the historic police powers of the States are not superseded [by federal law] unless that was the clear and manifest purpose of Congress."[222] Thus, while some servicers have attempted to argue that these types of provisions fall within the category of state regulation that § 1098g of the Higher Education Act expressly preempts—that is, those which regulate servicer-borrower communications—those arguments tend not to succeed.[223]

In addition, recent cases tend to support the constitutionality of the vast majority of SLBORA's enumerations of prohibited conduct, particularly those directed at misleading or otherwise deceptive methods that servicers might attempt to employ when servicing student loans in Rhode Island.[224] And, of course, student loan servicers can refrain from engaging in such conduct without

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220. *See id.* § 19-33-12(2).

221. *See* Pa. Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112, 121–22 (D. Conn. 2020) (noting that the presumption against preemption for state laws "is particularly strong where . . . a state or locality seeks to exercise its police powers to protect the health and safety of its citizens" (internal citation omitted)).

222. *See id.* (quoting Arizona v. United States, 567 U.S. 387, 400 (2012)).

223. *See, e.g.*, Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639, 647 (7th Cir. 2019). In *Nelson*, the Seventh Circuit dealt with a servicer's argument that a borrower's affirmative misrepresentation claim, which the borrower brought under the Illinois Consumer Fraud and Deceptive Business Practices Act, ought to be preempted by § 1098g. *See id.* at 642. In finding that § 1098g did not preempt such causes of action, the court expressly stated that "Congress did not use language [in the express preemption provision within § 1098g] that preempts all state-law consumer protections for student loan borrowers when they are communicating with their loan servicers." *Id.* at 647. According to the court, that fact is especially true where the underlying consumer protection claim deals with a servicer's "voluntary but deceptive statements," as these types of voluntary affirmative misrepresentations are not militated by any provision of the Higher Education Act. *Id.* at 649.

224. *See id.* at 647–49; Pennsylvania v. Navient Corp., 967 F.3d 273, 290 (3d Cir. 2020) (adopting distinction from *Nelson*).

violating their contracts with ED, the Higher Education Act, or any other relevant federal law, rendering any impossibility preemption argument bloodless.[225] To the extent that these prohibitions attempt to regulate a servicer's disclosures to Rhode Island borrowers, however, SLBORA likely stands on far weaker footing.[226]

2. SLBORA's Servicer Responsibilities—Dancing on the Line of Unconstitutionality

Unlike SLBORA's prohibited conduct provisions, which can find shelter from constitutional scrutiny in the manners just described, the responsibilities that SLBORA assigns to servicers operating within Rhode Island seem at least facially vulnerable to express preemption under § 1098g of the Higher Education Act.[227] Although rooted in the same consumer protection goal as the other components of the statute, many of these provisions stand on weak constitutional footing under the relevant case law.[228]

Unfortunately, many of SLBORA's servicer responsibility provisions attempt to regulate the disclosures that servicers make to borrowers in the process of servicing their student loans.[229] For example, SLBORA requires servicers to provide borrowers, both annually and upon request, the terms of the borrower's loan, the borrower's progress towards repayment, and information about any forgiveness programs for which the borrower might be eligible.[230] SLBORA also requires servicers to disclose to the borrower the financial impacts of that borrower's potential choice to consolidate or refinance his or her student loans.[231]

Though well-intentioned—and probably not too much of a stretch under ED's contracts with the servicers—the additional

225. *See* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 60–61 (D.D.C. 2018).

226. *See Nelson*, 928 F.3d at 650.

227. *See id.* (noting that "state consumer protection laws [that] impose additional disclosure requirements on loan servicers of federally insured student loans. . . . would be preempted under § 1098g [of the Higher Education Act]" (internal citation omitted)).

228. *See id.*

229. *See generally* 19 R.I. GEN. LAWS § 19-33-8 (2020).

230. *See id.* § 19-33-8(a).

231. *See id.* § 19-33-8(e).

responsibilities that SLBORA thrusts upon student loan servicers seem to fall directly within the Higher Education Act's express preemption provision, which invalidates state laws that regulate servicer-borrower disclosures.[232] While the state could argue that these responsibilities are intended to prevent servicers from using fraudulent or deceptive trade practices, the argument is a relatively weak one given the use of the word "disclose" within the servicer responsibilities provisions and the existence of a separate delineation of prohibited conduct within the statute.[233]

Many of SLBORA's other student loan servicer responsibilities may also struggle to survive constitutional scrutiny for a different reason—they encroach upon how servicers conduct their business within the state.[234] For example, SLBORA requires servicers to develop and implement consistent procedures for helping borrowers evaluate their loan repayment, consolidation, and refinancing options.[235] Further, "except as provided by federal law or required by a student loan agreement," SLBORA requires servicers to "inquire of a borrower how to apply an overpayment" to the borrower's loan or loans.[236]

