UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA ASSOCIATION OF PRIVATE POSTSECONDARY SCHOOLS, Plaintiff, v. ELISABETH DEVOS, in her official capacity as Secretary of the U.S. Department of Education, *et al.*, Defendants, MEAGHAN BAUER and STEPHANO DEL ROSE, Defendant-Intervenors.	)	Civil Action No. 17-999 (RDM)

DEFENDANT-INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant-Intervenors Meaghan Bauer and Stephano Del Rose hereby move for summary judgment on the ground that there is no genuine issue of disputed material fact and that they are entitled to judgment as a matter of law.

In support of this motion, plaintiffs submit the accompanying (1) memorandum of law and (2) a proposed order.

Dated: March 1, 2019

Respectfully submitted,

/s/ Adam R. Pulver

Adam R. Pulver
D.C. Bar No. 1020475
Scott L. Nelson
D.C. Bar No. 413548
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Toby R. Merrill
Mass. BBO No. 601071
PROJECT ON PREDATORY STUDENT LENDING,
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
(617) 522-3003
tomerrill@law.harvard.edu

Counsel for Defendant-Intervenors

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA ASSOCIATION OF PRIVATE POSTSECONDARY SCHOOLS, Plaintiff, v. ELISABETH DEVOS, in her official capacity as Secretary of the U.S. Department of Education, *et al.*, Defendants, MEAGHAN BAUER and STEPHANO DEL ROSE, Defendant-Intervenors.	)	Civil Action No. 17-999 (RDM)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Toby R. Merrill
Mass. BBO No. 601071
PROJECT ON PREDATORY STUDENT LENDING,
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
(617) 522-3003
tomerrill@law.harvard.edu

Adam R. Pulver
D.C. Bar No. 1020475
Scott L. Nelson
D.C. Bar No. 413548
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Defendant-Intervenors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

* Authorities on which we chiefly rely are marked with asterisks.

STATUTES

RULES, REGULATIONS, AND FEDERAL REGISTER PUBLICATIONS

OTHER AUTHORITIES

INTRODUCTION

In 2016, the Department of Education (ED) promulgated the Borrower Defense Rule, AR-A-1 (81 Fed. Reg. 75,926), a set of regulations incorporating a variety of protections for student loan borrowers who struggle with crushing debt loads that are often attributable to predatory practices of proprietary schools. Among other provisions, the Borrower Defense Rule provides that, as a condition of participation in the federal student loan program, schools must agree not to subject their students to forced arbitration and class-action waiver agreements that inhibit the ability of students to obtain meaningful redress when schools engage in loan-related wrongdoing. The California Association of Private Postsecondary Schools (CAPPS) sued to set the Rule aside, and ED itself unlawfully sought to delay its implementation. After this Court vacated ED's delay actions, CAPPS dismissed its challenge to all but the Rule's arbitration and class-action waiver provisions and moved for summary judgment on those two provisions.

Intervenors Bauer and Del Rose agree with CAPPS on one thing only: CAPPS's challenge raises purely legal issues that can be decided on summary judgment. CAPPS's various articulations of its assertion that the Borrower Defense Rule is contrary to the Federal Arbitration Act (FAA), however, all founder on the fact that the Rule does not render any arbitration agreement invalid or unenforceable. The FAA does not bar an agency from conditioning its agreement to provide a school with financial benefits on the school's agreement to forgo using arbitration agreements. CAPPS's fallback claim that the Rule is arbitrary and capricious reflects no more than its policy disagreement with ED's regulatory action. CAPPS falls far short of establishing that ED's well-reasoned decision to promulgate the Rule violates APA norms of agency rationality. The Court should deny CAPPS's motion for summary judgment, grant summary judgment to the intervenors (and ED), and dismiss CAPPS's remaining claims with prejudice.

BACKGROUND

I. Statutory and Regulatory Background

A. The Title IV Aid Program and Predatory Schools

The federal government spends more than $120 billion annually on student aid distributed under Title IV of the Higher Education Act (HEA), 20 U.S.C. § 1070. *See* ED, Federal Student Aid Office, 2018 Annual Report, https://www2.ed.gov/about/reports/annual/2018report/fsa-report.pdf. Students use Title IV, the largest stream of federal postsecondary education funding, to attend colleges, career training programs, and graduate schools. To receive Title IV funds, participating schools must enter into contracts called program participation agreements (PPAs) with ED and agree to comply with the HEA and applicable regulations. *See* 20 U.S.C. §§ 1087c(a), 1094; 34 C.F.R. §§ 668.14, 685.300(b).

In recent years, information has come to light showing that schools that participate in Title IV programs, particularly schools in the for-profit sector, have engaged in fraud and misrepresentation with respect to their educational offerings and student outcomes. *See*, *e.g.*, ED, Notice of Proposed Rulemaking, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, AR-B-1, 7 (81 Fed. Reg. 39,330, 39,335 (June 16, 2016)) (NPRM) (discussing fraudulent practices of Corinthian College). Many students drop out of such predatory schools because of the low quality of the programs, or realize that they were admitted to programs from which the school should have known they could not benefit. *See* NPRM, AR-B-38 (81 Fed. Reg. at 39,366). Students often find themselves in worse positions than they were in before attending, having wasted time and accrued massive debts that they cannot possibly repay given the low-paying jobs for which they qualify. *See id.* at AR-B-8 (81 Fed. Reg. at 39,373).

Students who have been injured by their schools' wrongdoing often have little recourse. Predatory schools have been remarkably successful at insulating themselves from liability by burying pre-dispute arbitration and class-action waiver provisions in enrollment contracts. *See generally* Comments of Public Citizen (Aug. 1, 2016), AR-J-48831–57 (hereinafter Public Citizen Comments) & App'x C, AR-J-48927. One 2016 investigation found that roughly 98 percent of students who attended for-profit colleges were subject to forced arbitration provisions. *See* Tariq Habash & Robert Shireman, *How College Enrollment Contracts Limit Students' Rights* 7 (2016), AR-H-1182. Moreover, as allegations of wrongdoing pile up, some predatory schools simply shut down, to the detriment of thousands of current students who have already invested time and money in programs at the schools. *See*, *e.g.*, NPRM, AR-B-7 (81 Fed. Reg. at 39,335).

By statute, regulation, and the terms of their loan contracts, students who are harmed by a Title IV school's violation of certain laws, including prohibitions on fraud, may be entitled to cancellation of their federal Direct Loans through a process known as "borrower defense" to repayment. *See* 20 U.S.C. § 1087e(h); 34 C.F.R. § 685.206(c). Through regulations adopted in 1995, ED concluded that a "borrower defense" would be available for an "act or omission of [a] school … that would give rise to a cause of action against the school under applicable State law." 34 C.F.R. § 685.206(c). The regulation was "silent on the process a borrower follows to assert a borrower defense claim." NPRM, AR-B-7 (81 Fed. Reg. at 39,335). Separately, federal law provides a basis for loan relief—called a closed-school discharge—for students whose schools close while they are attending and who do not reenroll in a related program. 20 U.S.C. § 1087(c)(1). In the absence of recourse against their schools, defrauded borrowers have flooded ED with borrower-defense and closed-school discharge claims. *See* NPRM, AR-B-2 (81 Fed. Reg. at

39,330); Borrower Defense Rule, AR-A-80 (81 Fed. Reg. at 75,985) (noting that Corinthian closed-school discharges exceeded $ 103 million in November 2016).

Before promulgation of the Borrower Defense Rule, ED was hamstrung in recouping the federal investment in predatory schools. The existing process for recovery of federal funds spent cancelling loans under the borrower defense process or through closed-school discharges is limited. Moreover, although ED may require schools at financial risk to post letters of credit that might protect taxpayers if the schools go under, these measures have been largely ineffective. *Id*. at AR-A-58, 62 (81 Fed. Reg. at 75,983, 75,987).

The 2015 closure of Corinthian Colleges provides a case in point. Corinthian went bankrupt after numerous state attorneys general investigations and federal investigations. For years, students attempted to sue the school for alleged misrepresentations and other wrongdoing. *See*, *e.g.*, Public Citizen Comments, AR-J-48855. Their cases were generally forced out of court and into individual arbitrations, where during the peak years of Corinthian's wrongdoing, only one student obtained a favorable arbitrator's award, among the tens of thousands of students who had enrolled in the school. *Id*. at AR-J-48856. ED ultimately determined that Corinthian "had misrepresented its job placement rates," Borrower Defense Rule, AR-A-21 (81 Fed. Reg. at 75,946), and it fined the institution. Unable to pay its bills, Corinthian shut down its campuses and filed for bankruptcy, setting off a wave of borrower defense and closed-school discharge applications, *id*., leaving "no other party from which the Federal government may recover any losses," *id*. at AR-A-97 (81 Fed. Reg. at 76,022). The fallout from Corinthian's conduct and bankruptcy made clear that ED's then-existing regulations governing the borrower-defense process were insufficient. *See id*.

