

No. 15-5190

---

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES,  
*Plaintiff-Appellant,*

v.

ARNE DUNCAN, IN HIS OFFICIAL CAPACITY AS SECRETARY  
OF THE DEPARTMENT OF EDUCATION; UNITED STATES DEPARTMENT  
OF EDUCATION; AND UNITED STATES OF AMERICA,  
*Defendants-Appellees.*

---

On Appeal from the United States District Court  
for the District of Columbia, No. 1:14-cv-01870-JDB

---

**BRIEF OF AMICUS CURIAE THE CHAMBER OF  
COMMERCE OF THE UNITED STATES OF AMERICA  
IN SUPPORT OF PLAINTIFF-APPELLANT**

---

KATE COMERFORD TODD  
STEVEN P. LEHOTSKY  
U.S. CHAMBER LITIGATION CENTER, INC.  
1615 H Street, NW  
Washington, DC 20062  
(202) 463-3187

JONATHAN G. CEDARBAUM  
*Counsel of Record*  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 663-6000

BRADLEY M. BAGLIEN  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
60 State Street  
Boston, MA 02109  
(617) 526-6000

October 6, 2015

---

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), amicus curiae The Chamber of Commerce of the United States of America (the “Chamber”) certifies that:

**(A) Parties and Amici**

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant, except for the following: Rocky Vista University has filed a notice of intent to participate as amicus curiae in this Court in support of Plaintiff-Appellant.

**(B) Rulings under Review**

Reference to the ruling at issue appears in the Brief for Plaintiff-Appellant.

**(C) Related Cases**

Reference to a related case appears in the Brief for Plaintiff-Appellant. The Chamber is not aware of any other related cases.

**RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

The Chamber is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions of the country. The Chamber does not have outstanding shares or debt securities in the hands of the public and does not have a parent company. No publicly held company holds a 10% or greater ownership interest in the Chamber.

## TABLE OF CONTENTS

	Page
CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES.....	i
RULE 26.1 CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES .....	iv
GLOSSARY.....	vii
STATUTES AND REGULATIONS.....	1
STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I. THE DEBT-TO-EARNINGS TEST IS CONTRARY TO THE HIGHER EDUCATION ACT AND PROVIDES A POOR MEASURE OF INSTITUTIONAL QUALITY.....	4
II. THE RULE WILL HAVE A DEVASTATING EFFECT ON BOTH UNDERSERVED COMMUNITIES AND MANY AMERICAN BUSINESSES THAT WOULD HIRE GRADUATES FROM PROGRAMS THAT WILL BECOME INELIGIBLE.....	6
A. The Rule Will Devastate An Important Sector Of The American Postsecondary Educational System.....	7
B. The Rule Undercuts Private Institutions’ Ability To Serve Underprivileged Students.....	13
C. The Rule Will Penalize Students Who Pursue Experience-Building Opportunities And Schools That Support Those Opportunities .....	16
D. The Rule Will Impede, Rather Than Advance, Development Of The Skilled Workforce Essential For Economic Growth.....	17
CONCLUSION.....	20
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

### CASES

	Page(s)
<i>North Carolina v. EPA</i> , 531 F.3d 896 (D.C. Cir. 2008).....	6
<i>Timpinaro v. SEC</i> , 2 F.3d 453 (D.C. Cir. 1993).....	6

### STATUTES

20 U.S.C. § 1001(b)(1).....	4
-----------------------------	---

### REGULATIONS

34 C.F.R.	
§ 685.208 .....	16, 17
§ 685.209 .....	17
§ 668.7 (2014).....	5
§ 668.403 (2014).....	5
§ 668.404 .....	17
<i>Program Integrity: Gainful Employment</i> , 79 Fed. Reg. 16,425 (Mar. 25, 2014) (proposed rule) .....	8, 9
<i>Program Integrity: Gainful Employment</i> , 79 Fed. Reg. 64,889 (Oct. 31, 2014) (to be codified at 34 C.F.R. § 600) .....	7, 8, 11, 12, 19

### OTHER AUTHORITIES

Association of Private Sector Colleges and Universities, <i>America's Private-Sector Colleges and Universities: Generating Real Value for Students &amp; Society</i> (2013), <a href="http://www.career.org/news-and-media/press-releases/upload/APSCU-Generating-Real-Value-Final.pdf">http://www.career.org/news-and-media/press-releases/upload/APSCU-Generating-Real-Value-Final.pdf</a> .....	9
Association of Private Sector Colleges and Universities, <i>Gainful Employment 2014 Comment Letter</i> , ED-2014-OPE-0039 (May 27, 2014), <a href="http://www.apscu.org/news-and-media/press-releases/upload/APSCU-GE-2014-Comment-Letter-52714-signed.pdf">http://www.apscu.org/news-and-media/press-releases/upload/APSCU-GE-2014-Comment-Letter-52714-signed.pdf</a> .....	10

