No. 17-10238

In the United States Court of Appeals for the Fifth Circuit

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, doing business as LAKE HOUSTON CHAMBER OF COMMERCE; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

AMERICAN COUNCIL OF LIFE INSURERS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – TEXAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – AMARILLO; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – DALLAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – FORT WORTH; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – GREAT SOUTHWEST; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – WICHITA FALLS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY; MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas (The Honorable Barbara M. G. Lynn)
Case Nos. 3:16-cv-1467, 3:16-cv-1530, 3:16-cv-1537

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

DEEPAK GUPTA
MATTHEW W.H. WESSLER
MATTHEW SPURLOCK
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Amicus Curiae American Association for Justice

July 6, 2017

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

No. 17-10238

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; FINANCIAL SERVICES INSTITUTE, INCORPORATED; FINANCIAL SERVICES ROUNDTABLE; GREATER IRVING-LAS COLINAS CHAMBER OF COMMERCE; HUMBLE AREA CHAMBER OF COMMERCE, doing business as LAKE HOUSTON CHAMBER OF COMMERCE; INSURED RETIREMENT INSTITUTE; LUBBOCK CHAMBER OF COMMERCE; SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

AMERICAN COUNCIL OF LIFE INSURERS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – TEXAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – AMARILLO; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – DALLAS; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – FORT WORTH; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – GREAT SOUTHWEST; NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS – WICHITA FALLS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

INDEXED ANNUITY LEADERSHIP COUNCIL; LIFE INSURANCE COMPANY OF THE SOUTHWEST; AMERICAN EQUITY INVESTMENT LIFE INSURANCE COMPANY;

MIDLAND NATIONAL LIFE INSURANCE COMPANY; NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR; R. ALEXANDER ACOSTA, SECRETARY, U.S. DEPARTMENT OF LABOR,

Defendants-Appellees.

Under Fifth Circuit Rules 28.2.1 and 29.2, the undersigned counsel of record certifies that all interested persons and entities who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the opening briefs of Plaintiffs-Appellants, except for the following listed persons and entities:

1. American Association for Justice (AAJ) is an *amicus curiae* in this case. Undersigned counsel certifies, under Federal Rule of Appellate Procedure 26.1(a), that AAJ is not a publicly held corporation and does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

2. Deepak Gupta, Matthew W.H. Wessler, and Matthew Spurlock are counsel for *amicus curiae* AAJ.

3. Washington Legal Foundation, *amicus curiae* in support of appellants.

4. Cory L. Andrews, counsel for *amicus curiae* Washington Legal Foundation.

5. Thrivent Financial for Lutherans, *amicus curiae* in support of appellants.

6. Andrew B. Kay, counsel for *amicus curiae* Thrivent Financial for Lutherans.

7. American Association of Retired Persons, *amicus curiae* in support of appellees.

8. American Association of Retired Persons Foundation, *amicus curiae* in support of appellees.

9. Americans for Financial Reform, *amicus curiae* in support of appellees.

10. Better Markets, *amicus curiae* in support of appellees.

11. Consumer Federation of America, *amicus curiae* in support of appellees.

12. National Employment Law Project, *amicus curiae* in support of appellees.

13. Mary Ellen Signorille, counsel for *amici curiae* AARP, AARP Foundation, Americans for Financial Reform, Better Markets, Consumer Federation of America, and National Employment Law Project.

/s/ Deepak Gupta
Attorney of Record for Amicus
American Association for Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative materials

Regulatory materials

Other authorities

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Until this week, the federal government had been successfully defending the class-action provision in the Department of Labor's fiduciary rule. But three days ago, the federal government filed a brief in this Court that abandoned the government's defense of an important regulatory provision designed to preserve investor class actions. Because this provision would otherwise go undefended, *amicus* American Association for Justice (AAJ) seeks time at oral argument and files this brief to explain why it should be upheld.

As the government previously explained, conditioning an exemption from ERISA's prohibited-transaction restrictions on the preservation of an investor's right to participate in a class action "do[es] not interfere" with the purposes of the Federal Arbitration Act (FAA). Dist. Ct. Dkt. 68, at 92. This is so because the class-action provision "does not purport to render any 'written provision' providing for arbitration invalid, revocable, or unenforceable" and does not "prohibit class action waivers." *Id.* at 92-93. Instead, "institutions and advisers remain free to invoke and enforce arbitration provisions, including those that waive or qualify the right to bring a class action in court." *Id.* at 93.

---

[1] All parties consent to this brief, and no party's counsel authored it in whole or in part. Apart from amicus and its counsel, no person contributed money to fund the brief's preparation or submission.

