U.S. CHAMBER
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Mr. Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave SW
Room 6W232B
Washington, DC 20202

Re: 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 (Docket ID: ED-2015-OPE-0103)

Dear Mr. Gaina:

This letter is submitted on behalf of the U.S. Chamber Institute for Legal Reform ("ILR"). ILR is an affiliate of the U.S. Chamber of Commerce and is dedicated to making our nation's overall civil legal system simpler, faster, and fairer for all participants. The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region.

ILR appreciates the opportunity to comment on the proposed rule on student loans released by the Department of Education and published in the *Federal Register* on June 16, 2016 (the "Proposed Rule").[1] Among other things, the Proposed Rule would impose significant restrictions on the use of arbitration agreements by educational institutions that participate in federal student loan programs. Most notably, it would

[1] 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, 81 Fed. Reg. 39,330 (June 16, 2016).

prohibit schools and students from entering into predispute agreements to arbitrate claims on an individual basis, by barring class-action waivers with respect to so-called "borrower defense-type claims" (*i.e.*, claims for acts or omissions by schools that could give rise to borrower defenses under federal regulations) and prohibiting "mandatory pre-dispute arbitration agreements."[2] The Proposed Rule would also require schools to promise not to enforce any arbitration agreements now in effect.[3]

We strongly urge the Department not to adopt regulations restricting arbitration—both as a matter of policy and also because the Department has no legal authority to regulate the use of arbitration agreements.

First, the proposed regulation of arbitration agreements is bad policy. For many individuals injured by wrongful conduct, arbitration is an easier and less costly means of seeking redress than the complex and slow-moving court system, where obtaining relief is far more expensive and takes considerably longer. Arbitration also lowers the costs of resolving disputes, which creates savings that can be passed on to consumers and, in this context, students. But these benefits can be realized only when parties are free to enter into arbitration agreements *before* disputes arise; despite arbitration's overall systemic benefits, parties almost never agree to arbitration in a particular case *after* a dispute has arisen. The Department should not eliminate the ability of educational institutions and their students to adopt this valuable form of dispute resolution.

Second, any regulation limiting arbitration agreements would be invalid, because the Department lacks the authority to override the federal statute—the Federal Arbitration Act ("FAA")—that protects the enforceability of arbitration agreements in the absence of an express indication of congressional intent to displace the FAA. Congress has not authorized the Department to supersede the FAA.

I. The Department Should Not Restrict Arbitration, Which Benefits Injured Persons By Providing A Fair Means Of Vindicating Rights That They Cannot Practically Litigate In Court.

Prohibiting the use of arbitration agreements by educational institutions would harm students at those institutions—the very people whom the Department seeks to

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2 *Id.* at 39,380.

3 *Id.*

protect. Arbitration enables individuals victimized by wrongdoing (including students at schools of higher learning) to obtain redress in a wide variety of situations for which litigation in court is impractical. Arbitration is quicker and less costly, and it is at least as likely to result in positive outcomes for claimants. Indeed, as discussed more fully below, the empirical evidence demonstrates that individuals in arbitration fare *at least as well as – if not better than* – they would have in court.

Arbitration thus provides the very significant benefit of a fair means of adjudicating claims that realistically could never be resolved in the absence of arbitration. Prohibiting pre-dispute arbitration agreements between educational institutions and students would mean, as a practical matter, that schools and students would be unable to use arbitration to settle disputes, thereby harming all of the parties involved.

A. The judicial system is not a realistic or efficient means of obtaining redress for many individuals victimized by wrongdoing.

For many individual disputes, litigation in court is simply impractical. Judicial procedures are procedurally complex, which means that non-lawyers must have legal representation to have any hope of successfully navigating the system. But many plaintiffs' claims are too small to justify paying a lawyer to handle the matter and, in any event, most people do not have the resources to do so. Studies indicate that a claim must exceed $60,000, and perhaps exceed $200,000, in order to attract a contingent-fee lawyer.[4]

Thus, as Supreme Court Justice Stephen Breyer has recognized, without arbitration, "the typical [plaintiff] who has only a small damages claim" would be left "without any remedy but a court remedy, *the costs and delays of which could eat up the value of an eventual small recovery*."[5]

Even when a claim is large enough to make it feasible to bring a lawsuit, the complexity of the court system makes litigation time-consuming and costly, which reduces any recovery that the plaintiff may eventually obtain. State and federal courts

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[4] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003). In some markets, this threshold may be as high as $200,000. Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force 10 (Nov. 23, 2011), http://www.mnbar.org/sections/outstate-practice/11-23-11%20Civil%20Justice%20Reform.pdf.

