UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA ASSOCIATION OF PRIVATE POSTSECONDARY SCHOOLS,

Plaintiff,

v.

ELISABETH DEVOS, in her official capacity as Secretary of the U.S. Department of Education, *et al.*,

Defendants,

MEAGHAN BAUER and STEPHANO DEL ROSE,

Defendant-Intervenors.

Civil Action No. 17-999 (RDM)

REPLY IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In the course of its 2016 borrower defense rulemaking, the Department of Education (ED) considered significant evidence showing that proprietary institutions of higher education were harming students and the public fisc, and evading accountability for that harm by forcing students into confidential, individual arbitration. As a result, ED issued a rule that gave plaintiff CAPPS's members and other higher education institutions a choice. The schools remain completely free to force their students into mandatory arbitration agreements and forced arbitration waivers. Those agreements remain as enforceable in court as they were before the Borrower Defense Rule. But if schools choose to use and/or enforce such agreements, they can no longer rely on student aid funding under Title IV of the Higher Education Act. Despite CAPPS's rhetoric, the Rule "bans" nothing. As explained in Defendant-Intervenors' opening brief, neither the Federal Arbitration Act (FAA), the Higher Education Act, nor the Administrative Procedure Act (APA) bars ED from giving schools that choice. The Rule does not conflict with the FAA's requirements regarding judicial enforcement of arbitration contracts or its "equal-treatment" rule. The Rule is well within ED's rulemaking authority. And the Rule is more than adequately supported by the record and comports with APA standards of reasoned decisionmaking, regardless of CAPPS's disagreement with ED's policy choices.

ARGUMENT

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

As both Defendant-Intervenors and ED explained in their memoranda opposing CAPPS's summary judgment motion and supporting their own cross-motions, the Borrower Defense Rule's provisions concerning arbitration and class actions do not render any existing arbitration agreements unenforceable or prevent the formation of new enforceable arbitration agreements

between schools and their students. Instead, they condition a school's continuing eligibility to receive the financial benefits of participation in Title IV programs on its agreement not to enforce or enter into agreements with students mandating arbitration or prohibiting class actions for borrower-defense claims. Although CAPPS acknowledges the point, *see* Pl. Opp./Reply (ECF 100) 3–4, and does not challenge it, CAPPS nonetheless persists in referring to the Rule as a "Ban."

That the Rule undisputedly prevents neither the formation nor the enforcement of an arbitration agreement, however, makes any direct conflict between its terms and those of the FAA impossible, as the FAA provides only that arbitration agreements are valid and enforceable on the same terms as other contracts, 9 U.S.C. §§ 2, and sets forth mechanisms for their judicial enforcement, *see id.* §§ 3–16. Again, CAPPS does not contest the point, but argues instead that the Rule violates the "policy" of the FAA.

Statutory "policies," however, are enforceable only to the extent that the statute itself pursues them. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[W]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says … what it means and means … what it says.'"). Thus, in every Supreme Court case that CAPPS cites in support of its attempt to rely on the FAA's "policy," including *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the issue was whether an arbitration agreement was valid and enforceable according to its terms. That is, each case involved what the Supreme Court has described as the FAA's two central concerns: "the 'enforce[ment]' of arbitration agreements" and "their initial 'valid[ity].'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). CAPPS cites no support for its assertion that the "pro-arbitration" policy of the FAA extends beyond the validity and enforceability of arbitration agreements, and it does not attempt

to square its position with Justice Thomas's explanation that the "pro-arbitration" policy "is merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010) (citation omitted).

CAPPS's repeated assertions that the Rule "discriminates" against and "disfavors" arbitration suffers the same flaw: failure to acknowledge that the FAA's concerns about discriminating against and disfavoring arbitration properly apply only to laws and decisional rules that determine what agreements courts will enforce. Thus, the Supreme Court has explained that the FAA's "equal-treatment principle" prohibits courts from applying rules that disfavor arbitration agreements when they adjudicate "defenses" to the enforcement of an arbitration agreement. *Epic Sys*., 138 S. Ct. at 1622. That is, it prevents courts from "selectively finding arbitration contracts invalid" or "selectively refusing to enforce those agreements once properly made." *Kindred*, 137 S. Ct. at 1428. The Borrower Defense Rule requires neither selective invalidation of arbitration agreements nor selective refusal to enforce them, and CAPPS offers no example of the Supreme Court applying the nondiscrimination principle to rules that do not affect the validity or enforceability of arbitration agreements.

