ORAL ARGUMENT SCHEDULED JANUARY 22, 2016

NO. 15-5190

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

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

v.

ARNE DUNCAN, Secretary of the Department of Education, *et al.*,
Defendants-Appellees.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia, No. 14-1870 (JDB)

BRIEF OF AMICI CURIAE AIR FORCE SERGEANTS ASSOCIATION, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, CENTER FOR PUBLIC INTEREST LAW, CENTER FOR RESPONSIBLE LENDING, CHILDREN'S ADVOCACY INSTITUTE, CONSUMER ACTION, CONSUMER FEDERATION OF CALIFORNIA, DEMOS, THE INSTITUTE FOR COLLEGE ACCESS & SUCCESS, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, MISSISSIPPI CENTER FOR JUSTICE, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL COUNCIL OF LA RAZA, NEW ECONOMY PROJECT, PUBLIC ADVOCATES, INC., PUBLIC CITIZEN, INC., PUBLIC COUNSEL, PUBLIC GOOD LAW CENTER, PUBLIC LAW CENTER, SERVICE EMPLOYEES INTERNATIONAL UNION, UNIVERSITY OF SAN DIEGO LAW SCHOOL VETERANS LEGAL CLINIC, VETERANS EDUCATION SUCCESS, VETERANS' STUDENT LOAN RELIEF FUND, VETJOBS, VIETNAM VETERANS OF AMERICA, WOODSTOCK INSTITUTE, AND YOUNG INVINCIBLES IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, RELATED CASES, AND CORPORATE DISCLOSURE STATEMENT

(1) Parties and Amici. All parties and amici appearing in this Court are listed in the Brief for Appellees, with the exception of the following undersigned organizations that are participating as amici in this Court: Air Force Sergeants Association, American Federation of Teachers, AFL-CIO, Center for Public Interest Law, Center for Responsible Lending, Children's Advocacy Institute, Consumer Action, Consumer Federation of California, Demos, The Institute for College Access & Success, Leadership Conference on Civil and Human Rights, League of United Latin American Citizens, Mississippi Center for Justice, NAACP Legal Defense & Educational Fund, Inc., National Council of La Raza, New Economy Project, Public Advocates, Inc., Public Counsel, Public Good Law Center, Public Law Center, Service Employees International Union, University of San Diego Law School Veterans Legal Clinic, Veterans Education Success, Veterans' Student Loan Relief Fund, VetJobs, Vietnam Veterans of America, Woodstock Institute.

(2) Rulings Under Review. The rulings under review appear in the Brief for Appellant.

(3) Related Cases. This case has not previously come before this Court or any other court. Counsel is aware of no related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(C).

(4) Corporate Disclosure Statement. Amici curiae have not issued shares or debt securities to the public and have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. The general purpose of the organizations is to advocate for the public interest on a range of issues, including those that affect or bear on students and college access, civil rights, veterans, educators, and consumers.

/s/ Julie A. Murray
Julie A. Murray

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GLOSSARY

APSCU	Association of Private Sector Colleges and Universities
Department	U.S. Department of Education
Gainful Employment rule	Department of Education, Program Integrity: Gainful Employment Final Rule, 79 Fed. Reg. 64,890 (2014)
HELP Committee	U.S. Senate Committee on Health, Education, Labor and Pensions
Title IV	Title IV of the Higher Education Act, 20 U.S.C. § 1070 *et seq*.

INTERESTS OF AMICI CURIAE[1]

Amici curiae are twenty-eight groups that advocate for students and college access, civil rights, veterans, educators, and consumers. Amici have been leading voices sounding the alarm on the for-profit college industry's harmful and sometimes unlawful practices, which frequently leave students saddled with a lifetime of debt and little to no improvement in their capacity to earn a living. Amici are deeply concerned that some predatory for-profit colleges that target students of color, low-income students, veterans, and others seeking to improve their financial lives are exploiting the federal Title IV student aid program, which is intended to help students afford a college education. These groups believe that the Gainful Employment regulation adopted by the Department of Education (Department) and at issue in this case, *see* Department of Education, Program Integrity: Gainful Employment Final Rule, 79 Fed. Reg. 64,890 (2014), provides critical protections against the grievous, detrimental conduct of failing career training programs, the bulk of which are operated by for-profit schools.

