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Via Overnight Delivery

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Acting Secretary of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, DC 20202

CITIZEN PETITION

The federal government spends more than \$128 billion annually on student aid distributed under Title IV of the Higher Education Act (HEA), 20 U.S.C. § 1070 *et seq.* This aid, which includes Stafford, PLUS, and Perkins loans, as well as Pell grants, is the largest stream of federal postsecondary education funding.

While profiting from U.S. taxpayers, some predatory schools—particularly in the for-profit education sector—target underserved populations of students, including people of color, low-income individuals, and veterans, with fraudulent recruitment practices. These schools provide students with an education far inferior to what has been promised. They offer low quality programs and faculty, provide few if any student-support services, and have abysmal graduation and job-placement rates. Many students drop out once they realize the extent of a school’s misrepresentations. Those who do not may find themselves with a worthless degree. In either case, the school’s wrongdoing leaves many students with a debt to the federal government that they cannot repay.

Unfortunately, the courthouse doors are closed to many of these students because they signed mandatory, pre-dispute arbitration agreements at the time of their enrollment. Under these agreements, students are required to use binding arbitration to resolve any dispute they may later have with the school; they are barred from the courts. As demonstrated in this petition, these arbitration clauses are detrimental to students, hamper efforts to uncover wrongdoing by institutions receiving Title IV assistance, and place the federal investment in Title IV programs at risk.

Public Citizen, Inc., a consumer organization with members and supporters nationwide, submits this citizen petition under 5 U.S.C. § 553(e) to request that the Department of Education issue a rule requiring institutions to agree, as a condition on receipt of Title IV assistance under the HEA, not to include pre-dispute arbitration clauses in enrollment or other agreements with

students.¹ This rule would be consistent with the Department's legal authority under the HEA and with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* It would also be in line with a call by members of Congress for the Department to condition Title IV funding on a school's commitment not to use forced arbitration clauses or other contractual barriers to court access in student enrollment agreements.²

I. STATEMENT OF INTEREST

Since its founding in 1973, Public Citizen has advocated on behalf of its members and supporters for public access to the civil justice system. As part of that work, it seeks to end the use of forced arbitration clauses in consumer contracts because these clauses are fundamentally unfair to consumers, encourage unlawful corporate behavior, and weaken the utility of enforcement efforts to protect the public. Public Citizen is engaged in efforts to encourage the Consumer Financial Protection Bureau (CFPB) and the Securities and Exchange Commission (SEC) to ban pre-dispute arbitration agreements in consumer and investor agreements. Public Citizen's counsel have represented parties in several major cases involving the scope of the FAA and the enforceability of pre-dispute arbitration agreements.³ Public Citizen also frequently appears as amicus in cases involving these issues.

In addition to its arbitration work, Public Citizen supports robust regulation of predatory educational institutions and student lending practices that leave students saddled with debt for overpriced educations. It participated in the Department's Gainful Employment rulemaking, and its attorneys represent twenty-eight organizations as amici in support of that rule in *Association of Private Sector Colleges and Universities v. King*, No. 15-5190 (D.C. Cir.). Counsel for Public Citizen have also represented parties and amici in numerous cases involving misconduct by for-profit educational institutions.⁴

¹ We anticipate that this petition will be of significant public interest, and we will encourage members of the public to submit comments in support of this petition. To ensure the completeness and public availability of the administrative record, we urge the Department to open expeditiously a docket for the petition on www.regulations.gov. See 21 C.F.R. § 10.30(b)(1), (d) (describing similar process used by the Food and Drug Administration for submission of petitions through [regulations.gov](http://www.regulations.gov) and the acceptance of public comments).

² See Letter from Sen. Durbin, *et al.*, to Department of Education Under Secretary Ted Mitchell, Feb. 11, 2016, available at <http://www.durbin.senate.gov/newsroom/press-releases/senators-call-on-department-of-education-to-deny-federal-funding-to-colleges-that-use-forced-arbitration-clauses>.

³ See, e.g., *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996).

⁴ See *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 168 F.3d 1362 (D.C. Cir. 1999), *amended on denial of reh'g*, 177 F.3d 1036 (D.C. Cir. 1999); *Jackson v. Culinary Sch. of Washington, Ltd.*, 59 F.3d 254 (D.C. Cir. 1995); *Morgan v. Markerdowne Corp.*, 976 F. Supp. 301 (D.N.J. 1997).

II. ACTIONS REQUESTED

Public Citizen asks that the Department take the action requested in two ways:

(1) The Department should add a new subsection (q) to 34 C.F.R. § 668.16, which sets forth standards for administrative capability that a school must meet to participate in Title IV programs. The section as revised would state in relevant part (proposed new text in italics):

To begin and to continue to participate in any Title IV, HEA program, an institution shall demonstrate to the Secretary that the institution is capable of adequately administering that program under each of the standards established in this section. The Secretary considers an institution to have that administrative capability if the institution—

...

(q) Does not, in advance of a dispute between the institution and a student, enter into any agreement with the student to arbitrate such a dispute, or an agreement to submit such a dispute to arbitration upon the election of either party.

An agreement permitting students to opt out of an agreement to arbitrate future disputes shall not satisfy the standard set forth in this subsection. This subsection does not address or affect an agreement to arbitrate an existing dispute entered into between an institution and a student after the dispute arises.

(2) The Department should amend 34 C.F.R. § 685.300(b) to require that an institution, as a condition on participation in the Direct Loan Program, agree in its Program Participation Agreement (a contract with the Department required by Title IV) not to use pre-dispute arbitration clauses in enrollment or other agreements with students. Specifically, § 685.300 would state (proposed new text in italics):

(b) Program participation agreement. In the program participation agreement, the school must promise to comply with the Act and applicable regulations and must agree to—

...

(12) Enter into no agreement that requires a student, in advance of a dispute between the school and student, to agree to arbitrate such a dispute, or to agree to submit such a dispute to arbitration upon the election of either party.

An agreement permitting students to opt out of an agreement to arbitrate future disputes shall not satisfy the condition set forth in this subsection. This subsection does not address or affect an agreement to arbitrate an existing dispute entered into between a school and a student after the dispute arises.

In addition, Public Citizen urges the Department, in the course of considering the requested action, to evaluate whether similar restrictions on Title IV funding should be imposed for other contractual barriers to justice that educational institutions may seek to impose on their students, such as waivers of the right to a jury trial or provisions that require mandatory mediation of all claims before students may bring claims in another forum.⁵

II. STATEMENT OF GROUNDS

A. Many Educational Institutions Alleged to Have Engaged in Wrongdoing Rely on Pre-Dispute Arbitration Agreements.

The extent to which institutions receiving Title IV funds rely on pre-dispute arbitration agreements is not fully known. There is no general requirement that institutions disclose such agreements to the public or to the Department. However, arbitration agreements are commonly used by higher education institutions alleged to have engaged in wrongdoing. In just the past few years, institutions have repeatedly relied on such clauses in court where students have accused the schools of violating the law, including through the commission of fraud and other misrepresentation.⁶

In addition, the Department has recognized the “accumulation of evidence” that for-profit institutions have misrepresented their outcomes to consumers,⁷ and the use of arbitration clauses in the for-profit education sector is widespread. A Senate committee investigating for-profit schools participating in Title IV programs found in 2012 that 21 of 27 enrollment agreements submitted to the committee by for-profit institutions contained clauses requiring students to

⁵ See, e.g., Tariq Habash, The Century Foundation, Four Ways That Schools Keep Fraud Hidden, Feb. 17, 2016, <http://www.tcf.org/work/education/detail/the-four-ways-colleges-keep-fraud-hidden>; David Halperin, *Misleading Assurance in the Corinthian-ECMC Deal*, Huffington Post, Feb. 13, 2015, http://www.huffingtonpost.com/davidhalperin/misleading-assurances-in_b_6680668.html.