[5] *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (emphasis added).

are also badly overburdened due to high caseloads and budget cuts, and that means lengthy delays before cases can be heard.

Indeed, forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association's "Task Force on the Preservation of the Justice System," which was co-chaired by David Boies and Theodore B. Olson—and the crisis in court funding has continued.[6] The effects of these funding cuts on state court administration have been devastating: in New York City, budget cuts have led to "severe reduction in evening hours in Small Claims Court . . . mak[ing] the Small Claims Court basically unavailable to claimants who cannot take time off during the day to appear." In certain boroughs, "it may now take up to several years to get a judgment."[7] And in California, a "10 percent across-the-board cut in court services in 2012" was followed the next year by another round of cuts. In total, "79 courtrooms [have been] shuttered."[8]

Although the vast majority of civil claims are filed in state courts,[9] the federal courts also have extraordinarily high caseloads, especially at the trial-court level, where the backlogs are particularly severe because speedy-trial requirements dictate that criminal cases take precedence.[10] The number of civil cases pending in federal courts

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[6] Am. Bar. Ass'n, *The Growing Crisis of Underfunding State Courts*, Mar. 16, 2011; *see also* G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 786, 787 (2011-2012).

[7] N.Y. Cnty. Lawyers' Assoc., Task Force on Judicial Budget Cuts, *Courts in Crisis* 7, Jan. 3, 2014, http://www.nycla.org/siteFiles/Publications/Publications1666_0.pdf.

[8] Marisa Lagos, KQED, *Cutbacks Still Felt Deeply In California's Civil Courts*, Mar. 11, 2015, http://ww2.kqed.org/news/2015/03/12/court-budget-cuts-delay-justice.

[9] State courts reported around 17 million new civil cases filed in 2013, while federal courts reported over 284,000 new civil cases filed that same year. *Compare* Nat'l Ctr. for State Courts, Court Statistics Project, *Examining the Work of State Courts: An Overview of 2013 State Court Caseloads* 7 (2015), http://courtstatistics.org/~/media/Microsites/Files/CSP/EWSC_CSP_2015.ashx (state courts in 2013), *with* Administrative Office of the U.S. Courts, *Judicial Business of the U.S. Courts 2013*, http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2013 (federal courts in 2013).

[10] Ruben Castillo, the Chief Judge of the Northern District of Illinois, said that budget constraints have created "a crisis" for U.S. district courts, and that he is essentially being asked: "Which limb do you want amputated?" Michael Tarm, *New Hispanic Chief Judge: Need More Jury Diversity*, Associated Press, July 2, 2013; *see also* Michelle R. Smith & Jesse J. Holland, *Budget cuts cause delays, concern in federal court*, Associated Press, April 25, 2013, http://bigstory.ap.org/article/budget-cuts-cause-delays-concern-federal-court ("Federal budget cuts have caused delays in at least one

as of March 2015—some 340,000[11]—was up more than 20% from 2004, and as of late 2014 "[t]he number of cases awaiting resolution for *three years or more* exceeded 30,000 for the fifth time in the past decade."[12] One federal judge comments, "'Over the years I've received several letters from people indicating, "Even if I win this case now, my business has failed because of the delay. How is this justice?"'[13]

Simply put, it has become increasingly difficult in recent years for individual litigants to navigate the court system and to endure the high costs and lengthy delays that a lawsuit frequently entails.

B. Arbitration provides a fair and effective remedy for the many injured persons for whom the judicial system is not a realistic option.

1. *It is far easier for most plaintiffs to pursue their claims in arbitration.*

In comparison to litigation in the court system, arbitration is faster, simpler, more flexible, and less costly. As the Supreme Court has observed, arbitration is "'usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices."'[14]

Studies have long found, for example, that in practice, a large percentage of individuals who bring claims in arbitration pay exactly *nothing* in fees to pursue their

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terror-related court case in New York and prompted a federal judge in Nebraska to say he is 'seriously contemplating' dismissing some criminal cases.").

[11] Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2015*, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015.

[12] Joe Palazzolo, *In Federal Courts, The Civil Cases Pile Up*, Wall St. J., Apr. 6, 2015, http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746.