B. The Borrower Defense Rule

In 2015, ED announced that it intended to amend its Title IV regulations to address the borrower defense process, including its consequences for borrowers, schools, and the agency. *See*

NPRM, AR-B-4 (81 Fed. Reg. at 39,332–33). On November 1, 2016, ED published its final Borrower Defense Rule. AR-A-1 (81 Fed. Reg. 75,926). As discussed in the Court's ruling on CAPPS's motion for a preliminary injunction, the 2016 Rule has four key provisions, addressing mandatory arbitration and class-action waivers, financial responsibility, disclosure of repayment rates, and the borrower defense provision. *See generally Cal. Ass'n of Private Postsecondary Schools v. DeVos*, 344 F. Supp. 3d 158 (D.D.C. 2018) ("*CAPPS*"). CAPPS has withdrawn its claims as to all but the provisions relating to mandatory arbitration and class-action waivers.

The provisions of the Borrower Defense Rule challenged by CAPPS address the use of predispute arbitration agreements and class-action waivers by schools choosing to participate in the Direct Loan Program. *See* Borrower Defense Rule, AR-A-96–106 (81 Fed. Reg. at 76,021–31). Under these provisions, a participating school must agree in its PPA with ED that it will not "enter into a predispute agreement [with a student] to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim." *Id*. at AR-A-163 (81 Fed. Reg. at 76,088) (new 34 C.F.R. § 685.300(f)(1)(i)). Similarly, a participating school must agree to forgo reliance on any predispute agreement with a student that waives the student's right to participate in a class action against the school related to a borrower defense claim. *Id*. (new 34 C.F.R. § 685.300(e)). The Rule requires schools participating in the Direct Loan Program to include language incorporating these agreements into any new contracts with students. *Id*. at AR-A-162, 163 (81 Fed. Reg. at 76,087, 76,088) (new § 685.300(e)(3)(i), (f)(3)(i)). Schools may either amend contracts predating the Rule's effective date or notify affected students or former students that the schools will no longer rely on predispute arbitration or class

action waiver provisions. *Id*. at AR-A-162–163 (81 Fed. Reg. at 76,087–76,088) (new 34 C.F.R. § 685.300(e)(3)(ii)-(iii), (f)(3)(ii)-(iii)).[1]

ED based these provisions on its findings of "widespread and aggressive use of class action waivers and predispute arbitration agreements [that] coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program." Borrower Defense Rule, AR-A-100 (81 Fed. Reg. at 76,025). ED found that forced arbitration clauses "jeopardize the taxpayer investment in Direct Loans," by allowing institutions to "insulat[e] themselves from direct and effective accountability for their misconduct, … deter[] publicity that would prompt government oversight agencies to react, and … shift[] the risk of loss for that misconduct to the taxpayer." *Id*. at AR-A-97 (81 Fed. Reg. at 76,022). ED also concluded that class action waivers "effectively removed any deterrent effect that the risk of … lawsuits would have provided," and shifted the risk to taxpayers by foreclosing meaningful options for redress other than the borrower defense process. *Id*. ED found that "class action waivers for these claims substantially harm the financial interest of the United States and thwart achievement of the purpose of the Direct Loan Program." *Id*. ED concluded that requiring Title IV-eligible institutions to agree not to use arbitration clauses and class-action waivers would benefit both borrowers and federal taxpayers by "enabl[ing] more borrowers to seek redress in court" through individual or class actions. *Id*. at AR-A-14 (81 Fed. Reg. at 75,939).

[1] The Rule defines "[b]orrower defense claim" as used in these provisions to mean "a claim that is or could be asserted as a borrower defense as defined in § 685.222(a)(5), including a claim other than one based on § 685.222(c) or (d) that may be asserted under § 685.222(b) if reduced to judgment." *Id.* at AR-A-164 (81 Fed. Reg. at 76,089) (new 34 C.F.R. § 685.300(i)).

II. Litigation Over the Borrower Defense Rule

In May 2017, just weeks before the Rule was to take effect, CAPPS filed suit, challenging parts of the four major provisions and seeking to enjoin ED "from implementing, applying, or taking any action whatsoever pursuant to the final regulations" and vacatur of the final rule. Compl. ¶ 242, ECF No. 1. CAPPS moved for a preliminary injunction against the Rule's provisions regarding predispute arbitration clauses and class-action waivers. *See* Pls.' Mot. for Prelim. Inj. (withdrawn), ECF No. 6, 6-1. Meaghan Bauer and Stephano Del Rose, two borrowers who were defrauded by a for-profit school that used forced arbitration clauses and class-action waivers and who have submitted borrower defense applications, moved to intervene as defendants, and the Court granted that motion in September 2018. *See* Sept. 14, 2018 Minute Order.

On June 16, 2017, two weeks before the 2016 Rule was to take effect, ED invoked section 705 of the Administrative Procedure Act (APA), 5 U.S.C. § 705, to issue an indefinite "stay" of the Borrower Defense Rule pending resolution of this litigation. *See* ED, Final Rule; Notification of Partial Delay of Effective Dates, 82 Fed. Reg. 27,621 (June 16, 2017). In a separate notice that same day, ED initiated a new negotiated rulemaking to revise the Borrower Defense Rule. *See* ED, Negotiated Rulemaking Committee, 82 Fed. Reg. 27,640 (June 16, 2017). CAPPS then withdrew its motion for a preliminary injunction.

Seeking implementation of the Borrower Defense Rule, Ms. Bauer and Mr. Del Rose filed a separate lawsuit in July 2017 challenging the legality of ED's section 705 delay. *See Bauer v. DeVos*, No. 17-1330 (D.D.C.). ED subsequently issued two further delay rules, an "interim final rule" and a "final rule," which would have delayed the main portions of the Borrower Defense Rule until July 1, 2019. Bauer and Del Rose amended their complaint to challenge those rules and participated in three rounds of summary judgment briefing necessitated by ED's actions.

Meanwhile, the Court stayed this litigation pending resolution of *Bauer*. *See* Minute Order of Mar. 1, 2018.

In September 2018, this Court held that the final delay rule and the section 705 stay were unlawful under the APA and found the interpretation of the HEA on which the interim final rule was premised to be contrary to law. *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C. 2018) ("*Bauer* I"). With respect to the section 705 stay, the Court faulted ED for ignoring the harm that the stay caused to student borrowers. *Id*. at 108. It also noted the attention that ED had given to the arbitration and class-action waiver provisions in the Borrower Defense Rule, specifically, that ED had "devoted nine columns of the Federal Register to describing the legal objections and to responding to them." *Id*. at 109. The Court ordered that the final delay rule and the section 705 stay be vacated but stayed vacatur of the section 705 stay until October 12, 2018, to permit ED "to attempt to remedy the [stay's] deficiencies." *Bauer v. DeVos*, 332 F. Supp. 3d 181, 183 (D.D.C. 2018) ("*Bauer* II"). ED then indicated that it would not pursue another section 705 stay and thus that the Borrower Defense Rule would go into effect.[2]

CAPPS renewed its motion for a preliminary injunction, and expanded it to cover all four provisions that it challenged. ECF No. 65. The Court denied that motion in its entirety in October 2018, finding that CAPPS had failed to sufficiently show that it or its members would be harmed, irreparably or otherwise, by the financial responsibility provisions, the repayment rate disclosure provisions, or the borrower defense provisions. *CAPPS*, 344 F. Supp. 3d at 173–82. As to the arbitration and class-action waiver provisions, the Count found that CAPPS had demonstrated

[2] ED initiated a new rulemaking to amend the Borrower Defense Rule in July 2018, but it did not complete the rulemaking by November 1, 2018, and thus that the earliest any new rule could go into effect is July 1, 2020. ED has recently stated that it will be issuing a new Notice of Proposed Rulemaking, revising the proposal it published in July 2018.

standing but failed to establish that it would suffer irreparable injury absent a preliminary injunction. *Id*. at 168–74.

On December 28, 2018, CAPPS filed a motion for leave to amend its complaint to delete ten of its twelve claims, along with a motion for summary judgment addressing the two remaining claims relating to the arbitration and class-action waiver provisions. *See* ECF Nos. 82, 83. The Court granted the motion for leave to amend on January 18, 2019. *See* Jan. 18, 2019 Minute Order. As a result, the only remaining substantive issues in this case are whether the arbitration and class-action waiver provisions are arbitrary, capricious, an abuse of discretion, or contrary to law.