Avery, Christopher & Sarah Turner, <i>Student Loans: Do College Students Borrow Too Much—Or Not Enough?</i> 26 J. Econ. Persp. 165 (2012).....	17
Career Education Corporation, 2014 Comment Letter, ED-2014-OPE-0039 (May 27, 2014) .....	17
Chamber of Commerce of the United States, GE 2014 Comment Letter, ED-2014-OPE-0039 (May 27, 2014), <a href="https://www.uschamber.com/sites/default/files/documents/files/140527_Comments_GainfulEmploymentNPRM_Duncan.pdf">https://www.uschamber.com/sites/default/files/documents/files/140527_Comments_GainfulEmploymentNPRM_Duncan.pdf</a> .....	11
Charles River Associates, <i>Report on the Proposed Gainful Employment Regulations</i> (May 23, 2014), in APSCU, <i>Gainful Employment 2014 Comment Letter</i> , ED-2014-OPE-0039 (May 27, 2014), <a href="http://www.apscu.org/news-and-media/press-releases/upload/APSCU-GE-2014-Comment-Letter-52714-signed.pdf">http://www.apscu.org/news-and-media/press-releases/upload/APSCU-GE-2014-Comment-Letter-52714-signed.pdf</a> .....	7, 13, 19
Department of Education, <i>Obama Administration Announces Final Rules to Protect Students from Poor Performing Career College Programs</i> (Oct. 30, 2014), <a href="http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-career-college-programs">http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-career-college-programs</a> .....	11
Donohue, Thomas J., <i>Regulating Higher Education: When “Helping” Hurts</i> (Nov. 10, 2014), <a href="https://www.uschamber.com/blog/regulating-higher-education-when-helping-hurts">https://www.uschamber.com/blog/regulating-higher-education-when-helping-hurts</a> .....	3
Editorial Board, <i>Tightening Rules on For-Profit Colleges</i> , Wash. Post, Apr. 27, 2014 .....	14
Johnson, Nate, Lumina Foundation for Education, <i>College Costs and Prices</i> , 1 (2014), <a href="http://www.luminafoundation.org/files/resources/college-costs-and-prices.pdf">http://www.luminafoundation.org/files/resources/college-costs-and-prices.pdf</a> .....	11
Krell, Eric, <i>The Global Talent Mismatch</i> , HR Magazine (June 1, 2011), <a href="http://www.shrm.org/publications/hrmagazine/editorial/content/2011/0611/pages/0611Krell.aspx">http://www.shrm.org/publications/hrmagazine/editorial/content/2011/0611/pages/0611Krell.aspx</a> .....	18

National Center for Education Statistics, <i>Enrollment in Postsecondary Institutions, Fall 2012; Financial Statistics, Fiscal Year 2012; Graduation Rates, Selected Cohorts, 2004-09; and Employees in Postsecondary Institutions, Fall 2012</i> (Dec. 2013), <a href="http://nces.ed.gov/pubs2013/2013183.pdf">http://nces.ed.gov/pubs2013/2013183.pdf</a> .....	10
O’Neill, June E., National Center for Policy Analysis, <i>The Disappearing Gender Wage Gap</i> , Brief Analyses No. 766 (June 22, 2012), <a href="http://www.ncpa.org/pub/ba766">http://www.ncpa.org/pub/ba766</a> .....	15
Oldham, Cheryl A., U.S. Chamber of Commerce, <i>Gainful Employment Rule Strips Students of Opportunity</i> (Apr. 29, 2014), <a href="https://www.uschamber.com/blog/gainful-employment-rule-strips-students-opportunity">https://www.uschamber.com/blog/gainful-employment-rule-strips-students-opportunity</a> .....	9
Oldham, Cheryl A., U.S. Chamber of Commerce, <i>What is the Gainful Employment Rule Really About?</i> (Mar. 10, 2014), <a href="https://www.uschamber.com/blog/what-gainful-employment-rule-really-about">https://www.uschamber.com/blog/what-gainful-employment-rule-really-about</a> .....	18
Ross, Chris, Pantheon Group, <i>Gainful Employment Rule Measures the Characteristics of Students, Not the Effectiveness of the Programs</i> (May 27, 2014), in APC Gainful Employment 2014 Comment Letter, ED-2014-OPE-0039 (May 27, 2014), <a href="http://www.apc-colleges.org/main/wp-content/uploads/2014/06/APCGEComments.pdf">http://www.apc-colleges.org/main/wp-content/uploads/2014/06/APCGEComments.pdf</a> .....	12
Sallie Mae, <i>How America Pays for College</i> , (2013), <a href="https://salliemae.newshq.businesswire.com/sites/salliemae.newshq.businesswire.com/files/doc_library/file/Sallie_Mae_Report_-_How_America_Pays_for_College_Report_FINAL_0.pdf">https://salliemae.newshq.businesswire.com/sites/salliemae.newshq.businesswire.com/files/doc_library/file/Sallie_Mae_Report_-_How_America_Pays_for_College_Report_FINAL_0.pdf</a> .....	15
Schanzenbach, Prof. Diane Whitmore, Comment Letter on Proposed Rule for Gainful Employment (79 Fed. Reg. 16,425) .....	14
Sparks, Erin & Mary Jo Waits, National Governors Association Center for Best Practices, <i>Degrees for What Jobs?</i> (Mar. 2011), <a href="http://www.nga.org/files/live/sites/NGA/files/pdf/1103DEGREES_JOBS.PDF">http://www.nga.org/files/live/sites/NGA/files/pdf/1103DEGREES_JOBS.PDF</a> .....	9