[13] *Id.*

[14] *Allied-Bruce Terminix*, 513 U.S. at 280 (quoting H.R. Rep. No.97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777); *see also*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

claim—no filing fees and no attorneys' fees.[15] The practical costs of presenting a claim in arbitration, moreover, are typically far lower than litigating in court. Arbitration does not require a personal appearance to secure a judgment; claims can be adjudicated based solely on written submissions or on the basis of a telephone conference.[16] There is no need for a claimant to go to court, only to be forced to return another day if the court is unable to get through its docket. Arbitration plaintiffs, moreover, need only submit the relevant documents and a common-sense statement of why they are entitled to relief, which they can often do without a lawyer. Indeed, as two prominent law professors noted in a recent study, in arbitration, "hiring an attorney offers little value to a [plaintiff] and is often unnecessary."[17]

Meanwhile, in contrast to the extreme delays that are typical of our overburdened state and federal courts, arbitrations can be resolved quickly, providing plaintiffs relief sooner. For example, consumer arbitrations administered by the American Arbitration Association are typically resolved in four to six months—a huge improvement over the *26.7 months* that pass before the average civil lawsuit in federal court first reaches trial (in those rare cases that make it to trial).[18] The long delays that

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[15] Elizabeth Hill, *supra* note 4, at 802 (lower-income employees "paid no forum fees" in 61% of the cases studied; employees also paid no attorneys' fees in 32% of the cases).

[16] See, for example, AAA, *Consumer Arbitration Rules* 22, Sept. 1, 2014, https://www.adr.org/aaa/-ShowProperty?nodeId=/UCM/ADRSTAGE2021425&.

[17] Jason Scott Johnson & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique* 25-26 (Mercatus Ctr., George Mason Univ., Working Paper, Aug. 2015) (observing that "self-represented plaintiffs were seven times *more* likely than represented plaintiffs to get an AAA arbitrator's decision in their favor" (emphasis added)).

[18] AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, 2007, at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 ("AAA Caseload Analysis"); *see also* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572-73 (2005) ("few dispute the assertion that arbitration is faster than litigation"); *U.S. District Courts—National Judicial Caseload Profile* (2016), http://www.uscourts.gov/file/19995/download. *See also*, *e.g.*, Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003 - Jan. 2004); reporting findings that arbitration was 33% faster than analogous litigation); *see also* 23-9 Insurance Times, Apr. 29, 2003, http://www.insurancejournal.com/pdf/InsuranceTimes_20030429_39125.pdf; GAO Report to Congressional Requesters, *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards* 32 (June 2000), http://www.gao.gov/archive/2000/gg00115.pdf (reporting that the few securities claims to reach a judgment in court took 1,151 days—or over 3 years—on average); FINRA, *Dispute Resolution Statistics*, *Summary Arbitration Statistics October 2013*, http://www.finra.org/arbitrationandmediation/

are typical of the court system considerably increase the costs of dispute resolution for plaintiffs.

2. *Plaintiffs prevail in arbitration at least as frequently as—and often more frequently than—they do in court.*

Arbitration is at least as likely, and often more likely, than litigation in court to result in positive outcomes for plaintiffs, as empirical studies repeatedly have shown. Data on win rates reveal that plaintiffs obtain relief to their satisfaction in a significant proportion of arbitrations.

A 2010 study by scholars Christopher Drahozal and Samantha Zyontz of claims filed with the American Arbitration Association found that consumers win relief 53.3% of the time.[19] This success rate compares favorably with the success rate of plaintiffs in state and federal court, who studies have shown prevail roughly 50% of the time.[20] And just as in court, plaintiffs who win in arbitration are able to recover not only compensatory damages but also "other types of damages, including attorneys' fees, punitive damages, and interest."[21] In particular, Drahozal and Zyontz found that 63.1% of prevailing claimants who sought attorneys' fees were awarded them.

3. *"Post-dispute" arbitration is not a feasible alternative to pre-dispute binding arbitration agreements.*

Some critics of arbitration concede the benefits of arbitration but maintain that parties would be better served if they were precluded from committing to arbitration until *after* a dispute arises.[22] The Department may have had this critique in mind when

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finradisputeresolution/additionalresources/statistics (arbitration claims closed in 2013 through October were pending only 14.2 months on average).

[19] Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010).

[20] *See, e.g.,* Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

[21] Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 902.