Collectively, amici have substantial experience working with students affected by the Gainful Employment rule. They also have expertise related to career training programs regulated by the rule, including those programs provided

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

by for-profit educational institutions, which receive billions of dollars each year in federal student aid and whose students hold a disproportionate share of the nation's student loan defaults. Additional information about each of the amici is provided in the Appendix.

Nearly all of the amici participated in the rulemaking that led to the Gainful Employment rule. They urged the Department to adopt a robust rule that would protect students and taxpayers from career education programs that leave students worse off than when they started. They also submitted comments addressing the potential impact of various policy alternatives on students—including students of color, low-income students, and veterans—and described the critical need for the rule's protections. Although amici advocated for a stronger rule than the one ultimately issued, they believe that the Gainful Employment rule remains a valuable tool to address some of the most egregious conduct by career training programs.

Amici submit this brief to provide useful context regarding the need for the rule and to address arguments by plaintiff-appellant Association of Private Sector Colleges and Universities (APSCU) that either purport to rely on the best interests of students or ignore students' interests altogether. Amici urge this Court to affirm the district court's decision granting summary judgment to the government and upholding the rule.

All parties have consented to the filing of this brief.

STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to Appellant's Brief.

INTRODUCTION

The federal government spends billions of dollars each year on student aid under Title IV of the Higher Education Act, 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. To obtain Title IV funds, students must attend an eligible institution. As a condition of eligibility, the Higher Education Act has long required career training programs—such as those intended to prepare students to be medical assistants, diesel mechanics, or hairdressers—to provide "training to prepare students for gainful employment in a recognized occupation." 20 U.S.C. § 1001(b)(1); *id.* § 1002(a)(1), (b)(1)(A)(i). This requirement advances Congress's goal of ensuring that "training offered by these programs . . . equip[s] students to earn enough to repay their loans." Gainful Employment Rule, 79 Fed. Reg. at 64,893. Nearly all programs at for-profit educational institutions, along with some others at public and private, non-profit schools, constitute career training programs. *Id.* at 65,024-25. Students attending career training programs received $9.7 billion in federal student aid grants and approximately $26 billion in federal student aid loans in Fiscal Year 2010. *Id.* at 65,025.

In 2014, the Department of Education adopted the Gainful Employment rule to address overwhelming evidence that some career training programs, particularly those offered by for-profit institutions, were failing to prepare students for jobs that would enable them to repay their federal student debt, thus endangering the government's investment and leaving some students worse off than if they had never pursued postsecondary education. As relevant here, the rule imposes, as a condition on receipt of Title IV funding, new accountability requirements by "defin[ing] what it means to prepare students for gainful employment in a recognized occupation," as the Higher Education Act requires. *Id.* at 64,890; 34 C.F.R. § 668.403 (setting forth gainful employment program framework). Specifically, schools must demonstrate that their programs' debt-to-earnings rates, which measure graduates' debt burden relative to their earnings, meet defined thresholds. *Id.* §§ 668.403, 668.404. Although programs at for-profit institutions account for only one-third of the nation's career training programs, 79 Fed. Reg. at 65,025, the Department predicts that nearly all programs with marginal or failing debt-to-earnings rates under the rule will be at for-profit institutions, *id.* at 65,065. To facilitate the calculation of debt-to-earnings rates, the rule also requires schools to report to the Department the amount of private educational debt that each Title

IV student accumulates while in a career training program. 34 C.F.R. § 668.411; *see* 79 Fed. Reg. at 64,975-76.

Plaintiff-appellant APSCU, which represents for-profit education industry members, contends, among other things, that the rule runs afoul of the Administrative Procedure Act, 5 U.S.C. § 706, because the debt-to-earnings rates are arbitrary and capricious.