CAPPS tries to evade the point by asserting that "[t]he Ban defenders' argument that the FAA is implicated only where there is a directive to a court also falters because their defense of the Ban requires *this court* to rule that it is permissible to disfavor a certain category of arbitration agreements." ECF 100 at 6. This case does not, however, require this Court to hold that any arbitration agreement is invalid or unenforceable, which is the only type of "directive to a court" that the FAA's equal treatment principle addresses. CAPPS's effort to equate judicial review of a

regulation with a court's refusal to enforce an arbitration agreement is a classic apples-to-oranges comparison.

Ultimately, CAPPS's argument rests on its view that the policy embodied in the FAA is not just one of requiring enforcement of arbitration agreements, but one of promoting arbitration under any and all circumstances. But nothing in the Supreme Court's arbitration jurisprudence suggests the existence of that policy, let alone holds that such a policy, untethered to any statutory text, could serve as a basis for finding that an agency action is "not in accordance with law" under 5 U.S.C. § 706(2)(A). In particular, federal policy does not favor arbitration where parties choose, for whatever reason, not to engage in it. *See Granite Rock*, 561 U.S. at 300–02; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 66 (1995). And the FAA does not suggest that arbitration is always desirable, regardless of the circumstances. Indeed, the Supreme Court has recognized that arbitration may threaten the protection of statutory rights and, accordingly, has acknowledged agency authority to take appropriate action in such circumstances. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987). CAPPS points out that *Shearson* held an arbitration agreement enforceable and did not approve rules "banning" arbitration, ECF 100 at 14 n.9, but its observation is beside the point given that the Rule here does not prevent enforcement of any arbitration agreement. The important point is that *Shearson* recognized that agencies have power to address harmful applications of arbitration and may exercise that power if they do not contravene the FAA's requirements.

Thus, as CAPPS acknowledges, rules of the Financial Industry Regulatory Authority (FINRA), which are effective only if approved by the SEC, have long prohibited FINRA members (that is, securities broker-dealers) from entering into agreements that prohibit judicial class actions by requiring individual arbitration of all claims, even though the FAA itself renders such

agreements enforceable by a court. *See Charles Schwab & Co. Inc. v. FINRA*, 861 F. Supp. 2d 1063 (N.D. Cal. 2012); *see also* ECF 100 at 13–14. CAPPS does not suggest that the FINRA rule is invalid, but claims that it is based on the SEC's "explicit statutory authority to limit pre-dispute arbitration." ECF 100 at 14 (citing 15 U.S.C. § 78o(o)). The FINRA rule, however, long predates the Dodd-Frank Act provision[1] that conferred that authority on the SEC in 2010, *see Charles Schwab*, 861 F. Supp. 2d at 1068–69, and the FINRA rule's validity does not depend on the SEC's new authority under 15 U.S.C. § 78o(o). Section 78o(o) now gives the SEC authority to prohibit enforcement of arbitration agreements *notwithstanding* the FAA. The pre-existing FINRA rule, by contrast, imposes a condition on FINRA membership, just as the Borrower Defense Rule imposes conditions on schools that participate in federal financial aid programs. Neither rule renders an agreement entered into in violation of that condition invalid or unenforceable, and thus neither implicates the FAA's terms, or the policy they embody, requiring enforcement of arbitration agreements.

The FINRA rule, like the Borrower Defense Rule, illustrates that a statutory directive that arbitration agreements be *enforced* by courts does not foreclose debate over whether it is desirable that parties should enter into such agreement in all circumstances. *See Epic Sys.*, 138 S. Ct. at 1632. "[P]olicymakers in the political branches" remain free to "contest[]" that issue and take action on the basis of their conclusions as long as they do not contravene the FAA's directive "that arbitration agreements … must be enforced as written." *Id*. Although the FAA resolves the latter point, it does not address whether it is permissible to discourage parties from entering into contracts to arbitrate by requiring them to agree to forgo arbitration in order to obtain financial benefits from the federal government. Still less does the FAA require, as CAPPS insists, that agencies must offer financial

[1] Pub. L. No. 111-203, § 921, 124 Stat. 1376, 1841 (2010).

subsidies to entities that wish to impose mandatory arbitration because Congress has somehow dictated that agencies must always regard arbitration as beneficial. That policy can be found neither in the text of the FAA nor in its penumbra.