[22] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 567 (2001) (describing detractors' position with respect to employment arbitration).

it drafted the Proposed Rule to address only "mandatory pre-dispute arbitration agreements."[23]

But permitting only *post*-dispute arbitration agreements is an illusory option that would have the real-world effect of eliminating arbitration. As scholars have recognized, without arbitration agreements that commit both sides to a potential dispute to arbitrate *before the dispute arises*, arbitration in fact will be rare indeed—and the result will be that plaintiffs are relegated to the judicial system in precisely those cases where burdensome court procedures and overcrowded courts are likely to stymie their claims.[24]

Empirical evidence has shown, and the consensus among academics confirms, that *once a particular dispute arises, the opposing parties will rarely if ever agree to arbitration.* This unwillingness has nothing whatsoever to do with the relative benefits or burdens of arbitration or litigation in court, and instead has everything to do with the practical burdens of administering dual systems and the tactical choices of lawyers in the context of particular cases.[25]

An entity, such as an educational institution, that sets up an arbitration program incurs significant administrative costs in connection with carrying out arbitrations—costs that it does not incur in connection with judicial litigation. For that reason, institutions will likely be unwilling to expend the effort and resources involved in setting up an effective, plaintiff-friendly arbitration system unless they know it will save them the cost of litigating in court. If an institution is faced with the prospect of running an arbitration system and simultaneously having to deal with judicial litigation, the rational response is for it to reduce transaction costs by not having an arbitration system at all.

Less rational factors also contribute to the unwillingness of parties to enter into even mutually beneficial post-dispute agreements to arbitrate. Once a dispute has arisen, the parties "often have an emotional investment in their respective positions"

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[23] 81 Fed. Reg. at 39,380.

[24] Estreicher, *supra* note 22, at 567 ("[P]ostdispute arbitration agreements are almost never negotiated. It is a chimerical alternative to predispute arbitration agreements.").

[25] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 U. Mich. J.L. Reform 783, 790 (2008) (noting that "employees will not be able to pursue [small claims] in court" and that they "and their lawyers are unlikely to agree to arbitrate a big case at the expense of forgoing a judge and jury").

that skews their preference in favor of vindication in court.[26] The lawyers for one or both sides may also be enticed by the fee-generating possibilities of prolonged in-court litigation and may therefore advise clients to choose a forum that is really in the lawyers' own best interest rather than in that of their clients.

All relevant facts, therefore, point to only one conclusion: post-dispute arbitration agreements "amount to nothing more than a beguiling mirage."[27] *They simply do not—and would not—happen.* "[P]re-dispute agreements to arbitrate," which preserve a plaintiff's right to an affordable forum, accordingly represent the only real-world option for addressing the very significant gap in access to justice under the court system.[28]

C. Class actions provide virtually no benefit to the vast majority of individuals.

One of the Department's principal concerns about individual arbitration appears to be that agreements to arbitrate on an individual basis preclude students from bringing class action lawsuits. The Proposed Rule relies heavily on a recent study of arbitration by the Consumer Financial Protection Bureau (CFPB), which argued that class actions are beneficial because they (1) allow for the vindication of small claims that (according to the CFPB) would be too expensive for plaintiffs to arbitrate individually and (2) encourage companies to obey the law.[29] The Proposed Rule here similarly contends that "class action lawsuits not only provide a vehicle for addressing a multitude of relatively small claims that would otherwise not be raised . . . but create a strong financial incentive for both a defendant school and other similarly situated schools to comply with the law in their business operations."[30]

But the evidence does not support this idealized view of the class action system. On the contrary, class actions are, on the whole, not effective for the kinds of

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[26] Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol J. 32, 37 (2012).

[27] St. Antoine, *supra* note 25, at 790.

[28] Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping it Lawful*, 60 Case W. Res. L. Rev. 629, 636 (2010).

[29] 81 Fed. Reg. at 39,382.

[30] *Id.* at 39,383.

claims that most individuals are likely to have, and they do little or nothing to encourage compliance with the law. That is so for numerous reasons:

First, most cases filed as purported class actions are not resolved in a manner that provides any benefit to absent class members. According to the CFPB study, 87% of resolved class actions (excluding claims affected by arbitration agreements) resulted in no benefit to absent class members. Instead, most were dismissed by or settled with the named plaintiff only. The CFPB found that only 13% of putative class actions were finally approved for classwide settlement during the study period.[31]

That is an even smaller amount than the proportion observed in another study conducted in 2013 on behalf of ILR and the U.S. Chamber.[32] That study found that ***the overwhelming majority of class actions studied (66%) resulted in no recovery at all*** for members of the putative class. That is because those cases were either dismissed on the merits by the court, or dismissed voluntarily by the plaintiff.