ARGUMENT

I. The arbitration and class-action provisions of the Borrower Defense Rule do not conflict with the Federal Arbitration Act.

CAPPS's arguments that the arbitration and class-action provisions of the Borrower Defense Rule conflict with the Federal Arbitration Act (FAA) and the policies it incorporates all rest on mischaracterizations of the Rule's provisions and misunderstandings of the FAA's scope as construed by the Supreme Court. The Rule conditions a school's participation in federal financial aid programs on compliance with the school's agreement with ED not to enter into or enforce arbitration and class waiver agreements applicable to certain claims. That condition is consistent with the terms of the FAA because it does not render any agreement to arbitrate unenforceable by a court. In addition, the condition poses no conflict with the "pro-arbitration" policy of the FAA, which fosters judicial enforcement of agreements to arbitrate and is fully consistent with contractual agreements *not* to arbitrate. And CAPPS's insistence that the Rule is unauthorized because the HEA does not clearly express an intention to "override" the FAA is irrelevant because nothing in the Rule purports to override the FAA or construes the HEA as doing so.

CAPPS's heavy reliance on *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), is particularly unwarranted. *Epic Systems* involved a claim that the terms of a federal statute negated the FAA's application to certain arbitration agreements by directly prohibiting courts from enforcing them. The decision did not involve the scope of an agency's regulatory authority and did not, as CAPPS asserts, broadly hold that agencies may never exercise such authority in any way that disfavors arbitration agreements without express statutory authorization. CAPPS S.J. Mem. 20. *Epic Systems* says nothing about the legitimacy of an agency regulation that conditions participation in a spending program on a participant's agreement to forgo arbitration but that does not affect the validity or enforceability of any arbitration agreement.

A. The Rule's provisions do not violate the FAA's requirement that courts enforce arbitration agreements.

The FAA provides that written agreements to arbitrate in contracts involving commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That command is followed by provisions that address in detail the procedures by which courts are to enforce such contracts. The fundamental concern of the FAA is whether and how *courts* must enforce arbitration agreements in cases involving claims subject to them: Indeed, except for one provision authorizing arbitrators to issue subpoenas, 9 U.S.C. § 7, the FAA addresses no other subjects. *See* 9 U.S.C. §§ 1–16.

The arbitration and class-action provisions of the Borrower Defense Rule contain nothing contrary to the FAA's commands. As ED explicitly stated in promulgating the Rule, those provisions do not affect the enforceability or validity of any arbitration agreement or the manner in which courts must address claims that may be subject to such agreements:

> [T]he Department does not have the authority, and does not propose, to displace or diminish the effect of the FAA. … These regulations do not invalidate any arbitration agreement, whether already in existence or obtained in the future.

> Moreover, the Department does not have the authority to invalidate any arbitration agreement, did not propose to do, and does not in this final rule attempt to do so.

AR-A-97 (81 Fed. Reg. at 76,023).

Instead, the challenged provisions of the Rule provide that if a school chooses to avail itself of the benefits of participating in the federal student loan program, it must agree as a condition of such participation not to use arbitration agreements, and/or agreements banning class actions, for controversies with its students that involve borrower-defense issues. *See id*. If a school violates its agreement with ED and enters into or seeks to enforce such an arbitration or class-action-waiver agreement, the Rule does not render that agreement invalid or unenforceable in court.[3] Rather, the consequences of a school's violation of its agreement with ED not to use such agreements are a matter between the school and ED, which may revoke the school's eligibility to participate in the federal student loan program, just as it may do so for other breaches of conditions on a school's participation established by ED regulation and agreed to by the school in its PPA.

B. The Rule does not implicate the FAA's "equal-treatment principle."

Because the Rule's provisions do not directly conflict with the FAA's enforceability mandate, CAPPS argues that the Rule violates the FAA's "equal-treatment principle" by "discriminating … against" or "disfavoring" arbitration. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). CAPPS's argument misunderstands the "equal-treatment principle." That principle is derived from, and limited by, the "saving clause" of section 2 of the

[3] For example, in *Kourembanas v. Intercoast Colleges*, No. 2:17-cv-00331, Order on Motion to Compel and Dismiss, Doc. 36 (D. Me. Feb. 28, 2019), the court granted a school's motion to compel arbitration against a student borrower without regard to whether the effort to compel arbitration was contrary to the Rule's conditions that a participating school may not rely in any way on a predispute arbitration agreement. *See* 34 C.F.R. § 685.300(e) & (f)(1)(i). The court noted that "only the Department of Education may enforce HEA regulations against entities like InterCoast," so there was no need to "address the parties' respective arguments concerning the effect of the Borrower Defense Regulations on the pending motion." Order, at 2 n.1.

FAA, which makes arbitration agreements valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Supreme Court has explained, section 2 "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred*, 137 S. Ct. at 1426 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also Epic Sys.*, 138 S. Ct. at 1622.

The equal-treatment principle thus applies to rules of contract law and other legal principles that affect whether courts will recognize the validity and enforceability of arbitration agreements: Specifically, it determines whether a claimed defense to enforcement of an arbitration agreement is cognizable. *See id*.[4] The arbitration and class-action waiver provisions of the Borrower Defense Rule do not address that subject and therefore fall outside the bounds of the equal-treatment principle. Because those provisions do not prevent courts from enforcing a school's arbitration agreement or class-action waiver agreement if the school chooses to seek such enforcement, they do not establish a "rule prohibiting arbitration of a particular type of claim" similar to the state contract-law principle invalidated in *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 533 (2012)

[4] In most instances, the equal-treatment principle applies, as a matter of implied preemption, to state-law rules relating to enforceability and validity of contracts. *See Kindred*, 137 S. Ct. at 1426 ("The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.'") (quoting *Concepcion*, 563 U.S. at 341); *see also Concepcion*, *id*. at 343 ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."); *Epic Sys.*, 138 S. Ct. at 1622 (questioning whether section 2's saving clause applies to defenses to contract enforcement "allegedly arising from federal statutes"). Because this case does not involve preemption of state law, but a claimed conflict between a federal law and a federal regulation, the doctrine of implied obstacle preemption does not apply here, *see POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111 (2014), but bears on the issues to the extent it may be "instructive" about how "to assess the interaction of laws that bear on the same subject." *Id*. at 112.

(holding that the FAA preempts state decisional law refusing to enforce arbitration agreements in cases involving claims by nursing home residents). They do not require courts to condition enforcement of arbitration agreements upon the adoption of procedures that "interfere[] with fundamental attributes of arbitration," as did the state decisional law struck down in *Concepcion*, 563 U.S. at 344 (holding that the FAA preempts a state-law doctrine prohibiting enforcement of arbitration agreements that ban class actions). And the Rule does not deny schools the power to enter into binding arbitration or class-action waiver agreements or impose more stringent limits on their ability to enter into valid arbitration agreements than agreements of any other kind, unlike the state-law doctrine held preempted in *Kindred*, *see* 137 S. Ct. at 1428 (holding that the FAA preempts state law that disfavors arbitration agreements by discriminatorily denying enforcement to arbitration agreements entered into by persons granted powers of attorney). That is, the Rule does not affect a school's capacity to form an enforceable arbitration contract.

In short, the Rule neither "selectively find[s] arbitration agreements invalid because improperly formed … [nor] selectively refus[es] to enforce those agreements once properly made." *Id*. It thus does not implicate the FAA's two core concerns: "the 'enforce[ment]' of arbitration agreements" and "their initial 'valid[ity]'—that is, what it takes to enter into them." *Id*. Instead, the Rule imposes federal program eligibility consequences on a school that, in violation of its agreement with ED, enters into or seeks to enforce an arbitration agreement with respect to a student's borrower-defense claims—although such an agreement remains enforceable under the FAA if it is otherwise valid under general principles of contract law. None of the Supreme Court cases CAPPS cites for its invocation of the equal-treatment principle addresses such a rule, let alone suggests that such a rule violates the FAA.

In particular, the Supreme Court's decision in *Epic Systems* does not, as CAPPS asserts, broadly stand for the proposition that federal agencies may not "discriminate against arbitration agreements" in any way. CAPPS S.J. Mem. 10. Rather, *Epic Systems* confirms that the FAA's equal-treatment principle is grounded in the judicial-enforcement mandate of section 2 and addresses the grounds on which "agreements to arbitrate [may] be invalidated" *by courts*. 138 S. Ct. at 1622 (quoting *Concepcion*, 563 U.S. at 339). That is, the equal-treatment principle concerns what "defenses" to the enforcement of arbitration clauses are judicially cognizable. *Id*.