⁶ See, e.g., *Ferguson v. Corinthian Coll., Inc.*, 733 F.3d 928 (9th Cir. 2013); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012), *abrogated in part by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009); *Grasty v. Colo. Tech. Univ.*, 599 F. App'x 596 (7th Cir. 2015); *Daniels v. Va. Coll. at Jackson*, 478 F. App'x 892 (5th Cir. 2012) (per curiam); *Miller v. Corinthian Coll., Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011); *Bernal v. Burnett*, 793 F. Supp. 2d 1280 (D. Colo. 2011); *Thornton v. Art Inst. of Charlotte*, No. 3:14-CV-00621, 2014 WL 6810407 (W.D.N.C. Dec. 3, 2014); *Perez v. Apollo Educ. Grp., Inc.*, No. 1:14-CV-00605, 2014 WL 5797148 (E.D. Cal. Nov. 6, 2014); *Cohen v. Career Educ. Corp.*, No. 13-CV-00125, 2013 WL 3287083 (M.D. Fla. June 28, 2013); *Asbell v. Educ. Affiliates, Inc.*, No. 3:12-CV-00579, 2013 WL 1775078 (M.D. Tenn. Apr. 25, 2013); *Marshall v. ITT Tech. Inst.*, No. 11-CV-552, 2012 WL 1565453 (E.D. Tenn. May 1, 2012); *Rosendahl v. Bridgepoint Educ., Inc.*, No. 11-CV-61, 2012 WL 667049 (S.D. Cal. Feb. 28, 2012); *Mitchell v. Career Educ. Corp.*, No. 11CV1581, 2011 WL 6009658 (E.D. Mo. Dec. 1, 2011); *Chisholm v. Career Educ. Corp.*, No. 11-CV-0994, 2011 WL 5524552 (E.D. Mo. Nov. 14, 2011); *Kimble v. Rhodes Coll., Inc.*, No. C-10-5786, 2011 WL 2175249 (N.D. Cal. June 2, 2011); *Montgomery v. Corinthian Coll., Inc.*, No. 11 C 365, 2011 WL 1118942 (N.D. Ill. Mar. 25, 2011); *Va. Coll., LLC v. Blackmon*, 109 So.3d 1050 (Miss. 2013); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770 (Ind. Ct. App. 2011); *Eakins v. Corinthian Coll., Inc.*, No. E058330, 2015 WL 758286 (Cal. Ct. App. Feb. 23, 2015).

⁷ Department of Education, Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,908 (Oct. 31, 2014) (final rule).

submit any future disputes to binding arbitration.⁸ These findings are consistent with other research demonstrating that arbitration clauses are common in consumer contracts with companies. For example, in a comprehensive study on arbitration clauses in consumer financial contracts, the CFPB recently found that “[t]ens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration,” and that “substantially all” private student loan contracts used by large companies included pre-dispute binding arbitration provisions.⁹

B. Although Pre-Dispute Arbitration Agreements Have a Dramatic Impact on Students’ Rights, Most Students Are Unlikely To Know They Are Subject To These Agreements, Understand What Arbitration Is, Or Have A Choice About Agreeing To Them.

1. Advocates of arbitration portray it as a cheaper, more streamlined substitute for court proceedings. Yet arbitration requires students to give up key constitutional and statutory rights available in court, forgo procedural mechanisms that affect substantive outcomes, and commit to resolving disputes through a process shrouded in secrecy.

First, in contrast to the rights of parties in court proceedings, parties in arbitration have no right to a jury; the arbitrator has sole authority to determine the outcome. Moreover, judicial review of an arbitrator’s decision has a much narrower scope than an appellate court’s review of a trial court’s decision. A court’s power to vacate, modify, or correct an arbitration award is limited to the grounds set forth in the FAA. Those grounds cover only the most “extreme arbitral conduct,”¹⁰ such as fraud, evident impartiality on the part of the arbitrator, or corruption.¹¹ Even clear legal and factual errors by arbitrators generally are not grounds for overruling the arbitrators’ decisions.¹²

Second, the secrecy of arbitration proceedings stands in stark contrast to the public’s right of access to court proceedings and, in practice, impairs the ability of one-time claimants to vindicate their rights. Arbitration proceedings—including hearings and awards—are presumptively private, and arbitrators are ethically bound not to publicly disclose information about the proceedings.¹³ Court filings and hearings, on the other hand, are presumptively open to

⁸ U.S. Senate Health, Education, Labor and Pensions Committee, For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success 175 (2012) (hereinafter, HELP Report), available at <http://1.usa.gov/1e1MM0U>.

⁹ CFPB, Arbitration Study: Report to Congress § 1.4.1 at 9-10 (2015) (hereinafter, CFPB Study), available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

¹⁰ *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

¹¹ *See* 9 U.S.C. §§ 10, 11.

¹² *See, e.g., Oxford Health Plans*, 133 S. Ct. at 2068.

¹³ CFPB Study § 2.5.8 at 51-52 (citing American Bar Association & American Arbitration Association, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (Mar. 1, 2004)); *see also, e.g.,* American Arbitration Association Consumer Rule 30 (stating that arbitration proceedings are private), <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased>; *see*

the public under the common law and the First Amendment.¹⁴ Accordingly, the extent to which regulators and members of the public who have been wronged may obtain information about a school's misconduct depends heavily on whether the misconduct is challenged in arbitration or in court. The school, on the other hand, has access to all such information. This informational asymmetry favors repeat players in arbitration, who in this context are the educational institutions alleged to have engaged in unlawful conduct.

Third, arbitration and court proceedings differ in key procedural respects that affect substantive outcomes. Those differences give a leg up to well-funded, repeat players in arbitration. Discovery of evidence in the hands of the defendant may be extremely limited, and the processes for selecting arbitrators often lead to designation of decisionmakers predisposed to be skeptical of a plaintiff's claims. Most importantly, while parties who have been harmed in similar ways can seek justice as a class or through consolidated proceedings in court, most consumer arbitration agreements preclude class and consolidated actions. Although most courts refused to enforce class-action bans before 2011, finding the provisions unconscionable under state law, the Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the FAA prohibits states from conditioning the enforcement of an arbitration agreement on the availability of the class mechanism.¹⁵ As Public Citizen found in a recent report, many cases that could have gone forward as class actions before *Concepcion* are no longer viable where a consumer is subject to an arbitration clause, a shift upon which numerous courts have also remarked.¹⁶

2. Strong evidence suggests that students generally do not know whether the take-it-or-leave-it contracts they enter into with their schools include arbitration clauses. To the extent they do know, many likely do not understand what arbitration is or what it means for their rights. Many students may also feel compelled to agree; otherwise, they will be unable to enroll in the school.

Although we are not aware of any study specifically addressing students and enrollment agreements, the CFPB recently conducted a national survey of consumers about their perceptions of the contracts they have with issuers of credit cards and compared those perceptions to the actual terms of the consumers' contracts. The CFPB found that "consumers whose credit card agreements included pre-dispute arbitration clauses were about as likely to believe that their agreement had such a clause as were consumers without such clauses in their agreements."¹⁷ Among those respondents whose credit card agreements contained a pre-dispute arbitration clause, more than one-third wrongly believed that they could sue in court, and another half were

also id. Rule 43(c) (stating that AAA may choose to publish an arbitration award but will, in any event, omit party names unless the party consents to disclosure).

¹⁴ See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion); *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 597-98 (1978).

¹⁵ 563 U.S. 333, 336 (2011).

¹⁶ See Public Citizen & National Association of Consumer Advocates, *Justice Denied, One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident* 8-16, 28-30 (2012), available at <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>.

¹⁷ CFPB Study § 3.1 at 4.

unsure.¹⁸ More than half of the respondents with pre-dispute arbitration clauses in their contracts believed that they could participate in a class action against their issuer.¹⁹ In addition, among those credit card holders who indicated that they had heard of arbitration as a method for resolving disputes, only about one-fifth correctly answered that an arbitrator actually decides the dispute, as opposed to facilitating resolution by the parties.²⁰

The CFPB's results are supported by other research in analogous consumer and employment contexts. In a survey commissioned by Public Citizen and the Employee Rights Advocacy Institute for Law and Policy, roughly two-thirds of respondents said they did not ever remember reading a mandatory arbitration provision in Terms of Agreement for goods and services, despite the ubiquity of such clauses.²¹ One study by the Center for Responsible Lending found that 68 percent of consumers with auto loans did not know if their contract had a forced arbitration clause, even after a clause was described to them.²² And a recent study in which the researchers asked respondents to read a sample credit card contract with a mandatory arbitration clause found that more than half did not realize the contract provided for arbitration or did not know whether it did.²³ Even among those respondents who recognized that the contract provided for arbitration, 61 percent believed that consumers would have a right to have a court decide their dispute with the company.²⁴ Only seven percent of all respondents realized that the agreement included an arbitration clause that forbade participation in a class action.²⁵ And fewer than one in five respondents realized that the contract required them to give up their right to a jury trial, even though the contract's arbitration provision made this waiver express.²⁶

This evidence indicates that many students currently subject to pre-dispute arbitration clauses have no idea that the clauses are in their contracts, or that the clauses preclude them from going to court and potentially joining with other students to address harmful conduct by their schools. This informational asymmetry between schools and their students is particularly likely in the for-profit sector, where evidence demonstrates that such schools target “non-traditional

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 4.

²⁰ *Id.* § 3.4.3 at 21.