SUMMARY OF ARGUMENT

The government considered the costs and benefits to students of the debt-to-earnings measures and reasonably concluded that the rule is beneficial overall. It also considered whether the rule unfairly affects for-profit institutions and determined that the rule's scope and impact are appropriate in light of the Department's regulatory authority under the relevant statutes. Amici agree with this determination.

The contrary assertions by APSCU and the amicus curiae Chamber of Commerce are erroneous. Indeed, as overwhelming evidence in the administrative record demonstrates, some predatory for-profit institutions have been responsible for charging high prices to provide low-quality training, with few to no job placement opportunities and abysmal graduation rates. They have targeted underserved populations of students—including veterans and students of color—with shameful, and sometimes outright fraudulent, recruitment practices that have prompted numerous state and federal agency investigations and resulted in significant enforcement actions. The for-profit education industry has saddled many students with a lifetime of debt often ending in default, with devastating consequences for those students and the federal fisc. Thus, far from being torchbearers for access to education, some for-profit schools engage in predatory practices that threaten the economic lives of the very students they claim to serve.

ARGUMENT

APSCU argues that the Gainful Employment rule is arbitrary and capricious because, among other things, the Department failed to evaluate seriously the harm that the rule's debt-to-earnings rate requirements will impose on students and on for-profit institutions. It contends that many students in programs rendered ineligible for Title IV funds under the rule will not be able to enroll in alternative programs, or will not have access to in-person options. Appellant's Br. at 54-55. In an amicus curiae brief in support of APSCU, the Chamber of Commerce contends that the rule will specifically disadvantage students of color, low-income students, women, and other underserved groups. *See* Chamber of Commerce Amicus Br. at 14-15. APSCU also contends that the rule's disproportionate impact on for-profit institutions is "irrational" because of the role of these schools in meeting market demand for skilled workers, Appellant's Br. at 55, and the Chamber of Commerce predicts that if these schools lose Title IV funds, businesses will suffer, *see* Chamber of Commerce Amicus Br. at 17-20.

The arguments put forward by APSCU and its amicus are based on a cherry-picked and self-serving reading of the Department's rulemaking. They also rest on the false premise that students and the public benefit from student enrollment even in those programs that saddle students with significant debt without providing a quality education.

I. APSCU Disregards Portions of the Rulemaking Analysis That Considered the Rule's Impact on Students and For-Profit Institutions.

In contending that the rule harms students and unfairly affects for-profit schools, APSCU ignores parts of the rulemaking record.

First, it is simply not true that the Department failed to consider seriously the impact of the rule on students, particularly students of color, veterans, and others targeted by career training programs. Although the Department recognized that the rule would result in closure of some programs, it determined that in the short term "the substantial majority of students" would find alternatives to their failing programs. Gainful Employment Rule, 79 Fed. Reg. at 65,074; *see also* Appellees' Br. at 50. Moreover, the Department's estimate of the share of students at failing or "in-the-zone" programs without transfer options—an estimate on which APSCU relies, *see* Appellant's Br. at 33—was based on a "static scenario assuming no reaction to the regulations," Gainful Employment Rule, 79 Fed. Reg. at 65,074.

The Department recognized, however, that the most reasonable assumption is that market participants *will* respond to the rule. For example, as the Department noted, successful institutions performing well under the rule will create "new programs in fields where there are more jobs and greater earnings." *Id.* at 65,080; *see also id.* at 65,078; Appellees' Br. at 50.