United States Bureau of Labor Statistics, *BLS Reports: Highlights of Women's Earnings in 2012, Report 1045* (Oct. 2013), <http://www.bls.gov/cps/cpswom2012.pdf>.....15

*Webster's Third New International Dictionary* (2002) .....4



**GLOSSARY**

APSCU	Association of Private Sector Colleges and Universities (Plaintiff-Appellant)
APSCU Br.	Opening Brief for Plaintiff-Appellant Association of Private Sector Colleges and Universities, Document #1575552 (Sept. 29, 2015)
Chamber	The Chamber of Commerce of the United States of America
Department	United States Department of Education
Higher Education Act	Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 20 U.S.C. §§ 1001 <i>et seq.</i>
Title IV	Title IV of the Higher Education Act of 1965, 20 U.S.C. §§1070-1099d

## STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Addendum to the Brief for Plaintiff-Appellant APSCU.

### STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. The Chamber respectfully submits that, as an organization dedicated to the interests of businesses and organizations that will be severely affected by the Department of Education's Gainful Employment Rule, it provides a valuable perspective on the issues presented in this appeal.

---

<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus certifies that no party's counsel authored this brief in whole or in part and that no one other than amicus, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

Plaintiff-Appellant and Defendants-Appellees have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

The Gainful Employment Rule will affect hundreds of thousands of students currently enrolled in programs that likely will be shuttered if the Rule is allowed to take effect. That will have an immediate impact on the students themselves, who will find their efforts at professional advancement delayed or blocked by a government regulation that, as explained below, wrongfully claims to be in these students' best interests. That result would be particularly troubling because many of the affected students come from underprivileged backgrounds. The programs the members of the Association of Private Sector Colleges and Universities ("APSCU") offer provide a means of socioeconomic advancement that might otherwise be unavailable through community college or other postsecondary options. Those APSCU member institutions that do remain operational will be incentivized to reject low-income students who are most reliant on financial aid in order to ensure compliance with the Rule's mandatory debt-to-income ratio targets.

The Rule also will have significant implications for employers and the long-term strength of the American economy. It will hinder the nation's ability to reduce the "skills gap" in our workforce—that is, the difference between employers' demand for workers with essential skills and the supply of job candidates who have sufficiently developed those skills. The programs targeted by the Rule are those that are most vital to building a skilled workforce. The for-profit college and

university sector serves an essential role in the American post-secondary educational system by readying students for careers for which our nation's four-year colleges and universities have not traditionally prepared students.

Employers—including many in growing industries experiencing an increased demand for skilled workers—count on APSCU's member schools to provide many of the candidates necessary to fill their hiring needs. Thus, in forcing the closure of many educational programs, the Gainful Employment Rule will impede, rather than advance, the ability of America's employers to hire a skilled and diverse workforce essential to help our nation compete in the global economy.

### **ARGUMENT**

The Gainful Employment Rule threatens to punish our nation's for-profit colleges with draconian program cuts on the ground that the jobs students obtain after graduation do not pay enough to satisfy the Department's debt-to-earnings and discretionary-income metrics. The Department's approach has no basis in the text of the Higher Education Act, and the Department has failed to offer a reasoned explanation for it. "These overreaching rules are being pushed under the guise of cost control and caring. Yet they fail the most basic test of a regulation's merit—whether it does more harm than good." Thomas J. Donohue, *Regulating Higher Education: When "Helping" Hurts* (Nov. 10, 2014), <https://www.uschamber.com/blog/regulating-higher-education-when-helping-hurts>.

For-profit schools have improved the overall quality and accessibility of America higher education. Many of these institutions serve growing or skilled industries that are traditionally underserved by four-year colleges and universities. Federal policies should support the growth of these institutions instead of perpetuating a system in which these institutions (and the students they serve) are treated differently than other public and private schools (and their students).