In short, absent class members generally receive nothing in class actions unless the action is settled on a class-wide basis, or there is a class-wide judgment for plaintiffs (something that almost never happens).

Second, even in those cases that do result in class settlements, most class members still receive nothing. The CFPB's study touted the purportedly large number of class members "eligible for relief" in the class actions it examined, but the only relevant metric is the rate at which "eligible" class members actually received relief, typically after submitting claims. Where statistics were available, the CFPB study reported a "weighted average claims rate" of just 4%.[33] That comports with the Chamber Study, which found that (in the handful of cases where statistics were available, and excluding one outlier case involving individual claims worth, on average, over $2.5 million) the claims rates were miniscule: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.[34]

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[31] Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* at section 6, page 37 (Mar. 1, 2015) ("*CFPB Study*").

[32] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013) ("*Chamber Study*"), http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

[33] *CFPB Study* at section 8, page 30.

[34] *Chamber Study* at 7 & n.20.

The CFPB's study thus shows that even in the 13% of class actions that did settle on a classwide basis, approximately 96% of class members received no benefit. A simple back-of-the-envelope estimate suggests that claims-made settlements provide very little to the broader set of individuals on whose behalf plaintiffs seek to bring class actions. If an average of just 4 percent of class members (weighted by size of the class) make claims in settlements and only 13 percent of class actions result in settlements to begin with, then only a very, very tiny percentage of the members of potential classes ever receive any recovery.

The CFPB's study also revealed that the average payment to class members in class action settlements is quite small. The class actions examined in the study involved "a total of $1.1 billion in 251 settlements." And the study elsewhere says that 236 settlements involved 34 million class members "who received, or will receive, a cash payment." Thus, even assuming that the extra 15 cases included in the first total and not in the second had *no* class members, the average settlement payment in these 251 settlements was just $32.35.[35]

And in many class actions, class members receive far less. Indeed, some class actions result in settlements where class members receive only small coupons; in these coupon cases, as one commentator puts it, "[t]he lawyers ha[ve] a nice payday and most of the class members pitch[] the coupons into the trash."[36] Professor Martin Redish has decried this phenomenon of "faux class actions," in which "as a practical matter [class members] will receive no damages" and "[t]he real parties in interest" are "the plaintiffs' lawyers, who are the ones primarily responsible for bringing th[e] proceeding."[37]

In some class actions, moreover, plaintiffs receive ***literally nothing at all***, because the only relief awarded in the settlement is injunctive relief or *cy pres* relief, which requires the defendant to pay money to a charitable organization. Chief Justice

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[35] *CFPB Study* at section 8, pages 27-28.

[36] Rob Berger, *The CFPB Declares War on Arbitration*, Forbes, Oct. 18, 2015, http://www.forbes.com/sites/robertberger/2015/10/18/the-cfpb-declares-war-on-arbitration.

[37] Testimony of Martin H. Redish at 7, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, *Hearing: Class Actions Seven Years After the Class Action Fairness Act* (June 1, 2012), http://judiciary.house.gov/_files/hearings/Hearings%202012/Redish%2006012012.pdf.

John Roberts has raised concerns about the "fairness" of *cy pres* settlements,[38] and scholars have suggested that they violate absent class members' due process rights.[39] But despite the fact that injunctive and *cy pres* relief do almost nothing to benefit class members, plaintiffs' attorneys eagerly pursue both, because "class counsel's interest in maximizing its fees is satisfied regardless of whether the settlement funds are paid to class members or distributed *cy pres*."[40]

What is more, claimants have to wait significantly longer in class actions than in arbitration to obtain relief. According to the CFPB's study, class actions that settled on a classwide basis—and for which it was thus even *possible* that a class action could provide benefits to absent class members—took an average of two years to resolve. (The Chamber Study found that some class actions take even longer; 14% of the class actions that the Chamber Study examined were still pending *four years* after they were filed, with no end in sight).[41] The two-year average duration calculated by the CFPB, moreover, may not even have included the time needed for consumers to submit claims and receive payment *after* a settlement is reached. In contrast to the interminable length of most class actions, meanwhile, arbitrations resolved by an arbitrator took between four and eight months to resolve, and those arbitrations that were settled took a mere two to five months.[42]

In sum, the CFPB's data reveal that class members in the vast majority of class actions receive no more than a pittance—and then only after a long wait while the lawsuit drags on.