II. The arbitration and class-action provisions are within ED's statutory authority.

CAPPS's argument that ED lacks authority to condition Title IV eligibility on schools' agreement not to use arbitration agreements in ways that, as ED found, impede the goals of Title IV by hindering schools' accountability and responsibility is meritless. The broad authority granted by the statute, allowing the Secretary to require that program participation agreements (PPAs) include "such other provisions as the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of this part," 20 U.S.C. § 1087d(a)(6), is more than sufficient to sustain the arbitration and class-action provisions of the Borrower Defense Rule. Courts have often recognized that similar language is a "broad delegation of authority" that "leaves to the agency's discretion the choice of the extent and pattern of regulation that will best ensure" achievement of statutory goals. *Formula v. Heckler*, 779 F.2d 743, 758–59 (D.C. Cir. 1985). CAPPS's attempt to apply the principle of *ejusdem generis* to limit the Secretary's authority to protect the interests of the United States and promote the purposes of Title IV to the assertedly more specific grants of authority that precede it fails because those grants are themselves broad, substantive, and have no single, common characteristic that would provide a basis for restricting the authority conferred by the final clause. Put another way, the final clause here cannot be viewed as a "more generalized description" of "specific examples" that precede it. *United States v. Turkette*, 452 U.S. 576, 582 (1981).

Thus, CAPPS necessarily relies on its assertion that what would ordinarily be considered a capacious grant of authority nonetheless fails to support the arbitration and class-action provisions of the Borrower Defense Rule because agency actions concerning arbitration require a

"clear and manifest" statutory basis. CAPPS, however, has no answer to the point that all the Supreme Court precedents on which it relies for the requirement of "clear and manifest" statutory authorization refer to the authorization necessary to "displace the [FAA]," *Epic Sys.*, 138 S. Ct. at 1624—which the Borrower Defense Rule does not purport to do.

CAPPS attempts to extend the requirement of "clear and manifest" authorization to any agency action that does not *favor* arbitration. That argument, however, is entirely dependent on CAPPS's erroneous view that the "pro-arbitration" policy of the FAA extends beyond the requirement that arbitration agreements be treated as valid and enforceable and expresses a binding congressional preference for promoting arbitration in all circumstances. Because CAPPS's premise is wrong, the conclusion it seeks to draw from it is also erroneous: No clear and manifest authorization is required for an agency to discourage arbitration, or to decline to support it financially, in circumstances where the use of arbitration agreements—even if enforceable under the FAA—is damaging to the objectives of a federal spending program.

CAPPS insists that agencies do not have "unbridled authority" to impose conditions on participation in federal spending programs, ECF 100 at 9—a point that no one disputes. The limits on that authority, however, do not come out of thin air: They are either statutory or constitutional. As demonstrated above, however, the Rule does not exceed any limits imposed either by ED's organic statute or by the FAA. And the constitutional decisions that CAPPS cites get it nowhere. Of course, constitutional limitations on federal authority impose outer limits on the federal government's power to restrict state authority through Spending Clause legislation, *see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 876–78 (2012) (lead opinion), and the unconstitutional-conditions doctrine imposes an analogous limitation on the degree to which spending conditions may limit First Amendment freedoms and other personal constitutional rights, *see Rumsfeld v.*

Forum for Academic & Inst'l Rights, Inc., 547 U.S. 47, 59 (2006). But schools have no constitutional right to force students to sign predispute arbitration agreements or to participate in Title IV programs more generally, and requiring schools that receive federal funds to agree not to require arbitration thus does not approach the limits on federal authority to condition financial benefits.