²¹ Public Citizen & Employee Rights Advocacy Institute for Law and Policy, National Study of Public Attitudes on Forced Arbitration: Findings from a Survey of 800 Likely 2010 Voters Nationwide 15 (2009), available at <http://www.citizen.org/documents/lake-research-national-study-of-public-attitudes-forced-arbitration.pdf>.

²² Joshua Frank, Stacked Deck: A Statistical Analysis of Forced Arbitration 10 (2009), available at http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.

²³ Jeff Sovern, *et al.*, “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 Md. L. Rev. 1, 45 (2015).

²⁴ *Id.* at 47.

²⁵ *Id.*

²⁶ *Id.* at 49-50.

prospective students who are often less familiar with higher education than other prospective college students.”²⁷

In addition, even if students did know about a school’s use of a pre-dispute arbitration clause, many would likely feel compelled to agree to it. As the Department has recognized, recruiters for some for-profit schools have described “‘boiler room’-like sales and marketing tactics” to recruit students, and internal institutional documents demonstrate “that recruiters are taught to identify and manipulate emotional vulnerabilities.”²⁸ In most cases, a for-profit college recruiter’s job is “to attempt to enroll every prospective student.”²⁹ As a result, some students targeted by for-profit schools are not qualified for admission to other schools and may believe they have no other option than to sign an arbitration agreement if they would like to get a degree.

C. Pre-Dispute Arbitration Provisions Help Cover Up Wrongdoing by Institutions and Hinder Students’ Ability to Recover for It.

Using publicly available records from institutions’ own websites, Public Citizen reviewed various pre-dispute arbitration clauses used recently by for-profit schools, some of which have been subject to government investigations or lawsuits brought by the government or by students. Those clauses, which appear in enrollment agreements or are presented as mandatory in student handbooks or academic catalogs, are attached as Appendix A.³⁰

Public Citizen’s search in this regard was not exhaustive.³¹ Nevertheless, the features of the clauses that we identified, when considered with existing research and case law, show that arbitration clauses hinder students from recouping damages from institutions that misbehave and prevent the public from uncovering wrongdoing that affects Title IV programs and the federal fisc.

1. The arbitration provisions reviewed by Public Citizen are exceedingly broad in scope. Either expressly or impliedly, they sweep in claims that relate to a school’s Title IV obligations, including proper handling and disbursement of financial aid and accurate disclosures regarding a school’s costs, offerings, job placement rates, accreditation, and campus crime.

For example, provisions used by South University and Argosy University, two schools owned by Education Management Corporation, apply to all claims “related to any aspect of [the

²⁷ HELP Report at 58.

²⁸ Department of Education, Program Integrity: Gainful Employment, 79 Fed. Reg. at 64,907.

²⁹ HELP Report at 49.

³⁰ Although some institutions tailor their contracts by campus or state, we have included only one arbitration clause per school in the appendix. Where the clauses appear in lengthy catalogs or handbooks, we have included an excerpt and the web address where the full document can be found.

³¹ Additional or more up-to-date clauses might be found on other institutions’ websites, in the American Arbitration Association’s arbitration clause registry, or in court records. In addition, the agreements located by Public Citizen may not be representative of the universe of pre-dispute arbitration agreements used by institutions. For example, one might expect that a school with particularly one-sided provisions in an enrollment agreement might be less willing to provide that agreement on its public website.

student's] relationship with or any act or omission by" the school.³² Education Management Corporation has been subject to numerous lawsuits and government investigations, including with respect to both South and Argosy Universities.³³ Similarly, the University of Phoenix requires students to arbitrate any dispute "arising out of or related to the student's interactions with the University."³⁴ That school and its parent, the Apollo Group, have been the subject of numerous investigations and lawsuits, including one by the Department of Justice that resulted in a \$67.5 million settlement of claims regarding the school's incentive compensation for recruiters.³⁵ And a provision used by Midwest Technical Institute expressly covers the school's "billing, financial aid, [and] disbursement of funds," issues of critical importance to the Department with respect to Title IV.³⁶

The expansive nature of arbitration provisions used by for-profit schools is underscored by the large number of recent decisions in which courts have compelled students to arbitrate their claims against a for-profit school, nearly always on an individual basis. Students in these cases have alleged fraud and misrepresentation in recruiting, admission of students despite knowing that the students would not benefit from programs, unlawful retention of financial aid, discrimination on the basis of race and disability, and other serious legal violations.³⁷ In nearly

³² South University, Savannah Campus, Student Handbook 2015-2016, at 52, <https://www.southuniversity.edu/documents/sav-student-handbook.pdf>; Argosy University, 2015-2016 Academic Catalog, Section Two, Institutional Policies, <http://catalog.argosy.edu/content.php?catoid=58&navoid=10953>.

³³ See, e.g., National Consumer Law Center (NCLC), Government Investigations and Lawsuits Involving For-Profit Schools (2004 – May 2014), at 2, 4, 6, 18, available at <https://www.nclc.org/images/pdf/pr-reports/for-profit-gov-investigations.pdf>; see also, e.g., *United States v. Educ. Mgmt., LLC*, No. CIV.A. 10-131, 2013 WL 2404082 (W.D. Pa. May 31, 2013).

³⁴ University of Phoenix, Consumer Information Guide 2015-2016, at 101, available at http://www.phoenix.edu/content/dam/altcloud/doc/about_uopx/Consumer-Information-Guide.pdf.

³⁵ NCLC, Government Investigations and Lawsuits Involving For-Profit Schools 4, 8, 14, 16-17.

³⁶ Midwest Technical Institute, Enrollment Agreement, Allied Health, Mechanical Trades, and Cosmetology, at 8 (Dec. 30, 2015), available at <http://www.midwesttech.edu/documents/enrollment-agreement/MO-EA.pdf>.

³⁷ See, e.g., *Ferguson v. Corinthian Coll., Inc.*, 733 F.3d at 930 (claims that schools misled students "to entice enrollment," including by misrepresenting information about the actual cost of education at one of the schools, and "misinformed" students "about financial aid, which resulted in student loans that many could not repay"); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d at 632, *abrogated in part by Oxford Health Plans*, 133 S. Ct. 2064 (alleged violations of the Texas Education Code based on solicitations of "students in Texas without the appropriate certifications"); *Grasty v. Colo. Tech. Univ.*, 599 F. App'x at 596 (claim of race discrimination); *Daniels v. Va. Coll. at Jackson*, 478 F. App'x at 893 (allegation that school unlawfully retained a student's "federal financial aid monies that should have been disbursed . . . to cover her cost of living"); *Fallo v. High-Tech Inst.*, 559 F.3d at 876 (allegations that school "engaged in fraudulent misrepresentation, violated the Missouri Merchandising Practices Act, [and] negligently trained and supervised employees"); *Bernal v. Burnett*, 793 F. Supp. 2d at 1282 (allegation that schools misrepresented the type and quality of services, "including the total cost of education at the schools, the prospect of job placement and salary expectations after graduation, the schools' accreditation status, and the transferability of credits obtained at the schools"); *Miller v. Corinthian Coll., Inc.*, 769 F. Supp. 2d at 1339 (alleged misrepresentation of "the transferability of credits to other institutions" and the cost of school's program); *Thornton v. Art Inst. of Charlotte*, 2014 WL 6810407, at *1 (discrimination claims under Title IX of the Education Amendments of 1972 and Title VI of the Civil Rights Act of 1964); *Perez v. Apollo Educ. Grp., Inc.*, 2014 WL 5797148, at *1

every case of which Public Citizen is aware, the result is the same: The courthouse doors are closed.

2. Nearly all provisions reviewed by Public Citizen expressly ban class actions and other consolidated proceedings in arbitration.³⁸ In addition, even where an arbitration clause does not expressly ban class actions, whether arbitration can proceed on a class basis is likely to be disputed by a defendant under the Supreme Court's decisions in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and *Oxford Health Plans*, 133 S. Ct. 2064.