In the district court, the government's argument carried the day. The court correctly held that the rule does not ban arbitration agreements. Quite the opposite: under the rule, "any arbitration provision without the class action provision would remain valid, irrevocable, and enforceable." ROA 9952. The *only* consequence of a refusal to comply would be to render the noncomplying person (or entity) ineligible for an exemption allowing an otherwise prohibited transaction. But that consequence does not implicate the FAA at all. The industry groups challenging the rule "are not being coerced into relying on a particular exemption" and have "several plausible options and alternatives," including "adjusting compensation models or innovating practices." ROA 9953. In this way, the district court explained, the rule's class-action provision is no different from similar conditions under the Financial Industry Regulatory Authority's (FINRA) Customer Code that have been in place—and governed the same institutions and advisers—since 1992. ROA 9951. Both FINRA's class-action preservation conditions and those in the rule at issue here serve the same purposes: they help safeguard retirement investors and prevent systemic misconduct by allowing individual investors and retirees to band together to redress injury.

Having persuaded the district court to uphold its rule, the government now abandons it. In its brief filed two days ago, the new Administration broke the news that it is not only flipping the government's position on the legal issues but is going one extraordinary step further—asking this Court to *vacate the government's own rule*. In other words, the government's lawyers at the Department of Justice are asking this Court to vacate a rule that the Department of Labor (a) promulgated after thorough notice-and-comment rulemaking, (b) successfully defended in court, and (c) is currently required to implement. And, to make matters worse, the government seeks this relief based *only* on its own reconsideration of a different legal issue raised in *NLRB v. Murphy Oil USA, Inc.*, Nos. 16-285, 16-300, and 16-307 (U.S. June 16, 2017). *See* U.S. Br. 59.

No law supports this back-door effort to repeal a valid rule through litigation. For starters, an agency issuing a legislative rule "is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment." *Nat'l Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992). And the government's "dramatic change in position"—especially one that "departs markedly" from its contemporaneous view at the time that it promulgated the rule—is entitled to no deference. *Wyeth v. Levine*, 555 U.S. 555, 579 & n.13 (2009).

Because of the government's late-breaking change in position, no party before this Court is defending either the class-action provision or the district court's decision upholding it. The Department of Labor, moreover, has recently requested comments about the provision—including comments on whether the "exemption structure should be retained or modified." U.S. Br. 93; *see* 82 Fed. Reg. 31278 (July 6, 2017). In light of these developments, the Court may wish to hold in abeyance the challenge to the class-action provision. In other recent appeals in which agencies (including the Department of Labor) have indicated a possible rule change, courts have done just that. *See, e.g*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, No. 17-10054 (5th Cir. June 16, 2017); *Sw. Elec. Power Co. v. Envtl. Prot. Agency*, No. 15-60821 (5th Cir. Apr. 24, 2017); *AHCA v. Dep't of Labor*, No. 16-cv-233 (N.D. Miss. June 8, 2017); *West Virginia v. Envtl. Prot. Agency*, No. 15-1363 (D.C. Cir. Apr. 28, 2017). Requiring the agency to formally modify or reaffirm its rule through the proper channels—instead of through the back door of litigation—is the prudent course of action. *See Clean Air Council v. Pruitt*, No. 17-1145, 2017 WL 2838112, at *9 (D.C. Cir. July 3, 2017).

If this Court nonetheless decides to reach the merits of the challenge to the class-action provision, it should grant leave to *amicus* American Association for Justice (AAJ) to present oral argument explaining why the class-action provision (and the district court's decision upholding it) should be affirmed. AAJ (formerly known as the Association of Trial Lawyers of America) was established in 1946 to safeguard victims' rights, strengthen the civil justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. Throughout its history, AAJ has served as a leading advocate for the right to trial by jury and access to the courts. In July 2015, AAJ submitted comments on the proposed rule and, in the district court, submitted the only brief focused on the class-action provision. AAJ files this brief to show not only that the Department of Labor acted within its authority when it conditioned exemptions from its rule on the preservation of investors' ability to participate in class actions but also that its rule does not conflict or interfere with the FAA.

SUMMARY OF ARGUMENT

Since 1992, FINRA—under the SEC's oversight—has allowed arbitration of individual investor disputes while preserving the right of investors to participate in class actions. Many, if not most, investment firms and broker-dealers covered by the Department of Labor's new fiduciary conflict-of-interest rule are *already* covered by these existing rules, which have governed the securities industry for more than two decades.