Third, while class members receive little from most class actions, ***the lawyers who bring class actions do very well for themselves***. Based on the CFPB's report, the average fee paid to plaintiffs' lawyers—as a percentage of the announced settlement (not the smaller amount actually distributed to class members)—was 41%, with a median of 46%. The total attorneys' fees in the cases studied by the CFPB added up to $424 million for 419 cases, which works out to an average of ***more than***

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[38] *See Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari) (noting the many "fundamental concerns surrounding the use of [*cy pres*] remedies in class action litigation").

[39] Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action*, 62 Fla. L. Rev. 617, 650 (2010).

[40] Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 123 (2014).

[41] *Chamber Study* at 1.

[42] *CFPB Study* at section 5, page 72; *id.* at section 8, page 37.

$1 million per case.[43] Moreover, these massive attorneys' fees are but one part of the equation: They do not include the other very large transaction costs associated with litigating class actions—the defense costs that companies must pay, and the cost to the courts of handling these cases.

Fourth, this abusive and wasteful class action system is not necessary to allow individuals with small claims to vindicate their rights effectively. Indeed, in the Supreme Court's 2013 decision in *American Express Co. v. Italian Colors Restaurant*, both the majority *and* the dissent rejected that notion. The dissent, written by Justice Kagan and joined by Justices Ginsburg and Breyer, identified several different ways in which individuals could effectively vindicate even small claims in arbitration without the use of class action procedures:

> In this case, . . . the [arbitration] agreement could have prohibited class arbitration without offending the effective vindication rule *if* it had provided an alternative mechanism to share, shift or reduce the necessary costs. The agreement's problem is that it bars not just class actions, but also all mechanisms . . . for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses.[44]

Individuals increasingly have access to arbitration systems that provide all of the features that the *Italian Colors* dissent identified as facilitating the effective vindication of small claims. For example, many businesses and other entities now have arbitration agreements that "shift" the "costs" of arbitration to the company and provide bonus and incentive payments to consumers who prevail. It is also easier than ever before for individual claimants to coordinate their claims by sharing the same lawyer, expert, and other elements required to prove a claim. For example, an entrepreneurial plaintiffs' lawyer can recruit large numbers of clients (via the Internet, social media, or other similar means), file thousands of individual arbitration demands on behalf of those clients, and distribute common costs over all those claimants, making the costs for expert witnesses and fact development negligible on a per-claimant basis.

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[43] *Id.* at section 8, page 33.

[44] *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2318 (2013) (Kagan, J., dissenting).

There are thus multiple alternatives to private class action lawsuits in court brought by plaintiffs' attorneys; these alternatives afford individual consumers, employees, or students actual opportunities to pursue their disputes or otherwise vindicate their rights—***in sharp contrast to the false promise of private class actions.***

Fifth, the deterrence argument advanced by the CFPB and by the Department in the Proposed Rule here simply does not make sense. In order for class actions to deter wrongdoing, parties must anticipate that they will be subject to class action liability only if they act wrongfully. But plaintiffs' lawyers do not choose which class actions to bring based on the merits of the underlying claims; rather, they simply look for *any* claims that can withstand a motion to dismiss and satisfy the standards for class certification. These lawyers know that, as Justice Ginsburg has observed, once a class is certified, the "potentially ruinous liability" facing a defendant "places pressure on the defendant to settle even unmeritorious claims."[45] And in any case where class certification is granted, the rational thing for a defendant to do is settle rather than risk going to trial, even if it has done nothing wrong; as one appellate judge has put it, class certification "is, in effect, the whole case."[46] The CFPB study's findings back up this analysis: the Bureau found that classwide judgments for plaintiffs on the merits after a trial are virtually unheard of, occurring in "less than 1% of cases."[47]

In short, therefore, the threat of class action liability is a function of who plaintiffs' lawyers sue (which, in turn, depends on how lucrative the potential claim is for the lawyers) and whether they are able to write a complaint that survives a motion to dismiss, rather than of whether the defendant has engaged in actual wrongdoing. As a result, class actions cannot—and do not—generally deter wrongful conduct. On the contrary, even law-abiding entities must treat class actions as an inevitable cost of doing business.

Educational institutions are far more likely to be deterred from wrongdoing by the threat of an enforcement action by the federal government or state governments. For example, as the Proposed Rule acknowledges, Corinthian Colleges, a for-profit

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[45] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (internal quotation marks omitted).

[46] Hon. Diane Wood, Circuit Judge, Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions (Sept. 13–14, 2004), in *Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate,"* 18 Geo. J. Legal Ethics 1197, 1213 (2005).