(Americans with Disabilities Act and Rehabilitation Act claims); *Cohen v. Career Educ. Corp.*, 2013 WL 3287083, at *1 (alleged violations of Florida's Deceptive and Unfair Trade Practices Act, the federal Racketeer Influenced and Corrupt Organizations Act, and common law claims of unjust enrichment, breach of fiduciary duty, and civil conspiracy); *Asbell v. Educ. Affiliates, Inc.*, 2013 WL 1775078, at *1 (alleged "false statements regarding the quality of education, accreditation of [the school], graduates' preparedness to pass the required certification examination, and job prospects upon graduation" (internal quotation marks omitted)); *Marshall v. ITT Tech. Inst.*, 2012 WL 1565453, at *1 (alleged misleading and deceptive statements in recruitment, a school's admission of students despite knowing they were not qualified to attend, and misrepresentations regarding student employment data); *Rosendahl v. Bridgepoint Educ., Inc.*, 2012 WL 667049, at *1 (alleged misrepresentations regarding the cost of programs and/or the extent to which the programs would be sufficient to qualify students for licensure); *Mitchell v. Career Educ. Corp.*, 2011 WL 6009658, at *2 (state law claims of misrepresentation relating to the school's offering and facilities, job prospects, and the transferability of school credits); *Chisholm v. Career Educ. Corp.*, 2011 WL 5524552, at *1 (alleged misrepresentations or omissions regarding the college's "program and the career prospects for program graduates"); *Kimble v. Rhodes Coll., Inc.*, 2011 WL 2175249, at *1 (alleged "misrepresentations . . . to induce [the plaintiff] to enroll at Everest College"); *Montgomery v. Corinthian Coll., Inc.*, 2011 WL 1118942, at *1 (allegations that defendants deceived students "about the program's accreditations, cost, and job placement rates, . . . charged them in excess of the contracted amount for tuition, falsified financial aid applications, and failed to offer certain courses listed in the curriculum"); *Va. Coll., LLC v. Blackmon*, 109 So.3d at 1052 (claims that the school falsely stated it had or would obtain accreditation necessary to make the students' degrees marketable); *Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d at 772 (alleged fraudulent inducement based on misrepresentations regarding accreditation); *Eakins v. Corinthian Coll., Inc.*, 2015 WL 758286, at *1, *3 (state sexual orientation discrimination claims).

³⁸ See, e.g., ITT Technical Institute, Marlton, NJ, 2015-2016 Catalog, at 27, <https://www.itt-tech.edu/campus/download/139.pdf> (stating that claims may not be brought as a class action or any other form of representative action and that "no claims of any other person will be consolidated into the arbitration or otherwise arbitrated together with any claims" of the student); Brown Mackie College – Kansas City, 2016-2017 Academic Catalog, at 62, https://content.edmc.edu/assets/pdf/BMC/Academic_Catalogs/catalog-kansas-city.pdf (stating that a student may not "combine or consolidate any Claims with those of other students, such as in a class or mass action" or "have any Claims be arbitrated or litigated jointly or consolidated with any other person's claims"); The Art Institute of Portland, Enrollment Agreement, at 2 (revised Mar. 23, 2015), available at <http://content.artinstitutes.edu/assets/documents/portland/enrollment-agreement.pdf> ("The arbitrator shall have no authority to arbitrate claims on a class action basis, and claims brought by or against a student may not be joined or consolidated with claims brought by or against any other person."). These companies or their corporate parents have been subject to government investigations or lawsuits. See NCLC, Government Investigations and Lawsuits Involving For-Profit Schools 2, 4, 10, 16 (describing previous investigations or lawsuits against ITT Educational Services, Inc., the owner of ITT Technical Institute); Education Management Corporation, SEC Form 10-Q, Mar. 31, 2014, available at <https://www.sec.gov/Archives/edgar/data/880059/000088005914000016/edmc-201433110xq.htm> (corporate parent of Brown Mackie College and the Art Institutes describing government subpoenas and investigations).

Bans on class and consolidated proceedings in arbitration quite obviously limit the number of students who stand to benefit from any specific favorable decision. For example, in its comprehensive analysis of arbitration in the context of consumer financial contracts, including those in the private student-loan industry, the CFPB determined that 422 federal consumer class settlements were approved in courts between 2008 and 2012.³⁹ It estimated that those settlements covered more than 350 million class members and provided “more than \$2 billion in cash relief including fees and expenses and more than \$600 million in in-kind relief.”⁴⁰ In contrast, the agency found that, from 2010 to 2012, consumers filed consumer-only arbitration demands with the American Arbitration Association (AAA), one of the largest arbitration firms in the country, in an average of 411 cases each year.⁴¹ The average affirmative claim made by consumers was around \$27,000.⁴² Of those arbitration proceedings for which an arbitrator rendered a decision and the agency was able to discern an outcome, the total relief for consumers’ affirmative claims was \$172,433.⁴³

Pre-dispute arbitration agreements that ban class and consolidated actions also discourage students from bringing claims in the first place. In particular, students may have more difficulty finding counsel to pursue their claims on an individual basis than on a class basis, because class treatment benefits from the economies of scale that make undertaking the costs of pursuing relatively small-value claims worthwhile. For instance, an attorney in an Oregon case involving claims of fraud against culinary schools operated by Career Education Corporation (CEC) stated that, after *Concepcion*, he had declined to bring additional cases in Washington and Minnesota against the same defendant because of the class action ban in the school’s arbitration agreement.⁴⁴ Another attorney who litigated against CEC in a similar case in Pasadena stated that he was aware of students with similar claims in more than a half dozen other cities but that, in light of *Concepcion*, those students might have trouble finding counsel.⁴⁵

The economies of scale that class actions provide are particularly important with respect to allegations of fraud and misrepresentation, which are common claims in cases involving students and postsecondary schools and are of considerable concern to the Department under Title IV. As one commentator has explained, “although students alleging fraud and deception by for-profit schools may have claims worth thousands of dollars,” many of the claims are “exceptionally difficult to prove.”⁴⁶ As a practical matter, the costs associated with proving these particular types of claims may not justify individual suits.

³⁹ CFPB Study § 1.4.7 at 16.

⁴⁰ *Id.*

⁴¹ *Id.* at § 1.4.3 at 11.

⁴² *Id.* at 12.

⁴³ *Id.*

⁴⁴ See Public Citizen, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* 11 (2008), available at <http://www.citizen.org/documents/ArbitrationDebateTrap%28Final%29.pdf> (discussing studies).

⁴⁵ *Id.* at 12.

⁴⁶ Blake Shinoda, *Enabling Class Litigation as an Approach to Regulating For-Profit Colleges*, 87 S. Cal. L. Rev. 1085, 1114 (2014); see also Aaron N. Taylor, “Your Results May Vary”: *Protecting Students and*

The court decision in *Bernal v. Burnett* provides one example of this dynamic.⁴⁷ In that case, a class of students alleged that Westwood College and Westwood College Online violated state consumer laws by misrepresenting the type and quality of their services, “including the total cost of education at the schools, the prospect of job placement and salary expectations after graduation, the schools’ accreditation status, and the transferability of credits obtained at the schools.”⁴⁸ The students argued that an arbitration clause in their contracts with the schools was unconscionable and therefore unenforceable because the clause banned the students from proceeding as a class. They explained that “the nature of the claims, *i.e.* fraud, takes time and upfront work to develop, and that no attorney [would] be willing or able to do that on an individualized basis.”⁴⁹ They also contended that “the confidential, non-precedential nature of arbitration” would make it infeasible to pursue their cases individually because “their strongest witnesses—former employees of [the schools]—would be forced to testify over 800 times.”⁵⁰ The district court admitted that it would likely have agreed that the contract was unconscionable “if it were issuing th[e] decision pre-*Concepcion*” and noted that *Concepcion* “likely foreclosed the possibility of any recovery for many wronged individuals.”⁵¹ However, it concluded that it was bound to enforce the agreement under existing law.

3. Some of the arbitration clauses reviewed by Public Citizen require that the parties keep information about the proceedings and their outcomes confidential (beyond, as discussed above, the secrecy that already attends arbitration proceedings as a result of an arbitration firm’s rules and the ethical rules applicable to arbitrators). The University of Phoenix, which—as noted above, has been subject to numerous investigations alongside its parent company—has required that students agree not to “disclose the existence, content or results of any arbitration” without the written consent of all parties.⁵² Provisions used by ITT Technical Institute, ECPI University, Western International University, Daniel Webster College, and Rasmussen College are similar in nature.⁵³

Taxpayers Through Tighter Regulation of Proprietary School Representations, 62 Admin. L. Rev. 729, 764-68 (2010) (explaining some of the hurdles that students must overcome when relying on tort, contract, and consumer protection law to challenge proprietary institutions’ conduct).

⁴⁷ 793 F. Supp. 2d 1280 (D. Colo. 2011).

⁴⁸ *Id.* at 1282.

⁴⁹ *Id.* at 1287-88.

⁵⁰ *Id.*

⁵¹ *Id.* at 1288.

⁵² University of Phoenix, Consumer Information Guide 2015-2016, at 102, *available at* http://www.phoenix.edu/content/dam/altcloud/doc/about_uopx/Consumer-Information-Guide.pdf.