The Department's new rule is just one among several steps taken by Congress and federal agencies in recent years to curb companies' efforts to shield themselves from class actions through the fine print. In the Dodd-Frank Wall Street Reform Act of 2010, Congress banned forced arbitration in all residential mortgages, and delegated to the SEC and the new Consumer Financial Protection Bureau (CFPB) broad authority to restrict arbitration in investor and consumer contracts. As mandated by Congress, the CFPB recently released the most comprehensive empirical study ever conducted on forced arbitration. Its findings are stark: class-action bans do not channel claims to a better, faster, cheaper system of dispute resolution. Instead, they kill the claims altogether. Their real-world effect is to shield corporate misconduct from public oversight, encourage future wrongdoing, and inhibit development of the law.

Beyond the SEC and CFPB, a range of federal agencies have moved to restrict either forced arbitration, class-action bans, or both. These include the Department of Defense (to protect servicemembers from predatory lenders), the Department of Agriculture (to protect poultry farmers from agribusinesses), the Department of Education (to protect students from for-profit trade colleges), the Department of Health and Human Services (to protect nursing-home patients), and the Federal Trade Commission (to protect consumers asserting warranty claims).

In two key respects, the Department of Labor's new rule is more modest than most of these measures. *First*, it does not preclude the enforcement of *any* arbitration agreements. By its terms, the rule "does not purport to render an arbitration provision in a contract between a Financial Institution and a Retirement Investor invalid, revocable, or unenforceable." 81 Fed. Reg. 21089, 21118 (Apr. 8, 2016). Instead, firms "remain free to invoke and enforce arbitration provisions, including provisions that waive or qualify the right to bring a class action." *Id*. *Second*, the rule affects only firms that *choose* to take advantage of the prohibited-transaction exemptions. If a firm decides to ban class actions, the only consequence under federal law is that its contract "does not meet the conditions" for exemption. *Id*. And if it nevertheless imposes class bans while engaging in prohibited transactions, those bans would still be enforceable in court. Its compensation, however, could be subject to an excise tax, which "leaves an individual with a lawful choice to do or not do a certain act." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012).

As the district court recognized (at ROA 9952-53) these twin features unmistakably differentiate this rule from the California and NRLB rules struck down in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Those rules were held to violate the FAA because they (1) rendered arbitration clauses with class-action bans unenforceable, and (2) left companies with no choice but to comply. The Department's rule, by contrast, is fully consistent with the FAA's command that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any such contract." 9 U.S.C. § 2. And it does not violate the FAA's core purpose of "ensur[ing] that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344. Again, the rule doesn't prevent the enforcement of *any* agreement.

That is why the district court soundly rejected each of the Chamber's FAA-based arguments. Because the rule is compatible with the "liberal federal policy favoring arbitration agreements," Chamber Br. 59, the district court correctly determined that the rule "d[id] not violate the FAA's primary purpose" of ensuring that "private arbitration agreements are enforced." ROA 9952-53. And, because the Supreme Court has held that the FAA's policies do not preclude a federal agency from employing its delegated authority from Congress to adopt "rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987), the district court also rightly concluded that the Department "has properly used its exemptive authority under ERISA" in promulgating the rule, ROA 9953.

BACKGROUND

A. Congress and federal agencies have limited the use of forced arbitration agreements and class-action bans across a wide range of areas.

The SEC was among the first federal agencies to regulate arbitration to preserve the availability of class actions. In 1992, at the request of FINRA (the financial industry's self-regulatory organization), the SEC approved a rule governing "the content of [any] pre-dispute arbitration agreements" entered into between FINRA members and their customers. 52 S.E.C. Docket 2189, 1992 WL 324491 (Oct. 28, 1992). Because the SEC "believe[d] that investor access to the courts should be preserved for class actions . . . arising out of securities industry disputes," it endorsed a rule allowing individual arbitration but prohibiting FINRA members from compelling arbitration against members of certified or putative class actions.[2] *Id.* It also required that any arbitration agreement "clearly state that class action claims are specifically outside the scope of arbitration contracts entered into by members." *Id*. For nearly twenty-five years, every FINRA member—including many entities that are subject to the Department of Labor's rule here—has complied with this regime. *See* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 Stan. J. Complex Litig. 1, 24–29 (2012).