**I. THE DEBT-TO-EARNINGS TEST IS CONTRARY TO THE HIGHER EDUCATION ACT AND PROVIDES A POOR MEASURE OF INSTITUTIONAL QUALITY**

Subsection 101(b)(1) of the Higher Education Act provides in relevant part that, for purposes of federal student aid programs, “institution[s] of higher education” include “any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation ... .” 20 U.S.C. § 1001(b)(1). The Higher Education Act does not define the term “gainful employment.” It should therefore be given its common meaning of “any employment that pays.” See Brief of Appellant APSCU at 21 (“APSCU Br.”); “Employment”, *Webster’s Third New International Dictionary* (2002) (“*Webster’s 3d*”) (an “activity in which one engages and employs his time and energies,” including “work (as customary trade, craft, service, or vocation) in which one’s labor or services are paid for by an employer”); “Gainful”, *Webster’s 3d* (“productive of gain” or “providing an income”). Until the Department’s novel

interpretation, the word “gainful” has never been understood to mean “employment that pays a certain percentage more than an educational cost ratio.” *See* APSCU Br. at 8-11 (analyzing the Department’s prior position on gainful employment).

Under the Gainful Employment Rule, the Department will measure whether an educational program prepares students for “gainful employment” by comparing the estimated annual loan payment owed by a cohort of recent graduates of a particular program to two metrics: (1) the students’ mean or median annual earnings (whichever is higher); and (2) their discretionary income. *See* 34 C.F.R. § 668.7(c)(1) (2014). In order to satisfy the “gainful employment” requirement, programs must show that the cohort debt-to-annual-earnings ratio is 8% or less or that the debt-to-discretionary-income ratio is 20% or less. *See id.* § 668.403(c)(1) (2014). As a result, a program may not “pass” as preparing students for “gainful employment” under the Department’s new test simply because the program’s graduates do not, on average, earn *enough* more—even if the students earn more, net of their repayment obligations, than they did before undertaking the program.

By advancing an interpretation that places primary emphasis on the level of immediate post-graduate earnings, the Rule fails as a measure of the quality of a school’s educational program. Evaluating employment outcomes during the first several years of post-graduation work is likely to give a misleading sense of the benefits of attending an institution because the benefits from education are

typically realized over a longer period. Furthermore, the Department's interpretation will punish schools who admit the most disadvantaged students and significantly improve their long-term career prospects simply because those graduates do not make enough money right out of the gate (irrespective of whether their earning ability increased from enrollment through graduation). As discussed more fully below, the Department's decision to base accountability on earnings levels alone will introduce perverse incentives for these schools, ultimately reducing opportunities for the most disadvantaged students.

The Chamber thus agrees fully with APSCU that the Higher Education Act does not permit the unreasonable construction of "gainful employment" adopted in the Rule.

**II. THE RULE WILL HAVE A DEVASTATING EFFECT ON BOTH UNDERSERVED COMMUNITIES AND MANY AMERICAN BUSINESSES THAT WOULD HAVE HIRED GRADUATES FROM PROGRAMS THAT WILL BECOME INELIGIBLE**

Under the Administrative Procedure Act, an agency's decision-making is arbitrary if it fails to adequately consider a rule's likely effects. *See, e.g., North Carolina v. EPA*, 531 F.3d 896, 907 (D.C. Cir. 2008) (per curiam) (invalidating agency rule that failed to demonstrate it "achieve[d] something measurable toward the goal" set forth in the authorizing statute); *Timpinaro v. SEC*, 2 F.3d 453, 457-460 (D.C. Cir. 1993) (remanding for further analysis where agency had not adequately substantiated its theory about regulation's likely effects). Here, the

metrics proposed by the Department will have a significant effect upon hundreds of thousands of current students. By the Department's own admission, approximately 1,445 programs enrolling 387,000 students are likely to be dismantled. *See Program Integrity: Gainful Employment*, 79 Fed. Reg. 64,889, 65,064-65,065 (Oct. 31, 2014) (to be codified at 34 C.F.R. § 600). This in turn will have a significant effect on the ability of employers in many industries to find enough qualified workers. Businesses in the healthcare, information technology, cybersecurity, automotive, building design, and heating and air conditioning sectors particularly depend on graduates of for-profit colleges to fulfill a significant portion of their workforce needs.<sup>2</sup> The Department's failure to provide a reasoned explanation addressing the far-reaching and devastating economic consequences of the Gainful Employment Rule renders the Department's promulgation of the Rule arbitrary and capricious.

**A. The Rule Will Devastate An Important Sector Of The American Postsecondary Educational System**

The Department estimates that programs serving more than 387,000 students nationwide will be deemed failing under the Rule, and programs serving over 840,000 students will be deemed failing or in the "zone." *See* 79 Fed. Reg. at

---

<sup>2</sup> *See* Charles River Associates, Report on the Proposed Gainful Employment Regulations, 85-87 (May 23, 2014) ("CRA Report"), in APSCU, Gainful Employment 2014 Comment Letter, ED-2014-OPE-0039 (May 27, 2014), <http://www.apscu.org/news-and-media/press-releases/upload/APSCU-GE-2014-Comment-Letter-52714-signed.pdf>.