[47] *CFPB Study* at section 6, page 37.

entity alleged to have engaged in pervasive misconduct, was subjected to a $30 million fine by the Department, a $531 million judgment in an enforcement lawsuit by the CFPB, *and* a $1.1 billion judgment in an enforcement action by the state of California.[48] These massive penalties are surely more than sufficient to deter other educational institutions from engaging in similar wrongdoing.[49]

Institutions will also be deterred by the reputational consequences of engaging in improper behavior, because reputational harm is often directly correlated to an educational institution's success or failure. Malfeasance by a school could cause it to lose its accreditation. And in the age of social media, student complaints can quickly go viral on Facebook, Twitter, and Change.org (to name a few examples). Damage to reputation impacts educational institutions immediately and directly leads to changes in practices. Class actions, by contrast, rarely, if ever, have that effect.

D. The Proposed Rule would raise costs for educational institutions and therefore raise the tuition paid by students.

The requirements in the Proposed Rule would make it more difficult for educational institutions to rely on arbitration as a means of resolving disputes with students efficiently and in an accessible way. Thus, they would raise the costs of education at those institutions—costs that ultimately would be borne by the students the Department seeks to protect.

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[48] 81 Fed. Reg. at 39,382.

[49] The Proposed Rule argues that class actions brought against Corinthian would have been more effective at deterring wrongdoing than these government enforcement suits because the class actions were brought earlier and thus might have reached judgment before Corinthian filed for bankruptcy. *Id.* But the anecdotal example of one institution—Corinthian—hardly suffices to show that class actions in general are superior to government enforcement actions. And in any event, the argument that class actions would have been a more effective way to address the alleged wrongdoing in the Corinthian case is pure speculation, for four reasons: First, if Corinthian had not moved to compel arbitration, the class actions might have been dismissed or settled with the named plaintiffs—like the vast majority of class actions—and thus yielded no benefit to class members at all. Second, even if the class actions had proceeded, there is no reason to think that they would have settled or reached judgment any sooner than the government enforcement actions, given how long class actions generally take to resolve. Third, a class action settlement would almost certainly have provided less relief to class members—based on the paltry recoveries documented in both the CFPB study and the Chamber Study of class actions. And fourth, even if the class actions had reached a classwide settlement or judgment sooner than the government actions, there is no reason to think Corinthian would have been any more able to pay the judgment at that time.

Arbitration provides a mechanism for resolving disputes more cheaply and efficiently than in the court system. Businesses can, and do, pass the savings they achieve through the use of arbitration on to their customers and clients in the form of lower prices,[50] and educational institutions similarly pass on such savings to students through lower tuition. These savings can only be attained, however, when schools have the assurance that they will be able to resolve disputes through arbitration rather than through costly litigation.

The Department's proposal to prohibit agreements to arbitrate on an individual basis would deny educational institutions that assurance. This lack of predictability, in turn, would increase legal costs and liability insurance premiums for educational institutions, inevitably leading to a rise in tuition paid by students.

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In short, arbitration provides students who could not obtain effectual relief in court with an affordable and accessible means of seeking redress. Any rational assessment of the benefits and costs of arbitration must conclude that a prohibition on the use of arbitration agreements by educational institutions would harm students much more than it would benefit them.

II. The Federal Arbitration Act Precludes the Department From Restricting The Use Of Arbitration Agreements.

"The Federal Arbitration Act reflects an 'emphatic federal policy in favor of arbitral dispute resolution.'"[51] Although arbitration agreements remain subject to generally applicable state contract law, the FAA affords contracting parties the freedom to "structure their arbitration agreements as they see fit," and to "specify by contract the rules under which . . . arbitration will be conducted."[52]

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[50] Amy J. Schmitz, *Building Bridges To Remedies For Consumers In International eCconflicts*, 34 U. Ark. Little Rock L. Rev. 779, 779–80 (2012); *accord, e.g.*, Steven C. Bennett, *supra* note 26, at 38 n.55; Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–55 (2006).

[51] *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 631 (1985)).

[52] *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

That well-settled legal principle precludes the Department from regulating or otherwise restricting the use of arbitration agreements. The Supreme Court has held repeatedly that the rights protected by the FAA may be overridden only by a clear "congressional command,"[53] and there is no such congressional command authorizing the Department to override the FAA.