Among financial regulators, the SEC is not alone. For investors subject to oversight by the Commodities Futures Trading Commission, it has been the rule for forty years that any arbitration agreement contained in a commodities contract must abide by certain restrictions. 41 Fed. Reg. 42942 (Sept. 29, 1976). In 2003 and 2004, Fannie Mae and Freddie Mac both decided to stop purchasing all mortgages with forced arbitration clauses. Kenneth R. Harney, *Fannie Follows*

[2] *See* FINRA Code of Arbitration Procedure for Customer Disputes 12204(d); S.E.C., Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions From Arbitration Proceedings, 57 Fed. Reg. 52659, 52661 (Nov. 4, 1992) (citing Securities and Exchange Act, section 19(b)(1), 15 U.S.C. § 78s(b)(1), and Rule 19b-4, 17 C.F.R. 249.819).

Freddie in Banning Mandatory Arbitration, Wash. Post, Oct. 9, 2004, http://wapo.st/2bm97eb. And perhaps most significantly, in May of last year—following its congressionally mandated study—the CFPB proposed a rule to "prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court" and require companies "to submit certain records relating to arbitral proceedings to the Bureau," effectively creating a public record of how consumers fare. 81 Fed. Reg. 32830, 32830 (May 24, 2016).

Beyond the financial and investment-services industry, many regulators have likewise moved to limit forced arbitration. The Department of Defense has used its authority under the Military Lending Act to ban arbitration in certain loans made to servicemembers. *See* 10 U.S.C. § 987(e) (making certain extensions of credit to servicemembers unlawful where "the creditor requires the borrower to submit to arbitration"); *id.* § 987(f)(1) (making a knowing violation a misdemeanor); 80 Fed. Reg. 43559 (July 22, 2015) (expanding definition of covered consumer credit and banning arbitration clauses in such products). Department of Education regulations prohibit schools participating in its direct loan program from entering into pre-dispute agreements with students that mandate arbitration of certain claims or waive their right to participate in class actions. *See* 81 Fed. Reg. 75926 (Nov. 1, 2016). The FTC's regulations implementing the Magnuson-Moss Warranty Act have barred the use, in consumer warranty agreements, of arbitration agreements that would result in binding decisions. *See* 80 Fed. Reg. 42710 (July 20, 2015). The Department of Transportation, under its broad statutory authority, has also long restricted the use of arbitration in the airline industry. *See* 76 Fed. Reg. 23110, 23155 (Apr. 25, 2011) (prohibiting a U.S. carrier "from including language in its contract . . . precluding a passenger from bringing a consumer-related claim involving a domestic flight against the carrier in any court of competent jurisdiction"). So too with the Department of Agriculture, which has restricted the ability of companies to force arbitration on poultry farmers by requiring that production contracts include language on the signature page allowing farmers to decline arbitration. 76 Fed. Reg. 76874 (Dec. 9, 2011). And last year the Department of Health and Human Services finalized new rules restricting the use of forced arbitration by any long-term care facility participating in Medicare and Medicaid. 80 Fed. Reg. 42167 (July 16, 2015).

And, in perhaps the most sweeping agency action thus far, the National Labor Relations Board in 2012 issued an order ruling that an employer violates the National Labor Relations Act when it requires workers to waive their right to maintain class or collective actions. *See In re D.R. Horton, Inc.*, 357 NLRB 2277, 2012 WL 36274 (2012). As a result, the NLRB adopted a policy that any employment contract with such a waiver is "unlawful." *Id.* at 2280.[3]

For its part, Congress, too, has often prohibited the use or enforcement of forced arbitration for certain sorts of statutory claims. *See, e.g.*, 7 U.S.C. § 26(n)(2) (banning enforcement of forced arbitration clauses in CFTC whistleblower suits); 15 U.S.C. § 1226(a)(2) (banning enforcement of forced pre-dispute (but not voluntary post-dispute) arbitration clauses in motor vehicle franchise contracts). In other contexts, it has restricted who can take advantage of a particular arbitration agreement, for example, by barring certain private federal contractors from enforcing pre-dispute arbitration agreements in any case involving either claims under Title VII of the Civil Rights Act or common-law sexual assault or harassment claims. *See* Department of Defense Appropriations Act 2010, Pub. L. No 111–118, § 8116, 123 Stat. 3409, 3454 (2009) (enforcing such restrictions for large defense contractors as a condition of federal funding); and Consolidated

[3] This Court, of course, rejected the Board's effort to restrict class waivers under the NLRA, *see D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), though, as we explain below, neither that holding nor its reasoning apply here. Recently, three other circuits have called this Court's decision into question, *see NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016). The Supreme Court's grant of certiorari on this question will shed additional light on the Board's effort. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-307). At any rate, the Department's rule here does not come close to contravening *D.R. Horton*.