65,064. Many of these students come from traditionally underserved and underprivileged communities, and the Department acknowledges that nearly 40% of these students will not have realistic transfer options if their current programs shut down. *Id.* at 65,074. Thus, the individuals perhaps most in need of these higher education programs will be deprived of the chance to matriculate and graduate, and in turn will lose the opportunity for social mobility that postsecondary education provides. That is because most of these students may not find alternatives at community colleges or public and non-profit colleges; and even those who do may not be served as well by the programs those schools offer.

The district court mistakenly downplayed the role of private sector schools in educating students from disadvantaged backgrounds, and improperly dismissed arguments showing the disproportionate effect the Rule will have on this segment of students. D.E. 31, at 25 (finding “no basis for the claim—on this record, at least—that any particular group of students will suffer special harm under these regulations”). The record evidence shows that targeting for-profit schools will particularly harm underprivileged and non-traditional students. As the Department admits, for-profit institutions “serve[] older students, women, Black students, Hispanic students, and students with low incomes at disproportionately high rates.” *Program Integrity: Gainful Employment*, 79 Fed. Reg. 16,425, 16,536 (Mar. 25, 2014) (proposed rule). This is consistent with APSCU’s findings that students at

for-profit institutions are significantly more likely to come from the lowest income groups. Sixty-three percent of them receive Pell grants (which are reserved for the lowest income students), as compared to about 27% in the general college student population.<sup>3</sup> Eighty-six percent receive some form of student aid based on their financial needs. *Id.* at 16,537. And about 39% of students at for-profit colleges and universities are African-American or Hispanic, 64% are women, and 67% are over 25. *Id.*

Moreover, many of these students are seeking the kind of educational opportunities that can improve their earnings. As many policy makers have recognized, for-profit institutions help provide education related to where the jobs will be.<sup>4</sup> Thus, both consumers and state regulators already have every reason to favor educational programs that they reasonably expect will line up with employers' labor demands. The Department's Gainful Employment Rule would instead throw hundreds of thousands of students out of such programs.

Students currently enrolled at for-profit institutions will have few, if any, alternatives if these programs are terminated. According to one estimate, half to

---

<sup>3</sup> See APSCU, *America's Private-Sector Colleges and Universities: Generating Real Value for Students & Society*, 2 (2013), <http://www.career.org/news-and-media/press-releases/upload/APSCU-Generating-Real-Value-Final.pdf>.

<sup>4</sup> See, e.g., Erin Sparks & Mary Jo Waits, National Governors Association Center for Best Practices, *Degrees for What Jobs?*, 2-3 (Mar. 2011), <http://www.nga.org/files/live/sites/NGA/files/pdf/1103DEGREESJOBS.PDF>.

three quarters of these students will not receive an education if they are forced out of these programs.<sup>5</sup> There are many reasons why for-profit colleges and universities provide the only educational opportunities for many of their students. Alternatives—most notably many community colleges—often do not have sufficient capacity, do not offer programs at the times when these students can attend, or simply do not offer the types of programs that lead to work in the areas of study for which these students want to prepare. In addition, these alternatives perform poorly in actually helping students graduate. The Department’s National Center for Education Statistics reports that 63% of those attending a two-year private sector school graduate—significantly higher than the graduation rate for students at two-year public institutions.<sup>6</sup> The Department’s new Rule therefore would disproportionately harm the students who are most in need of opportunity if they are not to be economically disenfranchised. Even for those who are fortunate enough to find substitute opportunities, “[g]iven the elimination of so many programs at once, students may face increased costs for higher education due to

---

<sup>5</sup> See APSCU, Gainful Employment 2014 Comment Letter, ED-2014-OPE-0039 (May 27, 2014), <http://www.apscu.org/news-and-media/press-releases/upload/APSCU-GE-2014-Comment-Letter-52714-signed.pdf>.

<sup>6</sup> See National Center for Education Statistics, *Enrollment in Postsecondary Institutions, Fall 2012; Financial Statistics, Fiscal Year 2012; Graduation Rates, Selected Cohorts, 2004-09; and Employees in Postsecondary Institutions, Fall 2012*, at 12 tbl. 4 (Dec. 2013), <http://nces.ed.gov/pubs2013/2013183.pdf>.

supply and demand[.]”<sup>7</sup> Indeed, the Department estimates that 1,445 educational programs will not pass the new metrics—more than 26% of the programs subject to the Rule. 79 Fed. Reg. at 65,064-65,065. That compares to 193 programs that would have closed under the prior iteration of the Rule.<sup>8</sup>

These programs, moreover, may not be able to improve their statistics and return to market because the causes of their failure to meet the Department’s new requirements are not within their control. Instead, they stem from the structure of our educational system and our economy.