In *Epic Systems*, the issue was whether the National Labor Relations Act (NLRA) prohibited waiver of employees' rights to litigate collectively, and thus barred courts from enforcing arbitration agreements that ban class actions. The Supreme Court held that such a prohibition (if it existed) would not overcome the FAA's mandate that courts "enforce, not override, the terms of … arbitration agreements," because it "disfavor[ed]" arbitration, by interfering with its "fundamental attribute[s]." *Id*. at 1622.[5] The Court's decision concerned the circumstances under which courts are prohibited from enforcing arbitration agreements—an issue not presented by the Borrower Defense Rule, which, unlike the interpretation of the NLRA posited by the employees in *Epic Systems*, does not affect the validity or enforceability of arbitration agreements. *Epic Systems* says nothing to suggest that agencies are precluded from acting to discourage or disfavor arbitration in ways that do not affect the validity or enforceability of arbitration agreements.

[5] Although the Court held that the FAA's saving clause did not accommodate the asserted NLRA prohibition of class-action waiver agreements, it still had to determine whether that prohibition existed, in which event the two statutes would conflict and the NLRA would arguably impliedly repeal the FAA's judicial-enforceability mandate. *See* 138 S. Ct. at 1623–24. The Court ultimately determined that there was not conflict because the NLRA did not prohibit class-action waiver agreements. As explained further below, that holding has no impact on this case because the Borrower Defense Rule does not purport to override the FAA. *See infra* pp. 27–38.

C. The Rule does not violate the FAA's "pro-arbitration" policy.

CAPPS argues that although the Rule leaves its members' ability to enter into and judicially enforce arbitration agreements under the FAA intact, should they choose to violate their agreement with ED not to do so, the Rule is nonetheless invalid under the FAA because it conflicts with the FAA's "pro-arbitration" policy. CAPPS S.J. Mem. 15. That a regulation authorized by a federal statute allegedly conflicts not with the terms but with the "policy" of another statute does not establish that the regulation may be set aside as "not in accordance with law" under the APA. 5 U.S.C. § 706(2)(A). Regardless of how expansive the FAA's "policy" may be, a court may set aside the Borrower Defense Rule only if it is irreconcilable with the FAA itself, *see Carcieri v. Salazar*, 55 U.S. 379, 395 (2014)—a determination that depends on "[a]nalysis of the statutory text," *POM Wonderful*, 573 U.S. at 112. The "simplistic[]" assumption that "*whatever* furthers [a] statute's primary objective must be the law" is an insufficient basis for setting aside an action based on another statute given that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987); *see also PBGC v. LTV Corp.*, 496 U.S. 633, 646 (1990) (holding that a lower court erred in setting aside an agency action for failure to consider "principles and policies" of other statutes that the agency did not administer). Because the FAA and the Borrower Defense Rule can each be "fully enforc[ed] … according to its terms," *POM Wonderful*, 573 U.S. at 118, the latter should not be set aside based on assertions that the "policy" of the former requires that the statute be "expand[ed] … beyond the field to which it is unambiguously limited," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012)—the validity and judicial enforceability of arbitration agreements.

The FAA's "pro-arbitration" policy, moreover, is much more limited than CAPPS asserts. The FAA embodies no generalized preference for arbitration over litigation in all circumstances, let alone a "definitive[]" congressional determination that arbitration is desirable in all settings

where Congress has not explicitly authorized prohibiting or limiting it. CAPPS S.J. Mem. 13. Rather, as Justice Thomas explained in *Granite Rock Co. v. International Brotherhood of Teamsters*, "'the federal policy favoring arbitration' … is merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" 561 U.S. 287, 302 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)). Critically, as that statement indicates, the policy is one of *judicial* enforcement of arbitration agreements—a policy that, as explained above, the Rule does not contravene.

Moreover, the FAA's policy is not to "force arbitration on parties who enter into contracts involving interstate commerce." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 66 (1995). The FAA's policy operates only where parties consent to arbitration, *see Granite Rock*, 561 U.S. at 300–02; *Volt*, 489 U.S. at 479; its "proarbitration policy does not operate without regard to the wishes of … contracting parties." *Mastrobuono*, 514 U.S. at 57. Thus, an agreement *not* to arbitrate—such as the one that, under the Borrower Defense Rule, a school that chooses to participate in federal student loan program enters into—is as consistent with the FAA's policy as an agreement to engage in arbitration.

The FAA's policy not only freely permits schools to agree with ED not to arbitrate with students, but also imposes no obstacle to ED's conditioning its dispensation of federal funds on PPAs that best achieve the HEA's purposes. Nothing in the FAA's policy requires federal agencies to promote arbitration, or to agree that parties seeking benefits from them may impose arbitration agreements on other parties if reliance on such agreements (although enforceable under the FAA) would have adverse consequences for the federal programs they administer. Indeed, the Supreme Court has rejected the notion that the FAA's policies requiring enforcement of private agreements

to arbitrate limit the powers of federal agencies to carry out their own statutory mandates: "[T]he proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). The Court in *Waffle House* specifically refused to permit courts to "balance the policy goals of the FAA" to limit an agency's authority under its organic statute and expand the effect of the FAA beyond its proper sphere of making private arbitration agreements enforceable in court as between the parties to those agreements. *Id*. at 293–94.

Finally, even on its own terms, CAPPS's characterization of the FAA as expressing a uniform, "definitive[]," "national statutory policy" favoring arbitration, CAPPS S.J. Mem. 15, is inaccurate. Congress has sharply limited companies' ability to use forced arbitration in some contexts by, for example, prohibiting forced arbitration in consumer credit contracts with some servicemembers or their dependents, 10 U.S.C. § 987(e)(3); forbidding commodities merchants from conditioning access to their products on a consumer's agreement to an arbitration clause, 7 U.S.C. § 21(b)(10)(A); prohibiting forced arbitration in livestock and poultry contracts, 7 U.S.C. § 197c; barring forced arbitration provisions in residential mortgage agreements, 15 U.S.C. § 1639c(e); and prohibiting auto manufacturers from imposing forced arbitration on dealerships, 15 U.S.C. § 1226. Moreover, CAPPS ignores the fact that agencies have for decades regulated the use of forced arbitration provisions in various settings, even absent express statutory authorization. For example, the Financial Industry Regulatory Authority (FINRA), the self-regulatory organization that oversees broker dealers, has long prohibited—with the Securities and Exchange Commission's approval—arbitration agreements that apply to class action litigation. *See* FINRA Rule 2268(f) (governing contents of arbitration agreements); FINRA Rule 12204 (governing arbitration procedure).

D. The Rule's lawfulness does not depend on a clear and manifest congressional authorization to "displace" the FAA.

CAPPS's argument that the Borrower Defense Rule is unlawful because the HEA does not embody a "clear and manifest congressional command to displace the [FAA]," CAPPS S.J. Mem. 19 (quoting *Epic Sys.*, 138 S. Ct. 1612, 1624 (2018)) is misguided for much the same reason as its argument that the Rule violates the FAA's equal-treatment principle and pro-arbitration policy: The provisions of the Rule do not "displace" the FAA by prohibiting courts from enforcing arbitration agreements, so no "clear and manifest" authorization to do so in the HEA is necessary.

The circumstances at issue in *Epic Systems*, on which CAPPS principally relies, illustrate why that requirement is inapplicable here. In *Epic Systems*, the Supreme Court rejected the argument (which had been accepted by two of the lower courts whose decisions were before the Court) that the terms of the NLRA prohibited courts outright from enforcing employment arbitration agreements containing arbitration waivers, and thus that the NLRA "overr[o]de" the FAA's provisions that would "normally require[] [courts] to enforce [such] arbitration agreements." *Epic Sys.*, 138 S. Ct. at 1623–24. Faced with the claim that the NLRA expressly conflicted with, and negated, the FAA's judicial-enforcement mandate, the Court took its usual approach to claims that federal statutes are in "irreconcilable conflict," *id*. at 1624, and that the later statute impliedly repeals the earlier to the extent of such conflict: It applied the ordinary "'stron[g] presump[tion]' that repeals by implication are 'disfavored'" and will be found only where there is "a clearly expressed congressional intention" that one statute displace another. *Id*. (citations omitted). The Court found no clear expression of intent in the NLRA to create a right to engage in collective legal proceedings at all, let alone an intention to override the FAA's otherwise applicable requirement that agreements requiring individual arbitration be enforced. *See id*. at 1624–27. That holding has no application here, where the Borrower Defense Rule does not purport

to prohibit judicial enforcement of any arbitration agreement and thus is not premised on the view that Congress displaced or authorized the displacement of the FAA's requirement that such agreements be enforced.