⁵³ ITT Technical Institute, Marlton, NJ, 2015-2016 Catalog, at 27, <https://www.itt-tech.edu/campus/download/139.pdf>; ECPI University, Enrollment Agreement, Virginia Beach Military/Online Continuing Education, at 3, *available at* <https://www.ecpi.edu/sites/default/files/NDS-App.pdf>; Western International University, Consumer Information Guide, 2013-2014, at 81, *available at* <http://west.edu/content/dam/westedu/pdf/West-Consumer-Information-Notice.pdf>; Daniel Webster College, Nashua, NH, 2015-2016 Catalog, Volume 11, at 39 (Sept. 1, 2015), *available at* <http://www.dwc.edu/catalog/currentcatalog.pdf>; Rasmussen College, 2014-2015 Academic Catalog – Florida, at 79, *available at* http://www.rasmussen.edu/pdf/course_catalog/2014_2015_fl_catalog.pdf.

a. This type of provision, when enforceable, has a devastating impact on the ability of multiple claimants to pursue claims against a school.⁵⁴ As one court has observed, even when confidentiality provisions are neutral on their face, they “usually favor companies over individuals.”⁵⁵ Companies that write the provisions can “accumulate experience” defending claims.⁵⁶ Meanwhile, individuals, who are likely to be one-shot claimants, are on their own in obtaining evidence and considering—in the absence of precedent—the strengths and weaknesses of their claims.

When a confidentiality provision is combined with a ban on class or collective arbitration proceedings, the negative effects for students intensify. For example, in *ITT Educational Services, Inc. v. Arce*,⁵⁷ the Fifth Circuit affirmed the grant of a permanent injunction barring students and their counsel from releasing information about “evidence and findings” from previous successful arbitrations against a for-profit school.⁵⁸ The students’ attorney had sought to use the information to assist another ITT student forced to bring his claim in a separate arbitration. The court stated that, if the students’ attorney “filed an unredacted copy of the arbitrator’s opinion, such information could be used against ITT in the [other student’s] arbitration, as well as open the door to innumerable other suits by ITT students,” an untenable outcome in the court’s view.⁵⁹

b. In addition, by shrouding the arbitration process in secrecy, confidentiality provisions and arbitration firm rules hamper regulators, including the Department, in their ability to uncover and respond to wrongdoing. In many cases, litigation sounds the alarm on a school’s unlawful practices; without it, wrongdoers may act with impunity.

The critical role of private litigation in paving the way for government enforcement is borne out by the CFPB’s recent study of consumer financial class actions. For 68 percent of the class actions the CFPB reviewed, it found no overlapping public enforcement action—meaning that the litigation was the sole means through which consumers obtained relief.⁶⁰ That share rose to 82 percent in cases involving class action settlements for less than ten million dollars.⁶¹ But where the agency “did find overlapping activity by government entities and private class action lawyers, public enforcement activity was preceded by private activity 71% of the time. In contrast, private class action complaints were preceded by public enforcement activity 36% of

⁵⁴ For a discussion of the enforceability of confidentiality provisions in arbitration agreements, see generally, e.g., Matthew Gierse, Note: *You Promised You Wouldn’t Tell: Modifying Arbitration Confidentiality Agreements to Allow Third-Party Access to Prior Arbitration Documents*, 2010 J. Disp. Resol. 463 (2010).

⁵⁵ *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003).

⁵⁶ *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 275 (Ill. 2006).

⁵⁷ 533 F.3d 342, 344 (5th Cir. 2008).

⁵⁸ *Id.* at 347.

⁵⁹ *Id.*

⁶⁰ CFPB Study § 9.1 at 4.

⁶¹ *Id.*

the time.”⁶² For class action settlements under \$10 million, “the private-first to government-first overlap ratio was much higher at 6-to-1.”⁶³

The downfall of Corinthian Colleges also provides strong evidence that arbitration limits public access to information about wrongdoing by educational institutions, and therefore hampers the Department and other regulators. Before it filed for bankruptcy in 2014, Corinthian was one of the largest for-profit schools in the country. Beginning in 2010, it was served with a series of civil investigative demands and subpoenas by state attorneys general for information on its activities relating to financial aid, admissions, recruitment, lending, and job placement.⁶⁴ In 2011, the Department of Education’s Office of Inspector General subpoenaed documents relating to one campus’s correspondence with its accreditor regarding job placement and employment rates.⁶⁵ The following year, the CFPB demanded information to determine whether Corinthian had engaged in “unlawful acts or practices relating to the advertising, marketing, or origination of private student loans.”⁶⁶ And in 2013, the SEC subpoenaed Corinthian for information on student “recruitment, attendance, completion, placement, defaults on federal loans and on alternative loans, as well as compliance with U.S. Department of Education financial requirements, standards and ratios.”⁶⁷

However, years before these government entities took action, students attempted to hold Corinthian accountable for unlawful conduct. Corinthian’s use of an arbitration provision shielded the proceedings in most cases from public scrutiny. For instance, in 2005, students at a National Institute of Technology campus in Long Beach sued Corinthian in California state court. The students alleged that the school had misrepresented their eligibility to take the Certified Medical Assistant examination.⁶⁸ In response, Corinthian “filed demands in arbitration against each of the individual plaintiffs for breach of their contractual obligation to arbitrate rather than litigate disputes” and a state court compelled the plaintiffs to binding arbitration.⁶⁹

In another of many more cases, in 2004, four former students sued Corinthian for alleged misrepresentations at the company’s Florida campuses regarding the school’s accreditation, and they contended that they had been pressured to enroll immediately.⁷⁰ Plaintiffs’ counsel

⁶² *Id.*

⁶³ *Id.* § 9.4.2 at 17.

⁶⁴ See Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2014, at 19-21, available at https://www.sec.gov/Archives/edgar/data/1066134/000110465914037670/a14-9787_110q.htm (providing a chronology of government investigations and enforcement actions).

⁶⁵ See *id.* at 20.

⁶⁶ *Id.*

⁶⁷ *Id.* at 21.

⁶⁸ Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2007, at 10, available at <https://www.sec.gov/Archives/edgar/data/1066134/000119312507110175/d10q.htm>.

⁶⁹ *Id.*

⁷⁰ *Corinthian Coll., Inc. v. Price*, No. G034327, 2005 WL 1199069, at *1 (Cal. Ct. App. May 20, 2005).

estimated that misrepresentations regarding accreditation could affect 11,000 students then-enrolled in Florida, and more than 100,000 students nationwide.⁷¹ However, a court appears to have ordered these plaintiffs, along with numerous others in similar class actions filed against Corinthian around the same time, to arbitrate their claims.⁷² In the course of the litigation, Corinthian sued the plaintiffs' attorney in the Florida case for defamation and tortious interference with contractual and economic relationships based in part on the attorney's press release about the original court case and a website designed to locate additional plaintiffs and witnesses by informing them (and the public) about the case.⁷³

That Corinthian continued to violate the law over a sustained period of time is not surprising given students' lack of access to the courts.⁷⁴ Corinthian had no reason to clean up its act because for years it faced no material consequences for alleged wrongdoing and was able to avoid public scrutiny by moving disputes with students into arbitration. By the time regulators stepped into the void, thousands of students had already been harmed. As a district court observed in *Ferguson v. Corinthian Colleges*, one of the later private cases against the company:

Defendants exploit a vulnerable consumer population by encouraging students to borrow amounts they will never be able to pay back, let alone ever discharge in bankruptcy, ruining the students' financial future for life. Defendants are able to tap into this easy source of credit, realize significant profits, and pass all of the down-side credit risk on to the students. Not only are the students harmed, but since the loans are federally guaranteed, U.S. taxpayers subsidize this scheme at the expense of the students and for the benefit of Defendants' bottom line. Plaintiffs allege that in the past year, these practices have been investigated by the Department of Education, the Government Accountability Office, and the Higher Learning Commission, and they have also been considered by Congress. Plaintiffs' desire to obtain injunctive relief to protect the public, including protecting the interests of current and potential students, members of the military, and U.S. taxpayers, is clearly in the public interest.⁷⁵

Nevertheless, the district court compelled the students to arbitrate most of their claims on an individual basis, and on appeal, Corinthian successfully forced the plaintiffs' claims out of

⁷¹ *Id.* at *3.

⁷² Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2009, at 10, available at <https://www.sec.gov/Archives/edgar/data/1066134/000119312509098049/d10q.htm>.

⁷³ *Price*, 2005 WL 1199069, at *2-*3. The attorney ultimately prevailed on an anti-SLAPP (strategic lawsuit against public participation) motion, and the court ordered that Corinthian pay the attorney's costs and fees on appeal. *Id.* at *11.