Three considerations support this conclusion. *First*, for-profit colleges do not receive the substantial subsidies that public colleges receive. Public colleges finance 53% of the cost of educating their students through public funds (mostly from state taxpayers, but also from local community college taxing districts in some states).<sup>9</sup> For-profit colleges, by contrast, need to internalize the real costs of providing an education; they cannot simply reduce their price to make the

---

<sup>7</sup> See Chamber of Commerce of the United States, GE 2014 Comment Letter, ED-2014-OPE-0039, at 2 (May 27, 2014), [https://www.uschamber.com/sites/default/files/documents/files/140527\\_Comments\\_GainfulEmploymentNPRM\\_Duncan.pdf](https://www.uschamber.com/sites/default/files/documents/files/140527_Comments_GainfulEmploymentNPRM_Duncan.pdf).

<sup>8</sup> See Press Release, Dep’t of Educ., Obama Administration Announces Final Rules to Protect Students from Poor Performing Career College Programs (Oct. 30, 2014), *available at* <http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-career-college-programs>.

<sup>9</sup> Nate Johnson, Lumina Foundation for Education, *College Costs and Prices*, 1 (2014), <http://www.luminafoundation.org/files/resources/college-costs-and-prices.pdf>.

education they offer more affordable. *Second*, as noted, the students attending for-profit colleges tend to come from less privileged backgrounds. Overall, the student population tends to have had fewer economic opportunities and advantages, to have received a weaker education, and to face more challenging life circumstances than students from higher-income homes. As a result, the educational institutions that welcome them undertake a greater risk that their students will not complete the program or will not be able to avail themselves of opportunities once they have done so. The Department itself recognizes that 44% of the variance in debt-to-earnings ratios turns on factors unrelated to program quality, such as demography. 79 Fed. Reg. at 65,053. Others estimate that the influence of these factors unrelated to quality is even greater.<sup>10</sup> *Third*, there are a number of vocations for which advanced education is necessary, and where the increase in earnings will give more overall and disposable income to the person but where the salary is not likely to be sufficient to clear the bar under the Department's new standard. Programs for medical assistants—which are among the most vital programs offered by for-profit colleges—are a prime example. More than 82% of the degrees in medical assistant programs are awarded by for-profit colleges, and their

---

<sup>10</sup> See Chris Ross, Pantheon Group, *Gainful Employment Rule Measures the Characteristics of Students, Not the Effectiveness of the Programs* (May 27, 2014), in APC Gainful Employment 2014 Comment Letter, ED-2014-OPE-0039 (May 27, 2014), <http://www.apc-colleges.org/main/wp-content/uploads/2014/06/APCGEComments.pdf>.

graduates earn almost double the federal minimum wage; many of these programs, however, may not meet the Department's new metric. *See* CRA Report at 85-86.

**B. The Rule Undercuts Private Institutions' Ability To Serve Underprivileged Students**

By judging for-profit schools based solely on the short-term earnings levels of their students, the Gainful Employment Rule punishes schools that serve the most disadvantaged students, even if those students are substantially benefitting from the schools' educational programs. The most desirable students become those with high earnings potential even *in the absence of additional schooling*, and not those who stand to benefit most from the program. In a comment on the then-proposed Rule, Northwestern University Professor Diane Whitmore Schanzenbach offered a compelling example:

School C is located in an extremely socioeconomically disadvantaged neighborhood and enrolls students with very low levels of cognitive and non-cognitive skills. Among these students, their likely earnings in the absence of the program would have been very low, on the order of \$5,000 per year. Nonetheless, the school prepares these students for employment and dramatically improves their earnings potential to \$12,500 per year (for a \$7500/year gain in earnings). Even with this dramatic increase in earnings, the school would be judged not passing under the GE regulations because the debt/earnings ratio is above 8 percent [assuming an annual debt payment of \$1,100]. On the other hand, School D is located in a less disadvantaged neighborhood and enrolls a mix of students who would have earned \$15,000 per year in absence of the schooling. This school improves students' earnings by only \$2000 per year. Under the GE rules though, School D is passing because its debt/earnings ratio is 6.5 percent [assuming an annual debt payment of \$1,100]. Note that they are deemed to be passing even though they have a much smaller impact on students' earnings than

School C. The GE rules would punish schools that serve a highly disadvantaged population like School C, and reward schools like School D for serving a more advantaged population.

Prof. Diane Whitmore Schanzenbach, Comment Letter on Proposed Rule for Gainful Employment (79 Fed. Reg. 16,425) (AR-H-088120-123).

Under the Department's approach, a for-profit school significantly increases its risk of non-compliance by admitting disadvantaged students, even if its programs are best-suited to enhance such students' long-term career prospects. As a result, institutions that have traditionally provided opportunities for low-income students will be incentivized to reject them in favor of those who traditionally fall within higher income-earning brackets. As the Washington Post's Editorial Board stated in criticizing the then-proposed Rule, "the likely outcome of implementing the draft as written is that schools will admit only students who pose the least risk. That will make it harder for minorities, poor people and nontraditional students to get the kind of post-secondary education that might help them improve their lives."<sup>11</sup>

In particular, the Rule makes it harder for institutions to admit fewer low-income students who must finance the majority of their own educations.