Again, standing alone, imposing these types of responsibilities upon the student loan servicers seems almost honorable in light of the alternative conduct they have proven capable of employing.[237] Yet, state laws which strive to regulate *how* servicers conduct their business within the state (as opposed to those regulating *who* may operate as a servicer within the state) often stand as obstacles to the objectives of federal law and ED's contracts with its servicers.[238]

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232. *See* Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 53–54 (D.D.C. 2018) (citing 20 U.S.C. § 1098g (2018)).

233. *See Nelson*, 928 F.3d at 650.

234. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 70 (citing Chae v. SLM Corp., 593 F.3d 936, 947–50 (9th Cir. 2010).

235. 19 R.I. GEN. LAWS §§ 19-33-8(b)–(d) (2020).

236. *Id.* § 19-33-8(g). An overpayment occurs when a borrower pays more than the amount due on his or her monthly statement. *See, e.g.,* Rivera v. Navient Solutions, No. 20-cv-1284 (LJL), 2020 WL 4895698, at *5 (S.D.N.Y. Aug. 19, 2020). For an example of when a servicer's misapplication of a borrower's overpayments can go terribly awry, see *id.* at *3–5 and the Introduction to this Comment.

237. *See, e.g.*, *Rivera*, 2020 WL 4895698 at *3–5.

238. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 70 (citing *Chae*, 593 F.3d at 947–50).

Thus, SLBORA's servicer responsibility provisions may be vulnerable to an obstacle preemption argument.[239]

Importantly, however, the *Student Loan Servicing Alliance* court expressly noted that the Higher Education Act only requires ED to establish minimum standards for servicer conduct.[240] And, as Congress did not intend to occupy the entire field of student loan servicer regulation with the Higher Education Act and ED's own guidelines, SLBORA's imposition of parallel or additional responsibility requirements upon servicers in Rhode Island may not run afoul of federal law.[241] Provided the state can muster up a compelling argument in this regard, those of SLBORA's new student loan servicer responsibilities that do not involve servicer-borrower disclosures just might survive a servicer's preemption challenge.[242]

CONCLUSION

To summarize, SLBORA appears to be better positioned than either of its invalidated counterparts to withstand a challenge from a servicer on preemption grounds. Critically, SLBORA does not center around a licensing scheme that empowers a Rhode Island state agency to second-guess the federal government's decisions to contract with certain student loan servicers; SLBORA only requires servicers to register annually with the DBR.[243] Further, the state's ability to conduct examinations of servicer-registrants, though wide-ranging, does not necessarily require servicers to violate the Higher Education Act or its contracts with ED in order to comply with the document requests that are likely to stem from such examinations.[244] And finally, while many of the disclosure requirements within SLBORA may not be enforceable, the vast

239. *See id.* (citing *Chae*, 593 F.3d at 947–50).

240. *See id.* at 57.

241. *See id.* at 55–59 (discussing field preemption).

242. *See id.*; *see also* 19 R.I. GEN. LAWS § 19-33-12 (2020) (prohibited conduct provisions).

243. *Compare* § 19-33-4 (registration scheme), *with* D.C. CODE § 31-106.02 (2020) (licensing scheme), *and* CONN. GEN. STAT. ANN. § 36a-847 (West, Westlaw through 2021 Reg. Sess.) (licensing scheme); see *also Student Loan Servicing All.*, 351 F. Supp. 3d at 63.

244. *See* 19 R.I. GEN. LAWS § 19-33-9 (2020); *see also* Pa. Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112, 123-225 (D. Conn. 2020).

majority of the conduct that SLBORA prohibits falls within Rhode Island's traditional police power to protect its consumers from commercial harm.[245]

Thus, while SLBORA may be similar to its out-of-state counterparts in many ways, it remains fairly distinguishable from those statutes in the manners described above such that the statute can likely remain on the books as a constitutional consumer protection measure and not just another "aspirational document."[246]

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245. *See* 19 R.I. GEN. LAWS §§ 19-33-9, 19-33-12 (2020); *see also Pa. Higher Educ. Assistance Agency*, 457 F. Supp. 3d at 121–22 (noting that the presumption against preemption for state laws "is particularly strong where . . . a state or locality seeks to exercise its police powers to protect the health and safety of its citizens" (internal citation omitted)).

246. *See Student Loan Servicing All.*, 351 F. Supp. 3d at 52.