Appropriations Act 2016, Pub. L. No. 114–113, § 8096, 129 Stat. 2242, 2374 (2015) (same).

B. A growing body of empirical evidence shows that class-action bans suppress claims, thwart the enforcement of statutory rights, and inhibit development of the law.

These many agency and congressional efforts to regulate the use of forced arbitration build on an emerging body of empirical research focused on the effect of forced arbitration in standard-form contracts. This research has demonstrated that, by taking advantage of clauses inserted into take-it-or-leave-it contracts that ban class actions, companies across sectors have succeeded in suppressing claims and sidestepping whole swaths of law—a point that even major companies openly acknowledge. *See, e.g.*, Discover Financial Services, Annual Report (Form 10-K) (Feb. 25, 2015), at 43 ("[W]e have historically relied on our arbitration clause in agreements with customers to limit our exposure to consumer class action litigation . . . ."). As a result, cases that previously would have been litigated and publicly recorded are now either diverted to a private arbitrator or (more likely) not brought at all—resulting in what one agency head has called a "legal lockout." Richard Cordray, Director, Consumer Fin. Prot. Bureau, Remarks at the Field Hearing on Arbitration Clauses (May 5, 2016), http://bit.ly/1UCGKWT.

Consider the CFPB's recent study on the use of arbitration agreements—the single most "comprehensive empirical" look at class-action bans and forced arbitration. *See* Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress* 2 (2015), *available at* http://bit.ly/19cVrvE. In March 2015—after nearly four years of study—the Bureau released its long-awaited report. It found that the use of class-action bans in arbitration agreements does not channel claims into a cheaper, faster alternative forum. Instead, these clauses effectively suppress claims altogether and immunize companies from accountability. 81 Fed. Reg. 32830, 32859.

One example from the CFPB's report illustrates the point. The Bureau's research included a case study of recent class actions filed against twenty-three banks for illegally charging consumers millions of dollars in excessive overdraft fees. *Id.* at § 8, at 39-46 (discussing *In Re Checking Account Overdraft Litig.*, 685 F.3d 1269 (11th Cir. 2012)). All of the banks had the same practice. Consumers reached eighteen settlements, resulting in a total of $1 billion in cash relief that was transferred directly to the bank accounts of over twenty-eight million people. But when the Bureau reviewed the outcomes in cases against five banks that had forced consumers into individual arbitration, it was unable to verify that even one consumer had received any relief.

Data from established arbitration providers reinforces the Bureau's conclusions. The Bureau reviewed several years of records from the leading arbitration provider documenting the amount of compensation consumers received for small-dollar claims. It was able to identify only *four* consumers that had received affirmative relief on claims of less than $1,000, compared to the tens of millions of people who got relief through group litigation. *Id.* at § 5, at 13. The amounts of recoveries were also remarkably one-sided. The agency found that class actions returned over $200 million annually in settlements for consumers, while disputes settled through arbitration netted just over $350,000 in a two-year period. Press Release, Consumer Financial Protection Bureau, CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers (Mar. 10, 2015), http://bit.ly/2bmlPty.

The upshot: though class actions offer the most "effective means of securing relief for large numbers of consumers affected by common legally questionable practices," arbitration agreements "block many class action claims that are filed and discourage the filing of others." 81 Fed. Reg. 32830, 32855; *see also id.* at 32830 (explaining the study's findings that class-action waivers "are being widely used to prevent consumers from seeking relief from legal violations on a class basis" despite the fact that "consumers rarely file individual lawsuits or arbitration cases to obtain such relief").

C. The Department's rule encourages the availability of class actions but does not require the invalidation of a contract that contains a class-action ban.

Like other agencies, the Department of Labor has sought to protect investors by ensuring the availability of class actions. The purpose of its rule is much the same as other agency-approved rules: It "ensure[s] that Retirement Investors receive the full benefit of the exemption's protections by preventing them from being contracted away." 81 Fed. Reg. 21089, 21115. Class actions, the Department explained, "address systemic violations affecting many different investors" and "create[] a powerful incentive for Financial Institutions to carefully supervise individual Advisers, and ensure adherence" to the exemption standards. *Id.* at 21117. The Department also recognized that "[o]ften the monetary effect on a particular investor is too small to justify the pursuit of an individual claim, even in arbitration"—meaning that the "ability to bar investors from bringing or participating" in a class action "would undermine important investor rights and incentives for Advisers to act in accordance with the Best Interest standard." *Id.*

Compared with many other agency efforts, however, the Department's approach to protecting the class action is far more modest. By its terms, the rule denies "relief" for an "exemption" from ERISA's prohibited transactions "if a Financial Institution's contract contains" a "provision under which the Plan, IRA, or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution." 81 Fed. Reg. 21002, 21041 (Apr. 8, 2016).