As the Supreme Court explained in *Epic Systems*, each of its previous decisions imposing the requirement of a clear congressional command to displace the FAA (including *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), on which CAPPS also relies, *see* CAPPS S.J. Mem. 10), involved a claim that a particular federal statute prohibited courts from enforcing the terms of arbitration provisions with respect to claims arising under that statute. *See* 138 S. Ct. at 1627 (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); and *McMahon*, 482 U.S. 220). In *none* of those cases did the Supreme Court impose a requirement of clear and manifest congressional intent where, as here, the rule said to conflict with the FAA in fact left the Act's requirement of judicial enforcement of arbitration agreements intact.

CAPPS nonetheless contends that because the HEA does not explicitly authorize regulation of arbitration, it must be construed to forbid such regulation because "Congress has … shown that it knows how to *override* the [FAA] when it wishes." CAPPS S.J. Mem. 19 (quoting *Epic Sys.*, 138 S. Ct. at 1626; emphasis added). CAPPS points as an example to 12 U.S.C. § 5518, which authorizes the Consumer Financial Protection Bureau (CFPB) to "prohibit or impose conditions or limitations on the use" of consumer financial agreements "providing for arbitration of any future dispute between the parties." Again, however, the Borrower Defense Rule, unlike the rules authorized in the laws CAPPS cites, does not "override" the FAA or prohibit the use of arbitration provisions. It attaches conditions on a school's receipt of federal funding to deny continued

eligibility to schools that (1) enter into new agreements prohibited by the funding condition, and (2) enforce or otherwise rely on such agreements already in existence. Accordingly, even under CAPPS's statement of the legal standard, its assertion that the arbitration and class-waiver provisions exceed ED's authority under § 1087d(a)(6) fails.

Moreover, that Congress has, in some circumstances, expressly permitted agencies to regulate on matters involving arbitration does not mean that Congress must do so in every instance. For example, long before Congress expressly authorized the SEC to regulate the use of forced arbitration provisions in broker contracts, the Supreme Court had recognized that the SEC "had expansive power to ensure the adequacy of the arbitration procedures employed by" self-regulatory organizations (SROs) overseen by the agency. *Shearson*, 482 U.S. at 233. The Court's conclusion in this regard was based not on 15 U.S.C. § 78o, which directly addresses arbitration and post-dates *Shearson*, but on § 78s(c), which broadly permits the SEC, "on its own initiative, to 'abrogate, add to, and delete from' any SRO rule if it finds such changes necessary or appropriate to further the objectives of the [Exchange] Act." *Shearson*, 482 U.S. at 233 (quoting § 78s(c)). The SEC has, in turn, relied on this general grant of authority to approve a FINRA rule that prohibits broker-dealers from using arbitration agreements that apply to class action litigation. *See* FINRA Rules 2268(f); 12204. Because of the SEC's oversight, these rules "have the force and effect of a federal regulation." *Charles Schwab & Co. Inc. v. FINRA*, 861 F. Supp. 2d 1063, 1065 (N.D. Cal. 2012). Just as the general grant of authority on which the Supreme Court relied in *Shearson* was "sufficient statutory authority to ensure that arbitration" was adequate to protect customers' rights, 482 U.S. at 238, the HEA's grant of authority to ED provides a sufficient basis for the adoption of the Final Rule's arbitration and class-waiver provisions to protect the integrity of the Title IV program.

Thus, no heightened standard of congressional authorization is applicable here. The Borrower Defense Rule's arbitration and class-action waiver provisions need only fall within the broad scope of the HEA's authorization to the Secretary of Education to require that PPAs "include such other provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of this part." 20 U.S.C. § 1087d(a)(6).

In addition, as in its motion for a preliminary injunction, CAPPS appears to suggest that section 1087d(a)(6) does not authorize the inclusion of any substantive provisions in PPAs because it is merely a "catchall provision" that "follows a series of ministerial requirements for loan administration under PPAs." CAPPS S.J. Mem. 19. That characterization of section 1087d(a) is not credible: The subsection sets forth broad, substantive requirements that participating schools must agree, among other things, to determine the eligibility and need of student borrowers, 20 U.S.C. § 1087d(a)(1); to comply with ED's informational requirements, *id*. § 1087d(a)(2); to "accept[] responsibility and financial liability stemming from [their] failure to perform its functions pursuant to the agreement," *id*. § 1087d(a)(3); to institute quality assurance programs to ensure compliance with program requirements, *id*. § 1087d(a)(4); and to refrain from "charg[ing] any fees of any kind … to student or parent borrowers for [loan] origination activities or the provision of any information necessary for a student or parent to receive a [covered] loan," *id*. § 1087d(a)(5). Because section 1087d(a)(6) follows a list of provisions addressing schools' substantive obligations and students' substantive rights, its authorization of other provisions in PPAs necessary to protect the interests of the United States and to promote the student loan program's purposes provides ample authority to impose other substantive conditions, such as those at issue here. Thus, absent the inapplicable clear-statement requirement CAPPS advocates, there

can be no serious doubt that the HEA authorizes the Rule's arbitration and class-action waiver provisions.

E. The Rule's provisions are permissible conditions on federal funding.

CAPPS attempts to bolster its challenge by citing decisions about the limits on federal authority to impose conditions on spending clause grants. CAPPS's citations, however, address a straw man: its assertion that ED's regulation rests on ED's "misimpression" that an agency has "*carte blanche* to impose whatever conditions it deems desirable." CAPPS S.J. Mem. 13. ED's promulgation of the Borrower Defense Rule rests on no such misimpression. Rather, the regulation rests on ED's detailed articulation of its reasons for concluding that the conditions it has added to PPAs satisfy the statutory criterion of being necessary to protect the interests of the United States and to promote the purposes of the student loan program. In *Grove City College v. Bell*, 465 U.S. 555 (1984)—the precedent CAPPS uses to lead off its argument on the point—the Supreme Court affirmed ED's authority to condition a school's participation in federal financial assistance programs on compliance with substantive requirements imposed in PPAs to meet statutory goals. Of course, the agency's regulation must satisfy the APA's requirements of rational and lawful agency decisionmaking—and as explained below, the Borrower Defense Rule fully meets those requirements. The precedents CAPPS cites require nothing more.

CAPPS's citations of decisions striking down spending conditions that infringe personal constitutional rights are particularly inapt. *See* CAPPS S.J. Mem. 14 (citing *AID v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); and *FCC v. League of Women Voters*, 468 U.S. 364 (1984)). The Borrower Defense Rule cannot be analogized to an unconstitutional condition on a school's acceptance of federal funding. There is no constitutional right to arbitrate. Arbitration is always a matter of agreement, *see Granite Rock*, 561 U.S. at 300–02, and agreeing *not* to use arbitration to obtain a financial benefit is nothing

more than a commercial choice implicating no constitutional concerns. The Supreme Court has emphasized that, "[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse it to decline the funds." *AID*, 570 U.S. at 214. If, as the Court has explained, this proposition generally "remains true [even] when the objection is that a condition may affect the recipient's exercise of its First Amendment rights," *id*., a condition that affects only the use of contractual provisions that are entirely optional and dependent on agreement in any event does not even approach the outer bounds of legitimacy.

CAPPS's contention that the conditions imposed by the Borrower Defense Rule are impermissibly coercive is even further afield. CAPPS relies principally on *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 582 (2012), and *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), which together stand for the proposition that Spending Clause conditions that coerce states in the exercise of their sovereign powers protected by the Tenth Amendment are unconstitutional. CAPPS asserts that the "logic of those decisions is not limited to contexts in which states are the affected actors" and that they announce some broader principle that no recipients of federal funds can be subjected to "compulsion" to accept conditions on federal funding. CAPPS S.J. Mem. 18. The logic of *Sebelius* and *Dole*, however, depends on the fact that the parties who claimed to have been coerced were states, because the substantive protection against coercion they invoked is derived from the Tenth Amendment principle that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992) (quoted in *Sebelius*, 567 U.S. at 575). Private entities have no similar constitutional protection against "compulsion," and hence cannot claim the benefit of *Sebelius*'s condemnation of "coercive" funding conditions imposed on states.

Coercion may also be relevant in determining whether conditions on a grant of federal funds infringe the exercise of some other constitutional right. *See* CAPPS S.J. Mem. 17 (citing *Regan v. Taxation Without Representation.*, 461 U.S. 540, 545 & n.6 (1983), and *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 51 (2006)). As explained above, however, CAPPS has not demonstrated, or even attempted to demonstrate, that the arbitration and class-action waiver provisions limit exercise of constitutional rights. And CAPPS cites no authority, and no logic, for the proposition that some freestanding prohibition on "coercive" funding conditions renders such conditions impermissible whenever some private entities feel economic compulsion to accept them. Indeed, if such a limitation existed, all of the conditions imposed by PPAs on schools for whom federal funding is an essential part of their business model would be vulnerable to challenge.