For the same reason, CAPPS's continued insistence—unsupported by any argument—that the Borrower Defense Rule is "coercive," *see* ECF 100 at11 n.7, is irrelevant. There is no general prohibition against spending conditions that those who desire federal funding may feel economic pressure or compulsion to accept: Whether such pressure amounts to "coercion" is only a factor in determining whether a condition infringes a constitutional entitlement or right. *See Sebelius*, 567 U.S. at 585 (lead opinion). Indeed, it is ironic that freedom from economic compulsion should be invoked by arbitration proponents, who regularly extract arbitration agreements from consumers (here, proprietary school students) by offering a take-it-or-leave-it choice: If you want to attend our school, you agree to arbitration. That the Borrower Defense Rule may require a similar choice from schools does not render their agreement to forgo arbitration in return for federal funding any less legitimate than the agreements they extract from students to engage in arbitration. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418 (2016). As consumers have learned from long experience, the FAA's requirement that arbitration agreements be enforced on the same terms as other contracts is not a guarantee that parties will be free from economic pressure in deciding whether or not to enter into such agreements. Neither the FAA nor any other source of law prohibits the federal government from demanding that schools agree not to arbitrate if they choose to avail themselves of the benefits of federal funding.

III. The arbitration and class-action provisions are consistent with the Administrative Procedure Act.

CAPPS's argument that the Rule's limitation on the use of forced arbitration clauses and mandatory class-action waivers is arbitrary and capricious continues to be largely duplicative of its statutory arguments. Thus, CAPPS asserts that any rule that does not sing the praises of arbitration and class-action bans, in all circumstances, for all purposes, must be arbitrary and capricious. As explained above, this conclusion is not mandated by the FAA. It is not a requirement of reasoned decisionmaking under the APA, either. To the contrary, it would have been arbitrary and capricious for ED to ignore the extensive record evidence showing the harms that forced arbitration agreements and class-action waivers impose on students and the public fisc, as CAPPS suggests ED was required to do. ED properly examined this evidence and explained its conclusions. *See* Def.-Intervenors' Opening Br. (ECF 92) 27–32 (lengthy discussion of ED's weighing of costs and benefits, unrebutted by CAPPS).

ED relied on a range of evidence that demonstrated the harms caused by forced arbitration clauses and class-action waivers, in both the student-loan context and the consumer-finance context more generally, including cases against for-profit colleges; data from the American Arbitration Association; declarations from students; reports of government investigations; and social science literature. CAPPS continues to ignore the vast majority of that evidence, and focuses narrowly on a single study conducted by the Consumer Financial Protection Bureau (CFPB). Rather than acknowledge the full range of evidence in the record, CAPPS argues that, by pointing to the record as a whole, the Borrower-Intervenors are engaged in "attempted post-hoc justification," ECF 100 at 16, contrary to *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). This argument has no merit, however, because ED explicitly cited all of this evidence in the rulemaking.

See AR-A-96–105 (81 Fed. Reg. at 76,021–30); NPRM, AR-B-52–57 (81 Fed. Reg. at 39,380–85).

As to the CFPB study, although the Borrower-Intervenors devoted three pages of their opening brief to explaining why it was appropriate for ED to consider the CFPB study, ECF 92 at 32–35, CAPPS has not responded to that explanation. The Borrower-Intervenors also explained that, under binding precedent, ED was allowed to rely on the cumulative evidence before it, contrary to CAPPS's argument that ED was required to conduct its own independent study and could not extrapolate from the CFPB study. ECF 92 at 32–33 (citing *Mississippi v. EPA*, 744 F.3d 1334, 1345 (D.C. Cir. 2013); *Pub. Citizen Health Res. Grp. v. Tyson*, 796 F.2d 1479, 1495 (D.C. Cir. 1986); and *Ethyl Corp. v. EPA*, 541 F.2d 1, 37 (D.C. Cir. 1976) (*en banc*)). CAPPS has failed to respond to this case law or argument as well. The Court may thus treat these arguments as conceded. *See, e.g.*, *Hedgeye Risk Mgmt., LLC v. Heldman*, 271 F. Supp. 3d 181, 190–91 (D.D.C. 2017).