Federal law protects parties' freedom to determine which issues will be arbitrated and who will participate in each arbitration proceeding; to prescribe the procedural rules that will govern the arbitration; and to select the arbitrator who will resolve their disputes.[54] In short, the FAA "makes arbitration agreements 'valid, irrevocable, and enforceable' as written."[55]

The federal policy favoring arbitration is so strong that a clear congressional command is necessary to displace the FAA "even when the claims at issue are federal statutory claims."[56] When federal law is "silent" as to whether Congress intended to override the FAA for a particular type of claim, "the FAA requires the arbitration agreement to be enforced according to its terms," regardless of whether the source of the claim is federal or state law.[57]

Nothing in any federal statute supplies the necessary clear command authorizing the Department to regulate arbitration agreements made between educational institutions and students – indeed, nothing in any statute indicates any intent whatsoever to limit the availability of such arbitration. The FAA therefore applies with full force. Because "[i]t is a fundamental precept of administrative law that an agency action, rule, or regulation 'cannot overcome the plain text enacted by Congress,'"[58] the Department cannot, without express statutory authority,[59] prohibit what the FAA protects.

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53 *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *see also Italian Colors*, 133 S. Ct. at 2309; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 483 (1989); *Mitsubishi Motors*, 473 U.S. at 628.

54 *See, e.g.*, *Concepcion*, 563 U.S. at 344-45; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010).

55 *Concepcion*, 563 U.S. at 344 (quoting FAA, 9 U.S.C. § 2)

56 *CompuCredit*, 132 S. Ct. at 669.

57 *Id.* at 673.

58 *Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.*, 627 F.3d 134, 141 (5th Cir. 2010).

Certainly Congress knows how to grant the necessary authority when it wants to. In the Dodd-Frank Act, for example, Congress authorized the Securities and Exchange Commission to issue rules "prohibit[ing], or impos[ing] conditions or limitations on the use of" predispute arbitration agreements in agreements between certain broker-dealers and their clients, and between investment advisers and their clients.[60]

Congress used similar language in authorizing the Consumer Financial Protection Bureau to conduct a study and report to Congress regarding the use of arbitration agreements in consumer financial products and services, and to issue a rule prohibiting or effectively eliminating arbitration if it "finds that . . . [it] is in the public interest and for the protection of consumers."[61] (The Chamber believes that the CFPB, which is currently conducting a rulemaking pursuant to this provision, has not met its burden under the statute of showing that prohibiting arbitration agreements with class waivers is "in the public interest and for the protection of consumers. It cites this example only to show how Congress authorizes agencies to regulate arbitration when it wishes to do so.)

Congress enacted no similar language that would authorize the arbitration regulations in the Department's Proposed Rule. The Department therefore lacks the legal authority to regulate, or ban, arbitration agreements.

Finally, the Department cannot justify its arbitration regulation on the ground that it is "merely" a condition on educational institutions' federal grants. An agency cannot use grant conditions to impose regulations that Congress has prohibited it from imposing directly.[62]

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[59] Tellingly, the Department never identifies any statutory provision specifically giving it authority to regulate arbitration in this or any other context. The arbitration restrictions in the Proposed Rule are purportedly based solely on the Department's general authority under the Higher Education Act of 1965 to determine what provisions in participation agreements between the government and educational institutions are "needed to protect the interests of the United States and promote the purposes of the Direct Loan Program." *See* 81 Fed. Reg. at 39,380 (citing 20 U.S.C. § 1087d(a)(6)). This vague and general language is patently insufficient to override the FAA.

[60] 15 U.S.C. §§ 78o(o), 80b-5(f).

[61] 12 U.S.C. § 5518(b).

[62] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is unlawful "if the agency has relied on factors which Congress has not intended it to consider").

That is particularly true with respect to conditions prohibiting, or even regulating, arbitration, because the FAA's "design[] to promote arbitration"[63] includes protecting contracting parties' freedom to "structure their arbitration agreements as they see fit," and to "specify by contract the rules under which . . . arbitration will be conducted."[64] "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[65] By interfering with that discretion, the proposed rule would "interfere with fundamental attributes of arbitration" in violation of the FAA.[66]

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Thank you for your consideration of these comments. We would be happy to discuss these issues further with appropriate members of the Department's staff.

Sincerely,

Lisa A. Rickard
President
U.S. Chamber Institute for Legal Reform

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63 *Concepcion*, 563 U.S. at 345.

64 *Volt Info. Scis., Inc.*, 489 U.S. at 479.

65 *Concepcion*, 563 U.S. at 344.

66 *Id.*