F. CAPPS cites no persuasive authority holding a regulation similar to the Borrower Defense Rule unlawful.

For the reasons explained above, the arbitration and class-action waiver provisions of the Borrower Defense Rule do not conflict with the terms of the FAA, its judicial construction, or its underlying policy, and they require no clear congressional authorization because they do not purport to override the FAA. CAPPS's reliance on three decisions from courts in the Fifth Circuit, which addressed different federal regulations affecting the ability of regulated parties to make use of arbitration, adds nothing to the persuasiveness of its arguments to the contrary.

The most superficially analogous of the decisions CAPPS cites is *American Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016), in which a district court granted a preliminary injunction to plaintiffs challenging a Centers for Medicare & Medicaid Services (CMS) rule that barred nursing homes receiving federal funds from entering into pre-dispute arbitration agreements with their residents or conditioning residents' admission on such

agreements. The district court's finding that the plaintiffs were likely to prevail inadequately addressed the limitations on the sweep of the FAA described above, *see* 217 F. Supp. 3d at 929–33, but CMS's voluntary dismissal of its appeal from the preliminary injunction, and the subsequent stay of proceedings pending further rulemaking, forestalled review of the shortcomings of the decision's reasoning. In any event, the district court's determination had "as much to do with the state of the administrative record" as it did with the legal authorities regarding the FAA. *Id*. at 933. Indeed, the court ultimately concluded that although the state of the law was "less than clear," such a rule could potentially be sustained if the agency could "demonstrate a strong basis in fact" for it. *Id*. The court faulted CMS for not creating "a strong factual record in enacting the Rule, even though, in the court's view, it potentially could have." *Id.* Regardless of whether that court's conclusions were correct as applied to the CMS rule, the same criticism cannot conceivably apply to ED's rulemaking, which—as described below—was based on an extensive factual record regarding the use of forced arbitration provisions and class-action waivers in student enrollment contracts and the impact of those provisions on the federal fisc.

CAPPS's reliance on *Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018), is also unpersuasive. There, the Fifth Circuit struck down the Department of Labor's "fiduciary rule," including provisions prohibiting investment advisers who wished to avail themselves of an exemption from rules that would otherwise bar certain fee arrangements from requiring their clients to waive participation in judicial class actions. Notably, the fiduciary rule's restriction on arbitration agreements—unlike the Borrower Defense Rule's—was not based on a regulated entity's acceptance of the restriction as a condition on receipt of financial benefits under an agreement with the government. Moreover, the court's decision rested principally on DOL's lack of authority to subject investment advisers to fiduciary standards. *See id*. at 368–84. On that

point, this Court's own decision in *National Ass'n for Fixed Annuities v. Perez*, 218 F. Supp. 3d 1 (D.D.C. 2016), is thoroughly at odds with the reasoning of *Chamber of Commerce*.[6] The Fifth Circuit's cursory treatment of the fiduciary rule's arbitration provisions is no more persuasive than the rest of its analysis and has no application here. *Chamber of Commerce* devoted very little attention to the arbitration provisions of the rule because the government had conceded their invalidity on appeal and no party to the appeal defended them. *See* 885 F.3d at 385. The court's brief, one-paragraph discussion of the provision accordingly treated it as if it rendered arbitration agreements unenforceable in violation of the FAA. *See id*. Whether or not the Fifth Circuit was correct in striking down the fiduciary rule, that court was not called upon to and did not address the reasons set forth above for why a rule with the Borrower Defense Rule's features is valid, let alone hold such a rule unlawful.

Finally, the unpublished decision in *Associated Builders & Contractors of Southeast Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016), adds nothing to CAPPS's arguments. There, the court granted a preliminary injunction against an executive order and implementing regulations that, without statutory authorization, sought to create an entirely new enforcement regime for a host of federal employment and labor laws affecting government contractors. The court's cursory discussion of the order's provisions concerning arbitration (which, unlike the provisions of the Borrower Defense Rule, were not restricted to claims with a nexus to any government contract) did not address any of the reasons why a more limited rule, such as the one at issue here, would comport with the FAA. The court's conclusory statements offer no basis for striking down the Borrower Defense Rule.

[6] *Perez* did not address the rule's arbitration provisions.

II. The forced arbitration and class-action waiver provisions are not arbitrary and capricious.

CAPPS argues that ED's limitation on the use of forced arbitration clauses and mandatory class action waivers was arbitrary and capricious for five reasons. To a large extent, these arguments are duplicative of arguments about ED's statutory authority and of each other, and reflect CAPPS's disagreement with ED on the policy it adopted and the purported costs and benefits of forcing students into secret arbitral proceedings and prohibiting them from accessing group dispute resolution methods. But none of the alleged deficiencies CAPPS complains of rises to the level of arbitrary and capricious decisionmaking. ED acknowledged CAPPS's arguments and explained why it rejected them based on record evidence before it. ED's "refusal to adopt the approach that Plaintiff[] prefer[s], and which no doubt would be more favorable to Plaintiff['s] interests, does not, by itself, make [ED]'s actions arbitrary and capricious." *Delta Air Lines, Inc. v. Exp.-Imp. Bank of U.S.*, 85 F. Supp. 3d 436, 477 (D.D.C. 2015).

A. ED properly considered the costs and benefits of forced arbitration and mandatory class-action waivers.

CAPPS's first two arguments relate to ED's assessment of costs and benefits: CAPPS claims ED failed to adequately consider arguments regarding the purported "benefits of arbitration" and the "drawbacks of class actions for students." CAPPS S.J. Mem. at 22–25. The record does not support this assertion, and, indeed, demonstrates that ED considered both arguments and explained why, based on the totality of the record, they did not alter ED's policy judgment. The APA requires no more. A court "will not hold [an agency's] decision to be arbitrary and capricious merely because it analyzed the competing interests in a way that displeased plaintiff." *N. Am. Catholic Educ. Programming Found., Inc. v. Womble Carlyle Sandridge & Rice, PLLC*, 800 F. Supp. 2d 239, 251 (D.D.C. 2011).

ED devoted ten Federal Register pages to identifying and responding to the objections raised by CAPPS and others relating to the proposed rule's provisions on forced arbitration and class-action waivers. AR-A-96–106 (81 Fed. Reg. at 76,021–76,031). CAPPS's claim that ED insufficiently acknowledged or considered the comments CAPPS submitted singing the praises of arbitration and derogating class-action litigation is wrong. ED acknowledged those comments and explained why they did not alter its conclusion given evidence in the record showing "that the widespread and aggressive use of class action waivers and predispute arbitration agreements coincided with widespread abuse by schools over recent years" and that forcing students to waive their rights to judicial relief in adhesion contracts resulted in injuries to "a great many students" and "cost the taxpayers many millions of dollars in losses." AR-A-100 (81 Fed. Reg. at 76,025).

Further, ED explained that the comments submitted as to the purported benefits of arbitration did not conflict with its approach of requiring schools to agree not to impose mandatory, pre-dispute arbitration agreements on students. ED explained, "we do not deny the merits of arbitration, and the regulations do not ban arbitration." AR-A-100 (81 Fed. Reg. at 76,025). As ED noted, a rule that expressly *permits* participating schools to enter into post-dispute arbitration agreements, 34 C.F.R. § 685.300(f)(1)(ii), does not "deny students the benefits that … commenters ascribe to arbitration." AR-A-104 (81 Fed. Reg. at 76,029). CAPPS's comments about the benefits of arbitration thus did not, even if true, "raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (internal quotation marks omitted).

This Court made a similar point in denying CAPPS's request for a preliminary injunction. There, CAPPS argued that its members would suffer harm if they were "forced" to halt ongoing arbitration proceedings. *CAPPS*, 344 F. Supp. 3d at 172. The Court rightly rejected the argument,

explaining that "nothing in the 2016 Rule prevents the parties to an existing dispute from agreeing to arbitrate, and, to the extent any pending case is on the eve of arbitration, it is not difficult to imagine that all parties might have an interest moving forward as planned." *Id*. The same applies to disputes that arise in the future: If the parties see benefits to proceeding with arbitration, they can agree to arbitrate that dispute. The "benefits" of arbitration remain available, now accompanied by meaningful choice. *See* AR-A-105 (81 Fed. Reg. at 76,030) (explaining that post-decision arbitration agreements are undertaken at a point where they reflect "an informed choice by the student").