The Department also explored the impact, if any, of student demographics on a school's ability to pass the debt-to-earnings rate measures and concluded that these factors were not "strong predictors." Gainful Employment Rule, 79 Fed. Reg. at 64,910; *see also*, *e.g.*, *id.* at 65,054 (concluding that various demographic variables "have little impact on annual earnings rates"). Accordingly, it was reasonable for the Department to conclude that the regulations would not "substantially reduce educational opportunities for minorities, economically disadvantaged students, first-generation college students, women, and other underserved groups of students." *Id.* at 64,910. Rather, programs that wish to improve their debt-to-earnings rates will likely resort to approaches that benefit underserved students: lowering tuition, offering better student services, such as job placement and career planning assistance, and increasing program quality. *Id.* at 65,080; *see also id.* at 64,916. Post-rulemaking representations by for-profit companies confirm this prediction. For example, the parent company for Kaplan Higher Education recently stated that, in response to the rule, the company is "increasing career services support, implementing financial literacy counseling, creating program-specific tuition reductions and scholarships, and revising the pricing model to implement a tuition cap for at-risk programs." Graham Holdings, 10-Q Filing with the Securities and Exchange Commission, Nov. 5, 2015, *available at* http://www.ghco.com/phoenix.zhtml?c=62487&p=irol-sec.

In addition, the Department addressed, at length, claims that the Gainful Employment rule unfairly targets for-profit institutions. *See* Gainful Employment Rule, 79 Fed. Reg. at 64,902-08. The Department explained that the rule applies to "all programs, across all sectors, that are subject to the requirement that in order to qualify for Federal student assistance, they must provide training that prepares students for gainful employment in a recognized occupation." *Id.* at 64,904; *see also* Appellees' Br. at 49-50. In light of comments denouncing the rule's impact on for-profit programs, the Department also highlighted the wealth of evidence supporting a concern about "high costs, poor outcomes, and deceptive practices at some institutions in the for-profit sector." Gainful Employment Rule, 79 Fed. Reg. at 64,904; *see also infra* at pp. 9-25.

II. Students Are Harmed by Enrolling in Career Education Programs That Do Not Provide A Quality Education.

APSCU and the Chamber of Commerce also err by assuming that students and the public would be better served if students stayed in programs that fail the rule's debt-to-earnings measures than if those programs were deemed ineligible for

Title IV funding. In reality, some for-profit colleges, which offer nearly all programs expected to fail under the rule, *see* Gainful Employment Rule, 79 Fed. Reg. at 65,065, do students no favor by opening their doors to federal aid recipients. These colleges often prey on underserved populations of students—particularly communities of color, low-income individuals, and veterans—targeting them with misleading, and sometimes fraudulent, recruitment practices. They then provide students an inferior product: low quality programs and faculty, few if any student-support services, and abysmal graduation and job placement rates. And most students who graduate as well as the majority of those students who withdraw (in some cases more than half of all entrants) are saddled with student-loan debt. Many of these students will never be able to repay these loans, with devastating consequences for their financial health and their ability to seek future educational opportunities.

Such predatory for-profit colleges fail to offer the access to education and economic success that APSCU and the Chamber of Commerce portray. Indeed, their shameful practices threaten hundreds of thousands of students of color, veterans, low-income students, and others who turn to these schools' programs for career advancement and who are disproportionately represented in the schools' student bodies. As one commenter told the Department, strong regulation of these schools is necessary to ensure that fewer students report that going to college was the worst mistake of their lives. Center for Responsible Lending Comments, ED-2014-OPE-0039-1727, AR-H-073977.

A. Some For-Profit Educational Institutions Engage in Manipulative and Fraudulent Recruitment Practices.

The failure of some for-profit schools to adequately serve students begins with the institutions' relentless recruitment and marketing practices. Based on a two-year investigation of the for-profit education industry, the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee concluded that, among the schools it analyzed, "almost 23 percent of revenues were spent on marketing and recruiting" (compared to 17 percent on instruction). U.S. Senate Health, Education, Labor and Pensions Committee, For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success 6 (2012), *available at* http://1.usa.gov/1e1MM0U (hereinafter HELP Committee Report), AR-G-001364; *accord* Gainful Employment Rule, 79 Fed. Reg. at 65,033 (citing the HELP Committee report). In recent years, for-profit schools have received criticism in particular for their aggressive marketing toward veterans and service members.[2] For example, one commenter told the Department about an individual