⁷⁴ See, e.g., NCLC, Government Investigations and Lawsuits Involving For-Profit Colleges 2-3 (describing judgment in a lawsuit brought by a state attorney general alleging that Corinthian schools inflated placement rates, failed to disclose completion rates, and overstated graduates' starting salaries); U.S. Department of Education, *Press Release: U.S. Department of Education Fines Corinthian Colleges \$30 Million for Misrepresentation*, Apr. 14, 2015, available at <http://www.ed.gov/news/press-releases/us-department-education-fines-corinthian-colleges-30-million-misrepresentation>.

⁷⁵ 823 F. Supp. 2d 1025, 1035-36 (C.D. Cal. 2011).

court altogether on the ground that they were covered by a pre-dispute arbitration clause.⁷⁶ Corinthian’s subsequent bankruptcy confirmed the district court’s observation that students and taxpayers foot the bill when schools like Corinthian are able to avoid liability for wrongdoing.

4. Some pre-dispute arbitration agreements reviewed by Public Citizen include other one-sided terms that unfairly favor the school. These provisions, whether or not enforceable, serve to discourage students from pursuing claims.⁷⁷

For example, an arbitration clause used by Rasmussen College in Florida provides that, unless both parties agree otherwise, arbitration will take place in Minneapolis, Minnesota.⁷⁸ On its face, the provision makes no exception for instances in which the location would cause an undue hardship to a student. Another arbitration provision—this one from Virginia College—permits the school to pursue a subset of claims (those seeking injunctive relief for breach of or default under the enrollment agreement) in court to restrain further breach or default, yet the same agreement is silent as to the student’s corresponding right.⁷⁹

Other arbitration provisions purport to sharply constrain an arbitrator’s authority to remedy unlawful conduct. An arbitration agreement used by the online program at Colorado Technical University—which is owned by Career Education Corporation, a company recently under investigation by numerous state attorneys general—purports to preclude an arbitrator from requiring “the University to change *any* of its policies or procedures.”⁸⁰ On its face, that type of limitation would bar, for instance, an arbitrator from requiring a school to change an admissions policy that expressly excludes all students with disabilities or students of color. The provision also purports to limit the arbitrator’s authority to “award consequential damages, indirect

⁷⁶ *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d at 930-31.

⁷⁷ Whether such clauses are enforceable will depend on the nature of the one-sided provision. For example, some particularly one-sided provisions may be struck by a court as substantively unconscionable under state law and thus unenforceable. *See, e.g., Rosendahl v. Bridgepoint Educ., Inc.*, 2012 WL 667049, at *11 (holding that a provision in an arbitration clause was substantively unconscionable, where the provision stated that “the arbitrator shall not have any authority to award punitive damages, treble damages, consequential or indirect damages,” or “award attorney’s fees” (internal alteration and quotation marks omitted)). In addition, an arbitration firm may refuse to accept a dispute for arbitration where the underlying agreement to arbitrate does not comply with certain minimum standards for procedural fairness adopted by the firm. *See, e.g.,* CFPB Study § 4 at 1-2.

⁷⁸ Rasmussen College, 2014-2015 Catalog and Student Handbook – Florida, at 79, *available at* http://www.rasmussen.edu/pdf/course_catalog/2014_2015_fl_catalog.pdf.

⁷⁹ Virginia College - Birmingham, Enrollment Agreement, at 3 (Dec. 8, 2014), *available at* <http://marketing.ecacolleges.com/public/Catalogs/Enrollment%20Agreement%20-%20Birmingham%20%28Final%2012-8-2014%29.pdf>.

⁸⁰ Colorado Technical University Online, Enrollment Agreement, at 4 (dated Feb. 21, 2011) https://studentlogin.coloradotech.edu/schools/6/pdf/admissions_packet.pdf (emphasis added); *accord* American InterContinental University Online, Enrollment Agreement, at 4 (dated Feb. 2011) https://studentlogin.aiuniv.edu/schools/5/pdf/admissions_packet.pdf; *see also* Career Education Corp., SEC Form 10-Q for Period Ending Sept. 30, 2015, at 16, *available at* https://www.sec.gov/Archives/edgar/data/1046568/000156459015009236/cecoco-10q_20150930.htm (describing investigations and litigation directed at the parent company of Colorado Technical University and American InterContinental University).

damages, treble damages or punitive damages, or any monetary damages not measured by the prevailing party's economic damages.”⁸¹

Finally, some arbitration clauses include provisions that could leave students responsible for high costs that would not apply in court. A recent Rasmussen College arbitration provision states that a student and the school will bear “an equal share of the arbitrator’s fees and administrative costs,” which could amount to thousands of dollars.⁸² Virginia College has used a provision stating that the school, “if it prevails, shall be entitled to recover its reasonable attorneys’ fees” in any arbitration arising out of the enrollment agreement, and the provision makes no express exception for causes of action that would not permit such fee-shifting in court.⁸³ The contract is silent as to whether the student has a corresponding right to fees.

These provisions may or may not be enforceable, but when an arbitrator, not a court, makes that determination, it is largely unreviewable. For example, as part of a recent series on arbitration, the New York Times profiled Debbie Brenner, a former student of Lamson College.⁸⁴ Ms. Brenner enrolled in a surgical technician program at Lamson but later joined other students in a lawsuit against the school for fraud based on alleged misrepresentations with respect to the school’s offerings. The school compelled arbitration, and the arbitrator ultimately ruled against Ms. Brenner in what the Times described as a “rambling” decision in which “the arbitrator mused on singing lessons, Jell-O and Botox.”⁸⁵ Ms. Brenner and other students whose claims had been grouped with hers in the arbitration were ordered to pay more than \$350,000 toward the defense’s legal bills “because of the ‘hardship’ the students had inflicted” on the school.⁸⁶ Ms. Brenner had no right to appeal in arbitration and was not able to challenge the award in court.⁸⁷

In another case against Corinthian Colleges and its schools, a student who attempted to bring his claims in court not only was ordered to arbitration and lost, but was found to have breached his arbitration contract with the school. The arbitrator ordered the student to pay a Corinthian subsidiary’s “damages associated with compelling the action to arbitration.”⁸⁸

⁸¹ Colorado Technical University Online, Enrollment Agreement, at 4.

⁸² Rasmussen College, 2014-2015 Catalog and Student Handbook – Florida, at 79, *available at* http://www.rasmussen.edu/pdf/course_catalog/2014_2015_fl_catalog.pdf.

⁸³ Virginia College – Birmingham, Enrollment Agreement, at 3 (Dec. 8, 2014), *available at* <http://marketing.ecacolleges.com/public/Catalogs/Enrollment%20Agreement%20-%20Birmingham%20%28Final%2012-8-2014%29.pdf>.

⁸⁴ Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. Times, Nov. 1, 2015, *available at* <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Alliance for Justice, How Forced Arbitration Prevented Three Everyday Americans From Being Able to Stand Up for Their Rights in Court, <http://www.afj.org/wp-content/uploads/2014/09/Overview-of-Cases.pdf>.

⁸⁸ Corinthian Colleges, Inc., SEC Form 10-Q for Period Ending Mar. 31, 2009, at 10, *available at* <https://www.sec.gov/Archives/edgar/data/1066134/000119312509098049/d10q.htm> (discussing *Satz v. Rhodes Colleges, Inc., Corinthian Colleges, Inc., and Florida Metropolitan University*).

And in *Dean v. Draughons Jr. College, Inc.*, a district court faced with a motion to compel arbitration noted that, based on its previous factual findings, it was “concerned that one or more of the named plaintiffs”—students who alleged that their for-profit school induced them “to enroll and take out significant student loans based on false or misleading representations”—would “not be able to afford the out-of-pocket costs to arbitrate, even under conservative cost assumptions.”⁸⁹ The court emphasized that several of the plaintiffs stated that they had no income or unencumbered assets and that sending the case to arbitration could prevent the plaintiffs from pursuing their substantive rights.⁹⁰ The court concluded that, “[w]hile required by the FAA,” the result seemed “manifestly unjust.”⁹¹

* * *

In sum, through case law, contractual examples, and other evidence, we know that institutions using pre-dispute arbitration clauses with their students impede access to justice and, through secrecy, hamper regulators in effectively enforcing the law. Accordingly, where these clauses apply, institutions that violate the law can pass off the costs of their own wrongdoing to the public and U.S. taxpayers.