Although CAPPS points (at 23) to studies and articles discussing forced arbitration generally, ED was not required to respond to each of these documents, particularly those that did not deal directly with the higher education context. *See Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (stating that an agency need not respond "to every comment made"). ED was correct to focus most heavily on evidence specific to colleges and universities, including its own experience with overseeing predatory schools notorious for using forced arbitration and class-action waivers. This evidence included data showing that, in the context of Corinthian Colleges, arbitration had "provided minimal relief for students" injured by what the government itself had determined was widespread institutional wrongdoing. AR-A-97 (81 Fed. Reg. at 76,022 n.75). ED recognized that between 2011 and 2015, "very few Corinthian students pursued arbitration, according to records maintained by the American Arbitration Association," the arbitration firm selected by Corinthian in its arbitration agreements, and that "even fewer received any award." *Id*. (citing Public Citizen Comments, AR-J-48856). In fact, as the comment on which ED relied makes clear, only *one* Corinthian student during this entire time period obtained a favorable arbitrator's award. AR-J-48856. ED thus correctly determined that "[t]his

data support[ed]" the "conclusion that widespread use of mandatory arbitration agreements effectively masked serious misconduct later uncovered in government enforcement actions, while providing minimal relief for students." *Id*.

CAPPS's argument that ED "failed to consider" what it maintains are "serious drawbacks of class actions for students," Def.'s Br. at 24, fares no better. As a preliminary matter, the Rule does not force any student to bring a claim on behalf of a putative class, nor does it require a state or federal court to certify a class action in any given case, or preclude students from opting out of a class if certified. *Cf.* AR-A-102 (81 Fed. Reg. at 76,027) (noting that ED's objective was to ensure students' ability to pursue a class action *if they so choose*, and that ED "cannot change the rules and practical consequences of class action litigation"). Preserving the option for students to bring class actions where appropriate is not incompatible with the recognition that class actions can have downsides.

As to CAPPS's criticisms of class action litigation, ED devoted nearly four columns of the Federal Register to these comments and the agency's response to them. AR-A-100–01 (81 Fed. Reg. at 76,025–26). Yet ED found "little evidence" to support the contention—which ED said appeared "unfounded"—that class actions had resulted in only "modest returns" in the "postsecondary education industry." AR-A-101 n.85 (Fed. Reg. at 76,026). ED emphasized that "in one of the few class actions to proceed to trial" in the higher education context, "a class of students obtained two million dollars in relief from a for-profit school." *Id*. (citing *Jamieson v. Vatterott Educ. Ctrs., Inc.*, 259 F.R.D. 520 (D. Kan. 2009)). Weighing all the evidence before it, ED stated it was "not suggest[ing] that class actions are a panacea," but pointed out "that class actions have significant effects beyond financial recovery for the particular class members, including deterring misconduct by the institution, deterring misconduct by other industry

members, and publicizing claims of misconduct that law enforcement authorities might otherwise have never been aware of, or may have discovered only much later." AR-A-101 (81 Fed. Reg. at 76,026). ED also noted that "recent history shows the significant consequences for students and taxpayers in an industry that has effectively barred consumers from using the class action tool." *Id*. ED relied on its expertise and history in evaluating the record before it to reach its conclusion that forcing students to waive their rights to proceed as a class had negative consequences.

CAPPS also argues that ED's current NPRM, which proposes a different view of the benefits of arbitration and how those purported benefits should affect its decisionmaking, somehow makes ED's 2016 view arbitrary and capricious. That argument runs counter to basic principles of administrative law. If an agency's tentative expression of a change of views in an NPRM could make the previous view arbitrary and capricious, and thus invalidate a prior rule, an agency could effectively rescind a rule just by issuing an NPRM taking an opposing position. As this Court's decision in the *Bauer* case made clear, that is not enough. Regardless of the merits of ED's NPRM, which is not now before the Court, and which ED has publicly stated it is abandoning, or of any rule that may or may not result from the still-pending rulemaking, there is no reason why two differing views of the merits of a particular policy cannot both meet the standards of reasoned decisionmaking under the APA. Decades of APA case law acknowledge that, as to both facts and statutes, there is frequently "a range of permissible interpretations, and that the agency is free to move from one to another," so long as it provides a reason for taking the view that it does. *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (Scalia, J., concurring) (citing *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991) and *Chevron, U.S.A, Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 863–64 (1984)); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *cf. In re Polar*

Bear Endangered Species Act Listing & Section 4(d) Rule Litig., 709 F.3d 1, 9 (D.C. Cir. 2013) (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1000 (D.C. Cir. 2008), for the principle that "reviewing courts must avoid[ ] all temptation to direct the agency in a choice between rational alternatives"). That today's ED may ultimately weigh competing evidence differently than did the ED of 2016 does not mean that the agency's prior conclusion was arbitrary and capricious.

B. CAPPS's disagreement about the relevance of one of several sources ED relied upon does not make ED's action arbitrary and capricious.

CAPPS argues ED acted arbitrarily and capriciously because it cited a CFPB study on arbitration agreements and class-action provisions in promulgating the Rule, and CAPPS does not think the experience of the consumer borrowers in that study should be extrapolated to that of student loan borrowers. CAPPS's argument misrepresents the record, overstating the degree to which ED "relied" on the cited study. Moreover, it ignores that ED rationally explained its decision to consider the study, addressing the very arguments CAPPS makes in its brief.

ED did not, as CAPPS contends, "simply cut and paste findings" from the CFPB, or fail "to undertake its own consideration of relevant data." CAPPS S.J. Mem. 25. In addition to the CFPB study, ED cited information from court cases, including cases against for-profit colleges; data from the American Arbitration Association; declarations from students; reports of government investigations; and social science literature. AR-A-96–105 (81 Fed. Reg. at 76,021–30); NPRM, AR-B-52–57 (81 Fed. Reg. at 39,380–85). CAPPS does not challenge ED's reliance on any of these sources, which ED found to be consistent with the CFPB study.

CAPPS's myopic focus on this single study, and its statement that ED was obliged to conduct its own independent study, is contrary to decades of case law on the scope of arbitrary and capricious review. As the *en banc* D.C. Circuit held more than forty years ago, an agency need not identify "a single dispositive study that fully supports [its] Administrator's determination." *Ethyl*

Corp. v. EPA, 541 F.2d 1, 37 (D.C. Cir. 1976) (*en banc*). Thus, an agency's action will be upheld as reasonable if "the cumulative effect of all [the] evidence, and not the effect of any single bit of it, presents a rational basis," even if that evidence is "inconclusive but suggestive." *Id*. at 38. *See also Mississippi v. EPA*, 744 F.3d 1334, 1345 (D.C. Cir. 2013) (citing *Ethyl Corp.*); *Pub. Citizen Health Res. Grp. v. Tyson*, 796 F.2d 1479, 1495 (D.C. Cir. 1986) (same).

There is no reason why a study conducted by a sister agency, analyzing a similar issue, cannot be a part of this cumulative evidence. An agency is not restricted to relying on data that provides "proof positive" to support its conclusions; it "need only gather evidence from which it can reasonably draw the conclusion it has reached." *Pub. Citizen Health Res. Grp.*, 796 F.2d at 1495. Indeed, as the Supreme Court has explained, "[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from facts and probabilities on the record to a policy conclusion." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

ED's consideration of available, reliable data as part of a larger set of information cannot be arbitrary and capricious simply because the data did not involve the exact scenario ED sought to regulate.[7] Courts have regularly upheld agencies' reasoned decisions to extrapolate data from

[7] CAPPS does not identify any flaw in the CFPB's methodology that would make its findings unreliable. *Cf. Varicon Int'l v. Office of Pers. Mgmt.*, 934 F. Supp. 440, 445 (D.D.C. 1996) ("While the plaintiffs identify conclusions in the feasibility study with which they disagree, they have failed to demonstrate that the methodology used, the analysis, or the reasoning contained in the study was either flawed or irrational."). CAPPS's statement (at 26) that Congress "rejected" the CFPB's study, is both incorrect and besides the point. The CFPB study was required by statute. 12 U.S.C. § 5518(a). CFPB subsequently issued a rule that it found consistent with that study, and Congress subsequently "disapprove[d]" that rule pursuant to the Congressional Review Act. Pub. L. No. 115-74 (2017). The relevant legislation simply stated that the rule would "have no force or effect"; it did not include any reason and it certainly did not say anything about CFPB's earlier study. *Id.* Congress's disapproval of a CFPB rule is no more relevant than Congress's failure to disapprove of ED's 2016 Rule under the Congressional Review Act.

one set of circumstances to another. *See, e.g.*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717 (D.C. Cir. 2011) (finding it reasonable for FCC to extrapolate from study about regional sports networks to reach conclusions about all satellite cable-affiliated networks); *Lignite Energy Council v. U.S. EPA*, 198 F.3d 930, 934 (D.C. Cir. 1999) (reasonable for EPA to extrapolate from studies of utility boilers in setting regulations regarding coal-fueled industrial boilers); *see also N. Carolina v. FERC*, 112 F.3d 1175, 1190 (D.C. Cir. 1997) ("The mere fact that the Commission relied on necessarily imperfect information in calculating an extrapolation rate for the years 2015 to 2030 does not render the projection arbitrary."). Indeed, it would have been arbitrary and capricious for ED *not* to consider data collected by a reputable sister agency examining similar issues. *Cf. Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) (finding it unreasonable for agency *not* to consider "extrapolat[ing] the time-on-task effects of driving longer hours using crash-risk data derived from drivers who drove for shorter periods of time").