[2] Under federal law, career training programs must obtain at least 10 percent of their revenues from non-Title IV sources. 20 U.S.C. § 1094(a)(24), (d). This requirement, called the "90/10" rule, creates strong incentives for schools to recruit veterans and service members, who have access to federal student aid programs that do not originate under Title IV. That some for-profit schools cannot find a (continued)

who provided his name to a website that promised to help veterans access their military-related education funding. Veterans Education Success Comments at 4, ED-2014-OPE-0039-2385, AR-H-110055 (describing National Public Radio interview). In reality, the website was a service for for-profit colleges to identify potential recruits, and within three to four days, the individual received more than 70 phone calls and 300 e-mails from for-profit schools. *Id.* The recruitment onslaught continued for more than a year. *Id.* Kaplan, a for-profit company, has even "operate[d] recruiting sites fronted as 'study centers' inside military and [Veterans Affairs] hospitals." *Id.* at 5, AR-H-110056.

Substantial record evidence also demonstrates that some for-profit institutions mislead or outright lie to students about material information before enrollment. Some of this evidence comes straight from former recruiters. For example, one salesman for DeVry testified before Congress that he was "instructed to pose as a 'military advisor' affiliated with the Pentagon" in his efforts to recruit veterans; four other DeVry salesmen subsequently echoed this story in statements to Congress. *Id.* Likewise, a former recruiter at for-profit South University stated, "It just got to the point where I felt like I was lying to these people on a regular basis. . . . Honestly, I just felt dirty doing the things I was doing. It's almost like

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sufficient number of students, families, and employers willing to pay any amount out-of-pocket for a for-profit education to meet the 90/10 requirement is telling with respect to the quality of education on offer at many for-profit programs.

they were trying to make me take advantage of people's belief in what this education was going to get them, when I didn't buy into it myself." *Id.* at 6, AR-H-110057. Other evidence comes from students and their advocates. For example, one commenter described to the Department the story of a Marine corporal, who stated, "When I attempted to transfer my units from [for-profit] Brown Mackie to [a public college], I found out that none of my units transferred because they didn't have the right level of accreditation." *Id.* at 8, AR-H-110059; *see also, e.g.*, American Federation of Teachers Comments at 4, ED-2014-OPE-0039-1620, AR-H-063295.

Misleading and false recruitment practices by these institutions have led numerous government entities to investigate and take action against for-profit institutions. At the time of the Gainful Employment rulemaking, more than two dozen state attorneys general, the U.S. Department of Justice, the Federal Trade Commission, the Securities and Exchange Commission, and the Consumer Financial Protection Bureau had investigated for-profit companies. *See* David Halperin Comments at 5, ED-2014-OPE-0039-1820, AR-H-075394; *see also* The Institute for College Access and Success Comments at 1-2, ED-2014-OPE-0039-1935, AR-H-087209-10. Although many of those investigations were pending or had settled without companies' admissions of guilt, allegations by these government entities were consistent with other accounts regarding problems within the industry. *See* David Halperin Comments at 5, AR-075394; *see also id.* Attachment, AR-H-075401-22 (collecting descriptions of government investigations and actions regarding for-profit colleges).

For example, the Attorney General of New York discovered that Career Education Corporation had inflated its graduates' job placement rates in disclosures to students, accreditors, and the state. Press Release, *A.G. Schneiderman Announces Groundbreaking $10.25 Million Dollar Settlement with For-Profit Education Company That Inflated Job Placement Rates to Attract Students* 1 (Aug. 19, 2013), AR-G-000001. The state alleged that company employees had counted graduates' "employment at single one-day health fairs, including fairs initiated at the request" of the company, as job placements, and had mischaracterized "graduates' job duties in order to improperly count such students as employed in the field in which the student trained or a related field." *Id.* Although the company did not admit wrongdoing, it entered into a $10.25 million settlement with the state, which included an agreement to pay more than $9 million toward restitution for eligible consumers. *Id.* As part of the Attorney General's investigation, the company audited its job placement reports and "announced that it was revising placement rates for 49 of its campuses, and that 36 of those no longer met its accreditor's standards for placement." HELP Committee Report at 164, AR-G-001522.