According to one recent study, students whose families earn a total income of less

---

<sup>11</sup> See Editorial Board, *Tightening Rules on For-Profit Colleges*, Wash. Post, Apr. 27, 2014, [https://www.washingtonpost.com/opinions/tightening-rules-on-for-profit-colleges/2014/04/27/2b80630e-cca4-11e3-95f7-7ecdde72d2ea\\_story.html](https://www.washingtonpost.com/opinions/tightening-rules-on-for-profit-colleges/2014/04/27/2b80630e-cca4-11e3-95f7-7ecdde72d2ea_story.html).

than \$35,000 annually are significantly more reliant on grants, scholarships, and student-loan borrowing than are students from higher-income families.<sup>12</sup> Thus, a student from a low-income home presents a far greater risk: she is much more likely to need to take the maximum amount of Title IV funds, which would hurt the school's average debt-to-income ratios upon graduation.

The Rule also may lead to a reduction in admissions of minority and female students. Numerous studies have concluded that female graduates earn less on average than their male counterparts, and minority students earn less than their white and Asian counterparts.<sup>13</sup> The Rule's debt-to-income metrics thus may perversely reduce the opportunities for minorities and women, notwithstanding these students' ability to remain current with their loan payments. All of these outcomes are irrational.

The district court dismissed these concerns, accepting the Department's contention that institutions can improve their debt-to-income-ratios by simply lowering tuition and other costs "within an institution's control." D.E. 31, at 18.

---

<sup>12</sup> See Sallie Mae, *How America Pays for College*, 9, figs. 7, 9 (2013), [https://salliemae.newshq.businesswire.com/sites/salliemae.newshq.businesswire.com/files/doc\\_library/file/Sallie\\_Mae\\_Report\\_-\\_How\\_America\\_Pays\\_for\\_College\\_Report\\_FINAL\\_0.pdf](https://salliemae.newshq.businesswire.com/sites/salliemae.newshq.businesswire.com/files/doc_library/file/Sallie_Mae_Report_-_How_America_Pays_for_College_Report_FINAL_0.pdf).

<sup>13</sup> See, e.g., United States Bureau of Labor Statistics, *BLS Reports: Highlights of Women's Earnings in 2012*, Report 1045, at 2 (Oct. 2013), <http://www.bls.gov/cps/cpswom2012.pdf>; June E. O'Neill, Nat'l Ctr. for Policy Analysis, *The Disappearing Gender Wage Gap*, Brief Analyses No. 766 (June 22, 2012), <http://www.ncpa.org/pub/ba766>.



But this assumes that for-profit programs can provide the same level of quality at lower cost. More likely, lower tuition and fee receipts will diminish program quality and require elimination of staff and important services for students, such as career services resources and employees.

**C. The Rule Will Penalize Students Who Pursue Experience-Building Opportunities And Schools That Support Those Opportunities**

The district court assumed, without evidentiary support, that graduates who exceed the Department's arbitrary debt-to-income threshold are likely to default on their student loan obligations shortly after they complete a for-profit program.

D.E. 31, at 21. In reality, many of these students will take advantage of federal programs that allow them to reduce initial payment obligations. As APSCU explains in its brief, all students with Title IV loans have the options (1) to extend the repayment period to up to 25 years through an "extended repayment" option, 34 C.F.R. § 685.208(d)-(e); (2) to reduce payments they must make in the early years after graduation through a "graduated payment" option (accounting for the graduate's ability to handle higher loan payments in the future as wages increase), *id.* § 685.208(f)-(h); or (3) to tie their repayment obligation to their discretionary

income through a variety of income-contingent repayment options, *id.*

§§ 685.208(k), 685.209.<sup>14</sup>

Significantly, flexible and income-based repayment options allow many graduates of for-profit schools to accept low-paying internships, apprenticeships, and other experience-building positions that improve long-term earnings prospects. *See* Career Education Corporation, 2014 Comment Letter, ED-2014-OPE-0039, at 67 (May 27, 2014). The Department's interpretation punishes schools whose students pursue these valuable opportunities and creates incentives for institutions to steer graduates toward opportunities that maximize short-term earnings. *See* 34 C.F.R. § 668.404(b)(2) (providing for calculation of annual loan payments assuming a 10-year repayment period for certificate and associate degrees, with no provisions to address actual repayment behavior or alternative loan payment strategies).