D. The Requested Action Is Consistent with The Department’s Legal Obligations.

1. The HEA authorizes the Department to take the requested action.

The HEA provides at least two independent legal bases for the action requested in this petition. As described below, both rationales rest on the Department’s authority to require institutions, as part of Title-IV-mandated contracts with the Department called Program Participation Agreements (PPAs), to agree not to include pre-dispute arbitration clauses in enrollment and other agreements with students.⁹²

a. First, through 20 U.S.C. §§ 1094(c)(1)(B) and 1099c(d), the HEA provides the Department with authority to establish standards for “administrative capability.” The Department has required by regulation, 34 C.F.R. § 668.14(b)(6), that an institution’s PPA contain a commitment to comply with these standards, which the Department has set out at 34 C.F.R. § 668.16.⁹³ As an exercise of its authority under 20 U.S.C. §§ 1094(c)(1)(B) and 1099c(d), the Department should incorporate the regulatory action requested by this petition in the “administrative capability” standards set forth in 34 C.F.R. § 668.16.

⁸⁹ 917 F. Supp. 2d 751, 753, 765 (M.D. Tenn. 2013).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See, e.g., *Mission Grp. Kansas, Inc. v. Riley*, 146 F.3d 775, 779 (10th Cir. 1998) (confirming the Department’s authority to condition Title IV funding on a provision added by the Department to a PPA).

⁹³ 34 C.F.R. § 668.14(b)(6). The Department is also required by statute to determine an institution’s administrative capability in qualifying the institution to participate in Title IV programs. 20 U.S.C. § 1099c(a).

As the D.C. Circuit has recognized, the Department is “expressly authorized to define” administrative capability under the HEA.⁹⁴ Specifically, 20 U.S.C. § 1094(c)(1)(B) permits the Department to establish “reasonable standards of . . . appropriate *institutional capability for the administration*” of Title IV programs, “including any matter the Secretary deems necessary to the sound administration of the financial aid programs.”⁹⁵ And § 1099c(d) similarly permits the Department to “establish procedures and requirements *relating to the administrative capacities* of institutions of higher education” and “to establish such other reasonable procedures” that the Department concludes “will contribute to ensuring that the institution of higher education will comply with administrative capability required by this subchapter.”⁹⁶ Existing standards for “administrative capability” under 34 C.F.R. § 668.16 rest on both of these statutory provisions.

Interpreting “administrative capability” to encompass an institution’s commitment not to include pre-dispute arbitration clauses in enrollment or other agreements with students is consistent with the HEA’s text, its legislative history, and Department precedent. The language of the HEA is sufficiently broad to cover the action requested in this petition. For example, the ordinary meaning of the term “administration” as used in § 1094(c)(1)(B) means “all the actions that are involved in managing the work of an organization”⁹⁷ or “the performance of executive duties.”⁹⁸ “Capability” is a “skill, an ability, or knowledge that makes [an institution] able to do a particular job.”⁹⁹

That “job,” in this case, extends beyond an institution’s receipt and disbursement of Title IV money to its ability to protect the federal investment under Title IV and to offer the education it promises. The HEA’s legislative history confirms as much. A House Report leading up to the Higher Education Amendments of 1992, which addressed administrative capability, stated that the administrative capability standards are intended to ensure that schools are “administratively capable of providing the education that they advertise.”¹⁰⁰ The Department has endorsed this goal by stating in a handbook for institutions that the administrative capability standards measure whether an institution is “administratively capable of providing the education it promises and of properly managing” the federal student aid programs.¹⁰¹

A construction of administrative capability to include the action requested here is consistent with the HEA’s overall structure and purpose. In particular, through Title IV, Congress has required that institutions publicly disclose a broad range of information, including

⁹⁴ *Career Coll. Ass’n v. Riley*, 74 F.3d 1265, 1274 (D.C. Cir. 1996).

⁹⁵ Emphasis added.

⁹⁶ Emphasis added.

⁹⁷ Black’s Law Dictionary (10th ed. 2014).

⁹⁸ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary>.

⁹⁹ *Id.*

¹⁰⁰ H.R. Rep. 102-447, at 74 (1992) (internal quotation marks omitted).

¹⁰¹ Department of Education, Federal Student Aid Handbook, 2015-2016, at 2-38, *available at* <https://ifap.ed.gov/fsahandbook/attachments/1516FSAHbkActiveIndexMaster.pdf>.

graduation rates, program costs, retention rates, and information about accreditation, academic programs and faculty, student body diversity, coeducational athletic opportunities, and services for students with disabilities.¹⁰² It has done so to ensure that students, the public, and the Department know what they are buying with Title IV loans and grants. Yet, as discussed in Part II.C above, the use of pre-dispute arbitration agreements hinders the ability of students to seek recourse for an institution's failure to provide accurate information through these disclosures and other representations. Moreover, it hampers efforts by the Department and other regulators to uncover wrongdoing that places the federal investment in Title IV programs at risk. In light of these outcomes, addressing the use of pre-dispute arbitration agreements in the administrative capability standards is consistent with the goal of Title IV's disclosure mandate because it helps to ensure that students and the public know what they are buying with federal funds.

Using the Department's authority to issue an administrative capability standard that addresses pre-dispute arbitration provisions in agreements with students also fits comfortably within the Department's past practice. Current administrative capability standards address an array of topics, from adequate staffing and record maintenance, to more substantive risk factors, such as the requirement that fewer than one-third of an institution's students may withdraw in a single year.¹⁰³ The Department has explained that withdrawal rates are a measure of administrative capability because the rates "are a function of overall institutional performance and the information and support services that an institution provides to its students and prospective students."¹⁰⁴

Similarly, the Department has determined that an institution is not administratively capable if its students have a "cohort default rate" on student loans that exceeds specified thresholds.¹⁰⁵ As the Department has explained, the default rate is an "appropriate measure[] of an institution's past administrative performance; an institution that administers the Title IV, HEA programs correctly will," in the absence of certain mitigating circumstances, have default rates below the specified thresholds.¹⁰⁶ The D.C. Circuit confirmed the Department's authority to adopt this provision as a measure of administrative capability based on the Department's statutory authority under 20 U.S.C. §§ 1094(c)(1)(B) and 1099c(d).¹⁰⁷

In 1994, the Department considered adding other administrative capability standards that dealt with an institution's representations regarding its academic program and its treatment of students. For example, the Department proposed adding a requirement that each institution "have advertising, promotion, and student recruitment practices that accurately reflect the content and

¹⁰² 20 U.S.C. § 1094(a)(7) (requiring institutions to agree in their PPAs to comply with § 1092, which mandates a broad range of disclosures).

¹⁰³ 34 C.F.R. § 668.16(b), (d), (l).

¹⁰⁴ Department of Education, Student Assistance General Provisions and Federal Pell Grant Program, 59 Fed. Reg. 22,348, 22,391 (1994) (interim final rule).

¹⁰⁵ 34 C.F.R. § 668.16(m).

¹⁰⁶ Department of Education, Student Assistance General Provisions and Federal Pell Grant Program, 59 Fed. Reg. 9,526, 9,549 (1994) (proposed rule).

¹⁰⁷ See *Career Coll. Ass'n*, 74 F.3d at 1274.

objectives of the educational programs offered by the institution.”¹⁰⁸ Although the Department ultimately decided not to adopt that provision in final regulations, it reaffirmed that its authority would have permitted it to do so and to adopt other beneficial requirements for students as part of the agency’s administrative capability regulations. It made clear, for example, “that providing adequate and accurate information to students, so they can make informed decisions, is a function of proper administration of the Title IV, HEA programs” and that “advertising, promotion and recruitment practices that reflect the content and objectives of educational programs accurately is a critical aspect of the proper administration of the Title IV, HEA programs.”¹⁰⁹

Accordingly, the action requested by Public Citizen would not require the Department to expand its interpretation of its own authority under the HEA. The Department’s own previous statements, alongside the HEA’s text and purpose, confirm that the Department may take with ease the action requested here because the use of a pre-dispute arbitration clause subverts the proper administration of a Title IV program and obscures information to permit students and the public to know what they are buying with Title IV aid.

b. In addition to amending the administrative capability regulations, the Department should use its authority under 20 U.S.C. §§ 1087d and 1094 to amend 34 C.F.R. § 685.300(b) to require that an institution, as a condition on participation in the Direct Loan Program, agree in its PPA not to use pre-dispute arbitration clauses in enrollment or other agreements with students. Although this regulation would cover only institutions participating in the Direct Loan Program, it would apply to agreements that those institutions have with all of their students, not just those who receive Direct Loans.

The Department’s authority to adopt stand-alone conditions on funding as part of its PPAs with institutions is broad with respect to the Federal Direct Loan Program, where it may add “such other provisions” that it “determines are necessary to protect the interests of the United States and to promote the purposes of” the Direct Loan Program.¹¹⁰ Barring pre-dispute arbitration clauses in enrollment and other agreements would meet this standard because it would force schools to internalize the costs of their misconduct and thereby reduce the United States’ exposure to financial liability in the form of student loans that cannot or will not be repaid.