But the rule "does not purport to render an arbitration provision in a contract between a Financial Institution and a Retirement Investor invalid, revocable, or unenforceable" 81 Fed. Reg. 21089, 21118. And it expressly does not "prohibit" class-action waivers. *Id.* Quite the opposite: As the Department explained in its commentary, "[b]oth Institutions and Advisers remain free to invoke and enforce arbitration provisions, including provisions that waive or qualify the right to bring a class action or any representative action in court." *Id.* The Department's rule also "does not prevent" investors from "voluntarily agreeing to arbitrate" class claims "after the dispute has arisen" or, like FINRA's approach, "permitting mandatory pre-dispute arbitration for individual claims." *Id.* at 21116.

If a contract prohibits investors from bringing class actions in court, the only consequence under federal law is that "such a contract simply does not meet the conditions for relief from the prohibited transaction provisions of ERISA and the Code" and "the exemption is unavailable." *Id.* at 21118, 21099. As a result, "the Financial Institution and Adviser would remain fully obligated under both ERISA and the Code to refrain from engaging in prohibited transactions." *Id.* at 21118. The statutory penalty for ignoring this command would be "the imposition of an excise tax under the Code, payable to the Treasury," not the invalidation of the class-action ban or contract. *Id.* at 21111.

ARGUMENT

THE FIDUCIARY RULE'S CLASS-ACTION PROVISION IS A VALID EXERCISE OF THE DEPARTMENT'S AUTHORITY THAT DOES NOT CONFLICT WITH THE FEDERAL ARBITRATION ACT

I. The Department acted well within its statutory authority when it conditioned an exemption on the availability of class actions.

The Department's modest approach to conditioning an exemption on the availability of class actions is well within its delegated regulatory authority. The rule is not only consistent with "Congress' desire to offer employees enhanced protection for their benefits," *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105, 114 (2008) (internal quotations omitted), but specifically falls within the requirement that the Department restrict the receipt of conflicted compensation. ERISA section 408(a) authorizes the Secretary to "grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of [ERISA's prohibited transactions]." 29 U.S.C. § 1108(a). As part of the Department's exemption, it has required covered entities—"[a]s a condition of receiving compensation that would otherwise be prohibited under ERISA and the Code"—to "adhere" to certain standards "set forth in an enforceable contract" with each investor. 81 Fed. Reg. 21089, 21090. Allowing class actions in court is one of these standards.

Yet the Chamber challenges the Department's authority head-on. In its view, the Department's decision to impose additional "exemptive" criteria qualifies as "backdoor regulation." Chamber Br. 47. But there is nothing "backdoor" about the Department's decision to impose additional requirements on institutions and advisers before they may properly engage in prohibited transactions. The statute itself makes this clear. It places three specific limitations on the Secretary's authority to grant a conditional exemption: The Secretary "may not grant an exemption" unless he "finds that such exemption is—(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan." 26 U.S.C. § 4975(c)(2). The Chamber makes no attempt to show that the arbitration-related restrictions are inconsistent with these requirements—for good reason. The Secretary explicitly found that conditioning an exemption on the availability of class actions "satisfies these requirements" because, "consistent with the position of the SEC and FINRA, . . . courts are generally better equipped to handle class claims than arbitration procedures." 81 Fed. Reg. 21089, 21118. That determination is entitled to "great deference." *AFL-CIO v. Donovan*, 757 F.2d 330, 343 (D.C. Cir. 1985).

This species of delegated authority is neither controversial nor novel. When a "statute expressly grants the Secretary authority to grant exemptions," the

Secretary's determinations are "entitled to great deference." *Id.*; *see also City of New York v. Slater*, 145 F.3d 568, 570-71 (2d Cir. 1998). The Supreme Court, in fact, has construed similar grants of "broad authority" as delegating an agency "expansive power" to "ensure that arbitration procedures adequately protect statutory rights." *McMahon*, 482 U.S. at 233-34.

It is also irrelevant that the Department's rule here is broader than it was in 1975. The Chamber seems to think (at 49) that, because the Department's rule here imposes a set of "new conditions," it has exceeded its authority. But agencies are "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). That the Department's earlier rule conditioned exemptions on a more narrow set of criteria does not mean that those rules must "last forever." *Id.* An agency "must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (internal quotations omitted). The Department has done just that here.