The relevant question is whether the agency "made a 'reasoned decision based on reasonable extrapolations from some reliable evidence.'" *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 253 (D.C. Cir. 2013) (quoting *NRDC v. EPA*, 902 F.2d 962, 968 (D.C. Cir. 1990)). ED did just that here, citing a number of sources including the CFPB study, and explaining why it considered them. Indeed, ED directly responded to CAPPS's criticism of its use of the CFPB study: It stated that the study "analyze[d] the prevalence of arbitration agreements for private student loans as well as disputes concerning those loans," that "[s]chools participating in the Direct Loan Program not infrequently provide or arrange private student loans to their students," and that "private loan borrowers … can be expected often to share characteristics

with Direct Loan borrowers." AR-A-100 (81 Fed. Reg. at 76,025). This rational disagreement with CAPPS is not arbitrary or capricious.

C. ED adequately considered reliance interests that may be impacted by the Rule.

CAPPS contends that ED "failed to consider the extent to which institutions have relied on the pre-existing regulatory framework," rendering the arbitration and class-waiver provisions arbitrary and capricious. CAPPS S.J. Mem. at 26. To the contrary, ED adequately did so.

As a primary matter, the "reliance" interests referred to in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), the case on which CAPPS relies, related to a situation where an agency had consciously jettisoned a previously adopted policy. Here, the agency was writing on a blank slate as to forced arbitration and class-waiver provisions, so regulated entities had nothing on which to rely. *Cf. Fox Television*, 556 U.S. at 515–16 (contrasting situations where agency is changing policy, implicating reliance interests, with those where it is writing on a "blank slate"). Certainly, CAPPS cannot claim any reasonable reliance with respect to enrollment agreements its members decided to enter into after the issuance of the NPRM, at the latest, which was now nearly three years ago. CAPPS's argument suggests that any time a regulation impacts a business model, the agency must consider that the business was "relying" on a lack of regulation. But this assertion conflates the reliance interest referred to in *Encino Motorcars* with the general requirement that agencies are generally required to acknowledge and account for the impact of their actions on regulated entities—a requirement ED scrupulously obeyed.

Even where the reliance principle of *Encino Motorcars* does apply, agencies are not barred from changing policies simply because a reliance interest is implicated. Rather, an agency must simply acknowledge that interest, and provide a "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." 136 S. Ct. at 2126. Here,

ED explicitly acknowledged that the Rule would impose costs on regulated entities, including the costs associated with an "increased risk of litigation" that CAPPS discusses in its brief (at 26). AR-A-101 (81 Fed. Reg. at 76,026). ED explained why it believed the potential for increased litigation costs was outweighed by the benefits of the Rule:

> It is possible that banning class action waivers may increase legal expenses and could divert funds from educational services, or lead to tuition increases. … We do not dismiss this risk, but we have no basis from which to speculate how much this regulation might increase that risk and attendant expense. We see that risk as outweighed by the benefits to students and the taxpayer in allowing those students who wish to seek relief in court the option to do so.

Id.; *see also* AR-A-104 (81 Fed. Reg. at 76,029) (noting comments about the impact of increased legal fees due to the arbitration provision); AR-A-123 (*id*. at 76,048) (noting comments as to costs associated with increased litigation); AR-A-127 (*id*. at 76,052) (discussing "compliance costs that may be incurred as institutions adapt their business practices and training to ensure compliance with the regulation"). ED also noted comments that asserted that arbitration itself could be quite costly, to the detriment of students. AR-A-104 (*id*. at 76,029). While ED may have not directly referred to these costs as a product of "reliance interests," it certainly acknowledged and addressed the argument that institutions might experience cost increases where they had anticipated being able to keep disputes in private, individual arbitrations as opposed to in court and/or group-based proceedings.

Although CAPPS disagrees with ED's policy judgment, it is incorrect to say that ED "failed to consider or address" the costs associated with an increased risk of litigation. An agency's obligation to respond to comments received "is not particularly demanding." *Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012).[8] ED directly addressed

[8] That ED may have not addressed specifically every potentially increased cost CAPPS mentioned is inconsequential. As the Court of Appeals recently explained, "The Administrative

the costs resulting from increased litigation risk that CAPPS now asserts it ignored, and ED's explanation why those costs were outweighed by the benefits to students and taxpayers more than adequately met the *Encino Motorcars* standard.

In addition, as ED pointed out, reliance interests are minimally implicated by the arbitration and class-action waiver provisions because they apply prospectively, "impos[ing] requirements on the future conduct of institutions that intend to continue to participate in the Direct Loan Program." AR-A-99 (81 Fed. Reg. 76,024). To the extent the provisions alter the consequences of past arbitration agreements by requiring schools that choose to continue their participation in the student loan program to agree not to seek to enforce them, *see id*., those consequences are accepted voluntarily by the schools, *see* AR-A-100 (81 Fed. Reg. at 76,025). Moreover, those consequences are aimed at requiring schools to internalize the costs of their own conduct and avoid shifting losses to the United States, *see* AR-A-97 (81 Fed. Reg. at 76,022), which can infringe no legitimate reliance interest.

D. *Epic Systems* does not require a remand.

As a last attempt to unsettle the Borrower Defense Rule, CAPPS argues that vacatur and remand is necessary because the "pertinent legal landscape has changed significantly" since 2016. CAPPS S.J. Mem. 27. Specifically, CAPPS argues that the Supreme Court's decision in *Epic Systems* was an "intervening development in the law," *id*., which ED should reevaluate. As

---

Procedure Act does not 'require separate, specific rulings on *each* exception to a decision. … The agency need only state the main reasons for its decision and indicate that it has considered the most important objections.'" *Util. Air Regulatory Grp. v. EPA*, 885 F.3d 714, 719–20 (D.C. Cir. 2018) (quoting *Simpson v. Young*, 854 F.2d 1429, 1434 (D.C. Cir. 1988)). *See also Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (marks omitted)) ("It is settled that the agency is not required to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking.").

explained above, however, *Epic Systems* did not change the law in any manner relevant to this case. CAPPS itself argues that the Court's decision "reflects [] longstanding precedent." *Id*. at 27 n.16. The Court in *Epic Systems* likewise declared that its FAA analysis broke no new ground. *See* 138 S. Ct. at 1630–31.

Indeed, CAPPS's argument for remand contradicts its argument that *Epic Systems* demonstrates that the Borrower Defense Rule is contrary to law under the FAA—an issue as to which ED's views would receive no deference. *See* 138 S. Ct. at 1629. If CAPPS's legal argument were correct, the Court would have to set aside the Rule regardless of any views the agency might express on the point. If, as we have demonstrated, CAPPS's argument is not correct, the Rule must be sustained without regard to the agency's views of the matter.

Thus, this case does not implicate the "principle that an agency should be afforded the first word on how an intervening change in law affects an agency decision." CAPPS S.J. Mem. 27 (quoting *Nat'l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249–50 (D.C. Cir. 1990)). Notably, *National Fuel* involved an *agency*'s request for a remand, after an intervening D.C. Circuit decision as to that agency, which the court and agency agreed had the effect of depriving a challenged order of "legal effect." 899 F.2d at 1249. *See also Panhandle E. Pipe Line Co. v. FERC*, 890 F.2d 435, 438 (D.C. Cir. 1989) (cited by *National Fuel*, and remanding to FERC where FERC had changed its own rule). *National Fuel* in no way suggests that agency action should be vacated and remanded any time there is a subsequent court decision on a related issue. Two years after CAPPS filed suit, and nearly a year after the Supreme Court ruled in *Epic Systems*, no purpose would be served by remanding this case to the agency to consider the same purely legal argument CAPPS has been making since the NPRM in 2016.

CONCLUSION

For the foregoing reasons, the Court should deny CAPPS's motion for summary judgment, grant the intervenor-defendants' motion for summary judgment, and enter final judgment dismissing CAPPS's claims with prejudice.

Respectfully submitted,

/s/ Adam R. Pulver

Toby R. Merrill
Mass. BBO No. 601071
PROJECT ON PREDATORY STUDENT LENDING,
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
(617) 522-3003
tomerrill@law.harvard.edu

Adam R. Pulver
D.C. Bar No. 1020475
Scott L. Nelson
D.C. Bar No. 413548
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Defendant-Intervenors

Dated: March 1, 2019