Pre-dispute arbitration agreements affect the United States’ interests in multiple ways. First, under current law, a Direct Loan borrower “may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.”¹¹¹ U.S. taxpayers become liable where students successfully assert such a defense, and this liability may be significant, as is evident from recent

¹⁰⁸ Department of Education, Student Assistance General Provisions, 59 Fed. Reg. at 9,548 (proposed rule).

¹⁰⁹ Department of Education, Student Assistance General Provisions, 59 Fed. Reg. at 22,388 (interim final rule).

¹¹⁰ 20 U.S.C. § 1087d(a)(6).

¹¹¹ 34 C.F.R. § 685.206(c); *see also* 20 U.S.C. § 1087e(h) (providing statutory authority for this regulation).

cases brought against institutions by state attorneys general and students.¹¹² Second, where a school collapses under the weight of its own wrongdoing and must close, federal law provides that students affected by the closure may receive discharges of their student loans.¹¹³ Third, U.S. taxpayers are put at risk when students default on loans used to attend institutions that fraudulently induce students to enroll in worthless programs.

The collapse of Corinthian Colleges provides a concrete example demonstrating that a restriction on Title IV funding to schools that use pre-dispute arbitration agreements would be in the United States' interests. Between 2010 and the school's closure in 2015, roughly 350,000 students borrowed federal money—totaling approximately \$3.5 billion—to attend Corinthian.¹¹⁴ Before closing, Corinthian had for years been accused of engaging in widespread fraud and other misconduct.¹¹⁵ However, because Corinthian included an arbitration clause in its enrollment agreements, courts repeatedly compelled students to arbitrate their claims against Corinthian and its related schools, frequently on an individual basis.¹¹⁶ As a result, many former students are deeply in debt, and they have had no realistic opportunity to be made whole by Corinthian.

Fortunately, former Corinthian students may be able to rely on fraud and other wrongdoing by the school as a defense to repayment of their federal loans. The Department is currently developing procedures for group relief based on findings of fraud and other violations of law by Corinthian.¹¹⁷ Public Citizen strongly supports an expansive defense-to-repayment regime.

Yet the cost of defense-to-repayment claims based on Corinthian's wrongdoing is significant and should have been borne by Corinthian, instead of students and taxpayers. As of December 2015, the Department had granted more than \$27 million in relief to students asserting borrower defense claims.¹¹⁸ In addition, the Department has discharged—based on Corinthian's

¹¹² See generally, e.g., David Halperin, Law Enforcement Investigations and Actions Regarding For-Profit Colleges, Republic Report (last updated Feb. 9, 2016), <http://www.republicreport.org/2014/law-enforcement-for-profit-colleges>; NCLC, Government Investigations and Lawsuits Involving For-Profit Colleges.

¹¹³ See 34 C.F.R. § 685.214.

¹¹⁴ Michael Stratford, *Debt Relief Unveiled*, Inside Higher Ed, June 9, 2015, available at <https://www.insidehighered.com/news/2015/06/09/us-will-erase-debt-corinthian-students-create-new-loan-forgiveness-process>.

¹¹⁵ See, e.g., NCLC, Government Investigations and Lawsuits Involving For-Profit Schools (describing various investigations of Corinthian).

¹¹⁶ See, e.g., *Ferguson v. Corinthian Coll.*, 733 F.3d at 930; *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d at 632, *abrogated in part by Oxford Health Plans*, 133 S. Ct. 2064; *Miller v. Corinthian Coll., Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011); *Montgomery v. Corinthian Coll., Inc.*, 2011 WL 1118942, at *1; *Kimble v. Rhodes Coll., Inc.*, 2011 WL 2175249, at *1; *Eakins v. Corinthian Coll., Inc.*, 2015 WL 758286, at *1, *3.

¹¹⁷ See Department of Education, Information About Debt Relief for Corinthian College Students, <https://studentaid.ed.gov/sa/about/announcements/corinthian>.

¹¹⁸ Department of Education, *Press Release: Special Master Joe Smith Delivers Progress Report on Borrower Defense Process*, Dec. 3, 2015, available at <http://www.ed.gov/news/press-releases/special-master-joe-smith-delivers-progress-report-borrower-defense-process>.

closure—more than \$70 million in federal loans.¹¹⁹ Now that Corinthian has been liquidated, the Department will not be able to obtain full reimbursement from the school, whose bankruptcy filings reported \$143 million in debt and less than \$20 million in assets.¹²⁰

As the Corinthian example demonstrates, pre-dispute arbitration agreements place the cost of a school’s wrongdoing and any closure related to that wrongdoing on U.S. taxpayers and students instead of the school responsible for the harm. The United States has a firm interest in protecting the federal fisc from predatory schools that use these clauses.

2. The action requested is consistent with the Federal Arbitration Act.

The requested action is fully consistent with Section 2 of the FAA, which provides that written agreements to arbitrate are “valid, irrevocable, and enforceable,” except where grounds “exist at law or in equity for the revocation of any contract.”¹²¹ The action requested by Public Citizen would not render unenforceable any existing pre-dispute arbitration agreements between institutions and their students.¹²² Nor would it bar the enforcement of arbitration agreements entered into in the future by a Title IV-participating institution in violation of its PPA with the Department. If the institution violated its PPA in this way, the Department could take administrative enforcement action for the breach of the PPA,¹²³ but the institution’s arbitration agreements with students would remain enforceable.

The action requested would not interfere with the FAA’s purposes, either. As the Supreme Court has explained, the FAA was enacted “in response to widespread judicial hostility to arbitration agreements.”¹²⁴ Under the English common law and in American courts until 1925, when the FAA was adopted, many judges refused to enforce existing arbitration agreements.¹²⁵ Section 2’s mandate thus evinces Congress’s goal of ensuring that private arbitration agreements,

¹¹⁹ Michael Stratford, *More Findings Against Corinthian*, Inside Higher Ed, Nov. 18, 2015, available at <https://www.insidehighered.com/news/2015/11/18/us-department-education-says-additional-corinthian-campuses-misled-students>.

¹²⁰ Danielle Douglas-Gabriel, *Government Watchdog Wins \$530 Million Lawsuits Against For-Profit Corinthian Colleges. Too Bad It Will Never See a Dime*, Wash. Post, Oct. 28, 2015, available at <https://www.washingtonpost.com/news/grade-point/wp/2015/10/28/government-watchdog-wins-530-million-lawsuit-against-for-profit-corinthian-colleges-too-bad-it-will-never-see-a-dime/>.

¹²¹ 9 U.S.C. § 2.

¹²² Compare, e.g., *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (holding that a state law was preempted by the FAA where it declared unenforceable any arbitration clause that did not comply with a state law notice requirement); *Southland v. Keating*, 465 U.S. 1, 10 (1984) (holding that a state statute requiring judicial consideration of certain state law claims and purporting to render “void” any agreement to the contrary conflicted with the FAA).

¹²³ See, e.g., 34 C.F.R. § 668.86 (providing that the Department may limit or terminate an institution’s participation in Title IV programs based on violations of any regulatory provision adopted under Title IV).

¹²⁴ *Concepcion*, 563 U.S. at 339.

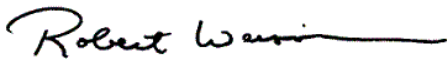
¹²⁵ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974).

once entered into by the parties, “are enforced according to their terms.”¹²⁶ Restricting Title IV funds in the manner that Public Citizen requests does nothing to interfere with that goal.

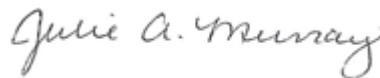
Indeed, the Supreme Court has repeatedly stated that “arbitration is a matter of contract,”¹²⁷ and that “the FAA does not require parties to arbitrate when they have not agreed to do so.”¹²⁸ Here, institutions have a choice. They remain free to use pre-dispute arbitration agreements with their students, but they may not—through the receipt of Title IV funds—require U.S. taxpayers to bear the risk of that decision. Conversely, they may opt to receive Title IV money, but they must agree as a reasonable condition on that funding not to use pre-dispute arbitration agreements with their students. Nothing in the FAA prevents anyone, including an educational institution, from agreeing *not* to arbitrate.

III. CONCLUSION

For the foregoing reasons, we urge that the Department move quickly to condition Title IV assistance on an institution’s commitment not to require its students to sign pre-dispute arbitration agreements.



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¹²⁶ *Hall St. Assoc.*, 552 U.S. at 593 (internal quotation marks omitted); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (“The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered . . .”).

¹²⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

¹²⁸ *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).