**D. The Rule Will Impede, Rather Than Advance, Development Of The Skilled Workforce Essential For Economic Growth**

Many of the skills taught by for-profit institutions are vital to the growth of the American economy as well as to the people who want to participate more fully in it. By undermining the programs of those institutions, the Gainful Employment Rule is likely to have two harmful effects on our nation's economy. First,

---

<sup>14</sup> *See also* Christopher Avery & Sarah Turner, *Student Loans: Do College Students Borrow Too Much—Or Not Enough?*, 26 J. Econ. Persp. 165, 170 (2012).

individuals who might otherwise learn the skills necessary to provide the goods and services that American customers need might not be ready to provide them, leaving consumers underserved. Second, and relatedly, the mismatch between labor supply and employer demand may slow growth of the economy. As Cheryl A. Oldham, the Chamber's Vice President of Education Policy, recently explained,

At a time when there are 4 million open jobs across the country, partially due to a workforce that lacks the skills needed by employers, we need to be expanding options and access to higher education for students, not limiting them. Employers all across this country need the assurance that America's education system is preparing students for the 21st century economy. Not just traditional students, but *all* of those who attend institutions of higher education with the desire for a better life for themselves and their families.<sup>15</sup>

The World Economic Forum and the Boston Consulting Group estimate that by the end of this decade there could be a shortage of 20 million workers able to fill U.S. jobs.<sup>16</sup> For-profit schools have been the most nimble at assessing where these needs are and developing programs to fill them. For-profit institutions have the most direct relationships with businesses, and are often the first to answer the needs of employers when they require training to improve their current workforce

---

<sup>15</sup> Cheryl A. Oldham, U.S. Chamber of Commerce, *What is the Gainful Employment Rule Really About?* (Mar. 10, 2014), <https://www.uschamber.com/blog/what-gainful-employment-rule-really-about> (emphasis in original).

<sup>16</sup> See Eric Krell, *The Global Talent Mismatch*, HR Magazine (June 1, 2011), <http://www.shrm.org/publications/hrmagazine/editorialcontent/2011/0611/pages/0611Krell.aspx>.

and to obtain new employees with appropriate skills.<sup>17</sup> For example, for-profit colleges predominate in the health care industry, awarding over 82% of medical assistant certificates, about 77% of dental assistant certificates, and over 73% of pharmacy technician certificates. CRA Report at 85-86. Other areas in which large growth is expected and for which the for-profit higher education industry produces at least a third of the workers are heating, air conditioning, and refrigeration; drafters; veterinary technologists; auto technicians; security and fire alarm system installers; and computer network support specialists. *Id.* at 86. The ability of for-profit colleges and universities to train workers in the skills needed by growing sectors of the economy is critical to maintaining America's economic strength.

Under the Gainful Employment Rule, however, these are the types of programs likely to fail under the Department's new metrics. According to data collected and analyzed by the Department, the programs most likely to fail or fall within the "zone" include medical/clinical assistant associates' and certificate programs, computer systems networking and telecommunications associates' programs, general business associates' programs, graphical design bachelor's programs, and electrical technician associates' programs. *See* 79 Fed. Reg. at

---

<sup>17</sup> *See* Cheryl A. Oldham, U.S. Chamber of Commerce, *Gainful Employment Rule Strips Students of Opportunity* (Apr. 29, 2014), <https://www.uschamber.com/blog/gainful-employment-rule-strips-students-opportunity>.

65,069 (Table 2.28: Most Frequent Types of Zone or Failing Programs in the 2012 GE Informational D/E Rates Sample (by Enrollment Count)).

Graduates from “traditional” universities alone cannot meet employer demand for an educated workforce, particularly in those fields that have been traditionally served by proprietary institutions. These institutions, which provide expanded higher education opportunities to mostly non-traditional students, offer the very programs that prepare people for jobs and thus build a skilled workforce. By discouraging these programs, the Gainful Employment Rule will widen the gap between available, high-skilled jobs and qualified workers. The result will be diminished employment and productivity, and ultimately slower economic growth. In a highly competitive global economy, American employers—and ultimately workers—may miss out on economic opportunities that instead flow to foreign countries.

### **CONCLUSION**

For the foregoing reasons, as well as those stated in APSCU’s Brief, the Court should reverse the district court’s judgment and should remand the case with instructions to vacate the Gainful Employment Rule.

Date: October 6, 2015

Respectfully submitted,

KATE COMERFORD TODD  
STEVEN P. LEHOTSKY  
U.S. CHAMBER LITIGATION CENTER, INC.  
1615 H Street, NW  
Washington, DC 20062  
(202) 463-3187

/s/ Jonathan G. Cedarbaum  
JONATHAN G. CEDARBAUM  
*Counsel of Record*  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 663-6000

BRADLEY M. BAGLIEN  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
60 State Street  
Boston, MA 02109  
(617) 526-6000

*Counsel for the Chamber of Commerce of the United States of America*

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 4,469 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Jonathan G. Cedarbaum  
JONATHAN G. CEDARBAUM

October 6, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of October, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Jonathan G. Cedarbaum  
JONATHAN G. CEDARBAUM