II. The rule is fully consistent with the Federal Arbitration Act.

A. The rule does not preclude the enforcement of any arbitration agreements.

The FAA provides that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy . . . *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any such contract." 9 U.S.C. § 2 (emphasis added). Its purpose is "to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344. The Chamber argues that the rule violates this command, and frustrates the FAA's purpose, by "attempting to dictate the terms of arbitration agreements through the . . . exemption." Chamber Br. 60.

The Department's rule does no such thing. Instead, as the district court explained "the exemptions' contract requirements do not render arbitration agreements between a financial institution and investor invalid, revocable, or unenforceable." ROA 9951. Institutions and advisers "remain free to invoke and enforce arbitration provisions, including provisions that waive or qualify the right to bring a class action or any representative action in court." 81 Fed. Reg. 21089, 21118. The consequence of including such a provision is simply that the contract will "not meet the conditions" for the exemption, so that conflicted compensation will be subject to taxation. *Id.* The conditions placed on the exemption, however, "do[] not purport to render an arbitration provision in a contract between a Financial Institution and a Retirement Investor invalid, revocable, or unenforceable." *Id.* Indeed, the Department has specifically disclaimed the possibility that the rule may be used to render an arbitration clause invalid. *Id.* ("If a Financial Institution enters into a contract requiring binding arbitration of class claims, the Department would not purport to invalidate the provision."). The Chamber ignores every one of these statements.

To win, the Chamber must convince this Court that the rule is something other than what it is. It takes on that task by, in effect, inventing a different rule—suggesting that the plain words contained in the rule cannot be taken at face value. But the Chamber never explains why the Court should not simply read the rule as it is written. *See Rucker v. Wabash R.R. Co.*, 418 F.2d 146, 149-50 (7th Cir. 1969) (administrative rules "are to be construed to effectuate the intent of the enacting body," and court must "look first to the plain language" and the "legislative purpose behind its enactment").

In short, the FAA poses no barrier here. It requires only that courts "enforce agreements to arbitrate according to their terms," *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012), but it "does not confer a right to compel arbitration of any dispute at any time," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989). Because the Department's rule does not affect the enforceability of agreements one way or another, it does not even implicate the FAA. That makes this rule fundamentally different from the California state-law and NLRB rules at issue in *Concepcion* and *D.R. Horton*, both of which directly conditioned the enforcement of arbitration clauses on the availability of class procedures. *Compare D.R. Horton*, 737 F.3d at 358 (holding that the NLRB violated "the requirement under the FAA that arbitration agreements must be enforced according to their terms") *with* 81 Fed. Reg. 21089, 2111 (rule's "exemption does not purport to render an arbitration provision . . . invalid, revocable, or unenforceable").

The Supreme Court's most recent FAA opinion neither undermines nor expands these basic principles. In *Kindred Nursing Centers Ltd. Partnership v. Clark*, the Court simply applied the well-settled rule of FAA preemption, first announced in *Concepcion*, to a Kentucky state law that failed "to put arbitration agreements on an equal plane with other contracts." 137 S. Ct. 1421, 1427 (2017) (explaining that the Kentucky law "did exactly what *Concepcion* barred"). That rule of preemption has no application here: FAA preemption principles apply only to *state* laws—not federal regulations—that "discriminat[e] on [their] face against arbitration." *Id.* at 1426; *see also* U.S. Br. 61 ("Of course, the question of whether the enforcement of a given state law is conflict preempted under the FAA does not control the question of whether the enforcement of an analogous federal law would be precluded by the FAA"). And, in any event, under the Department's rule, advisors indisputably remain free to invoke and enforce arbitration provisions, including provisions that waive or qualify the right to bring a class action or any representative action in court.

B. The rule covers only those who choose to invoke an exemption.

Even apart from the fact that the rule does not prevent the enforcement of any arbitration agreements, the voluntary nature of the rule provides another, independent reason why this case is controlled by neither *Concepcion* nor *D.R. Horton*.

First, institutions may freely choose whether to either (1) continue to receive conflicted compensation under the conditions set forth by the best-interest-contract exemption or (2) avoid those conditions by "structur[ing] their operations to avoid prohibited transactions." *See* 81 Fed. Reg. 21089, 21104. The Chamber accepts that this is the correct reading of the rule but denies that advisers may freely make this choice, analogizing to Spending Clause cases like *South Dakota v. Dole*, 483 U.S. 203 (1987), and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). That is a stretch, to put it mildly. Spending Clause jurisprudence says nothing about the federal government's ability to impose obligations on regulated *private parties*, and specifically rests on the States' unique status as "separate and independent sovereigns." *NFIB*, 567 U.S. at 589. In any event, the rule's exemptions are a far cry from the coercion inherent in the federal government's ability to withhold all Medicaid payments from a State. *Id.* at 585. And the Chamber offers nothing more than speculation to support its hyperbolic claim (at 62) that this rule hands industry participants "no choice at all."