CAPPS also continues to raise its "reliance" argument. First, as the Borrower-Intervenors argued in their opening brief, in the situation presented here, the APA does not require any special consideration for reliance interests under *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), because the agency is not reversing a formal position or interpretation. As one court recently explained, *Encino Motorcars* and other cases finding rules invalid for their failure to consider "reliance interests" involved situations "where the agency had itself stated a contrary interpretation in the past." *Faith Int'l Adoptions v. Pompeo*, 345 F. Supp. 3d 1314, 1327 (W.D. Wash. 2018). The absence of any such explicit rule here, as in the *Faith International* case, "both lowers the justifiable reliance by private parties and diminishes the explanation necessary to support [the agency]'s new position, since there is no competing logic from a past policy

announcement." *Id.*; *see also City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 620 (E.D. Pa. 2017) (noting that in *Encino Motorcars* and related cases, "the agencies had an explicit rule in place, only to later issue the opposite rule with limited or no explanation").

Moreover, *Encino Motorcars* does not bar agencies from making changes that implicate reliance interests; all an agency must do is provide a "reasoned explanation" for making the change despite such interests. *See* 136 S. Ct. at 2125–26. Here, although ED did not reverse itself, it did provide a reasoned explanation as to why the Rule was justified despite its costs: As noted in the Borrower-Intervenors' opening brief, ED made *numerous* references to the costs that the Rule would impose on regulated entities, including the specific costs identified by CAPPS as deriving from reliance interests. *See* ECF 92 at 36–37 (collecting references throughout Rule). CAPPS's suggestion that ED only made "passing comments to a recognition of increased 'expenses'" on a single page, ECF 100 at 17, is not an accurate description of the record. That ED did not use the magic word "reliance" is irrelevant, because ED substantively addressed the costs that CAPPS claimed its members would suffer as a result of harms to their reliance interests. The agency's explanation is similar to those that courts have repeatedly found constituted sufficient acknowledgments of reliance interests. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 709–10 (D.C. Cir. 2016); *Estes v. U.S. Dep't of the Treasury*, 219 F. Supp. 3d 17, 33 (D.D.C. 2016). Based on a range of evidence, ED reasonably concluded that costs to institutions, including those CAPPS identified as deriving from their reliance interests, were justified by the benefit to students and the public fisc. That conclusion is permissible under the APA. *Cf. In re FCC 11-161*, 753 F.3d 1015, 1143 (10th Cir. 2014) ("When the FCC drew on this empirical judgment, it did not ignore the CLECs' reliance interests; instead, the FCC concluded that these interests did not trump other competing considerations.").

IV. There is no basis for an involuntary remand.

CAPPS continues to argue that the Supreme Court's decision in *Epic Systems* requires a remand, even though, as explained above, *Epic Systems* does not control the outcome of this case, and ED does not seek a remand. CAPPS ignores the case law cited by Borrower-Intervenors' that establishes why a remand is not justified in this case, *see* ECF 92 at 36–37, as well as its own concession that *Epic Systems* simply "reflects longstanding precedent," Pls.' Opening Br. (ECF 83-1) at 27 n.16. CAPPS's only response is to make a new argument, based on *Chenery*, that statements by "the Justice Department" which, by law, speaks for ED in this Court, cannot explain why a remand would be inappropriate because those statements constitute an "after-the-fact justification." This response makes no sense, as *any* response to an argument that intervening developments necessitate remand would be an "after-the-fact justification": An agency could not have addressed the relevance of post-rule developments in a rule itself. CAPPS's argument suggests that a remand would be required whenever a rule's challenger raises an intervening factual or legal development, notwithstanding the persuasiveness of the agency's explanation of why a remand is unneeded. Notably, CAPPS cites no cases for this principle.

Neither ED nor the Borrower-Intervenors rely here on anything outside the agency's contemporaneous explanation to support the challenged rule; they are simply responding that CAPPS's speculation about *Epic Systems*' potential impact on the agency's deliberations is insufficient to justify an involuntary remand. Thus, *Chenery* is not implicated. Because ample grounds exist on the face of the Rule to support ED's action in promulgating it, *Epic Systems* does not require a remand.

CONCLUSION

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

Respectfully submitted,

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Dated: May 10, 2019