Second, even if they have freely decided to obligate themselves to the rule's restrictions, institutions face a second choice: They may lawfully choose between (1) complying and being exempt from the excise tax on prohibited transactions, or (2) not complying and being subject to the tax. That is voluntary as a matter of law; the "imposition of a tax nonetheless leaves an individual with a *lawful choice* to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." *Id.* at 574 (emphasis added).

In *NFIB*, the Court determined that the Affordable Care Act's imposition of a "[s]hared responsibility payment" should be considered a tax for several distinct reasons, including that (1) the payment "is paid into the Treasury," (2) "[t]he requirement to pay is found in the Internal Revenue Code and enforced by the IRS," and (3) it "yields the essential feature of any tax: it produces at least some revenue for the Government." *Id.* at 2594. Applying this approach compelled the conclusion that "the mandate is not a legal command to buy insurance," *id.* at 563-64, and further that failure to comply need not be considered "unlawful," as it triggered no "negative legal consequences . . . beyond requiring a payment to the IRS," *id.* at 568. The excise tax on prohibited transactions here meets each of these factors—the Treasury collects the payment, the Code requires it, and the government coffers benefit. What's more, the consequence of engaging in a prohibited transaction (absent qualifying for an exemption) not only functions as a tax—thus meeting the *NFIB* test—but also has been specifically labeled as such by both Congress and the Supreme Court. *See* Pub. L. No. 93–406, § 2003(a), 88 Stat. 829, 971 (1974) (amending the Code to add "Sec. 4975. Tax On Prohibited Transactions"); *C.I.R. v. Keystone Consol. Indus.*, 508 U.S. 152, 155 (1993) ("Section 4975 of the Internal Revenue Code . . . imposes a two-tier excise tax on specified 'prohibited transactions' between a pension plan and a 'disqualified person.'").

C. The rule can—and therefore must—be harmonized with the Federal Arbitration Act's policies.

Unable to identify a square conflict between the rule and the FAA, the Chamber suggests (at 60-61) that the FAA's policies impede agencies from ever regulating the use of arbitration procedures absent a specific congressional delegation authorizing the agency to do so. Nothing in existing FAA jurisprudence supports that suggestion.

To the contrary, the Supreme Court has made clear that federal agencies may properly employ their general congressionally delegated authority—even if that authority says nothing specific about arbitration—to regulate arbitration procedures and "protect statutory rights." *McMahon*, 482 U.S. at 233-34 (recognizing SEC's "broad authority to oversee and to regulate . . . the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights"). The rule here follows the path first charted by the SEC under the very authority approved in *McMahon*, allowing individual-investor arbitration and preserving class actions. Only once has this SEC rule been challenged under the FAA, and the agency prevailed in both court and agency adjudication. *See Charles Schwab & Co. v. FINRA*, 861 F. Supp. 2d 1063 (N.D. Cal. 2012); *In re Dep't of Enforcement v. Charles Schwab & Co.*, 2014 WL 1665738 (FINRA Bd. 2014). And the Supreme Court has never suggested that a federal program offends the FAA merely by encouraging participants in the program to forgo arbitration, or placing conditions on its use.

Even assuming a tension between the rule and what the Chamber identifies as the FAA's pro-arbitration policies, the two sources of law must be harmonized. The Department's rule has "the force of law, . . . just as if all the details had been incorporated into the congressional language," *United States v. Mersky*, 361 U.S. 431, 437–38 (1960), and "[r]egulations are generally subject to the same rules of construction as statutes," *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982), including the fundamental obligation to reconcile statutes capable of co-existence. "The courts are not at liberty to pick and choose" among these sources of federal law; where, as here, they are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see* Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework For Resolving*

Conflicts Between Congressional Statutes And Federal Rules, 51 Emory L.J. 677, 701–726 (2002).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Deepak Gupta

DEEPAK GUPTA
MATTHEW W.H. WESSLER
MATTHEW SPURLOCK
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

July 6, 2017

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017, I electronically filed the foregoing brief with the Clerk of the Court of the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and 29(5) because it contains 6,409 words, exclusive of the portions excluded by Rule 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point Baskerville font.

July 6, 2017

/s/ Deepak Gupta
Deepak Gupta