B. Many For-Profit Career Training Programs Charge High Prices, Resulting in Loans That Leave Students Deeply in Debt.

Once enrolled in for-profit institutions, students often pay exceedingly high prices as compared to public or private non-profit alternatives. For example, "tuition and fees at for-profit colleges are twice what they are for equivalent programs at less-than-two-year public colleges and four times what they are for equivalent programs at two-year public institutions." Education Trust Comments, ED-2014-OPE-0039-1729, AR-H-074016. Although public institutions receive government subsidies that defray students' cost of attendance, evidence suggests that the high cost of for-profits remains even after controlling for these subsidies. Gainful Employment Rule, 79 Fed. Reg. at 65,032.

Unsurprisingly, students at for-profit programs are more likely than those at other institutions to rely on loans, including federal student aid, to finance their educations. *Id.* at 65,033. The Senate HELP Committee concluded that 96 percent of students at for-profit schools have student loans, compared to 13 percent at community colleges, 48 percent at 4-year public colleges, and 57 percent at 4-year private, non-profit colleges. HELP Committee Report at 7, AR-G-001365.

On average, students at for-profit schools also have larger amounts of debt than students who attend non-selective public or non-profit institutions. Gainful Employment Rule, 79 Fed. Reg. at 65,033. For example, 57 percent of those students who graduate with a bachelor's degree from a for-profit school owe

$30,000 or more in student loans, compared to 25 percent of those graduating from private, non-profit colleges and 12 percent graduating from public colleges. HELP Committee Report at 7, AR-G-001365; *see also*, *e.g.*, Gainful Employment Rule, 79 Fed. Reg. at 65,033 (documenting higher median loan amounts among students attending for-profit certificate and associate's degree programs than at public alternatives).

Certain groups of students—including students of color, low-income students, veterans, and women—acutely feel the impact of for-profit schools' high costs (and their poor quality and outcomes, as discussed below). These students are targeted for enrollment by for-profit institutions and matriculate there in large numbers. *See*, *e.g.*, NAACP Legal Defense and Educational Fund Comments at 2, ED-2014-OPE-0039-1927, AR-H-087119; National Education Association Comments at 1, 3, ED-2014-OPE-0039-1412, AR-H-053446-48; American Association of University Women Comments at 1, ED-2014-OPE-0039-2072, AR-H-090032. Their attendance helps to swell the size of student bodies of career training programs. For example, "[b]etween 2004 and 2009, African American enrollment in for-profit college bachelor's degree programs increased by 218 percent, compared with a 24 percent increase in public four-year university programs." Education Trust Comments at 2-3, AR-H-074015-16. One in five African American undergraduates now begins his or her education at a for-profit college. *Id.* at 3, AR-H-074016; *see also* Veterans Education Success Comments at 2, AR-H-110053 (describing an increase in for-profits' recruitment of veterans and students in the military of more than 200 percent in just one year).

These students, like for-profit college students more generally, often find that student loans are necessary to finance their education. And to keep up with costs, they must borrow more. In one recent year, 74 percent of African American students and 72 percent of Hispanic students attending for-profit colleges took out federal loans to finance their education, compared to 24 percent and 27 percent, respectively, of their peers at other institutions. Education Trust Comments at 4, AR-H-074017; *see also* American Association of University Women Comments at 1, AR-H-090032 (explaining that women who enroll in for-profit colleges are more than twice as likely to take out federal student loans than women at other colleges and universities).

C. Despite Taking Federal Money, For-Profit Career Training Programs Routinely Offer Students an Inferior Education with Little Support.

Because students in career training programs must frequently borrow—often from the federal government—to attend, the programs at for-profit institutions rely heavily on federal money to keep their doors open and their profits up. One analysis of the finances of thirty for-profit colleges concluded that the schools received more than 79 percent of their revenue from federal Title IV aid, a larger proportion than most public and non-profit colleges receive. HELP Committee Report at 24, AR-G-001382. That share was even larger when other forms of federal educational assistance, such as military-related education aid, were included. *See id.* For-profits' share of federal funding also increased in the years preceding the rulemaking. For example, between the 2000-01 and 2009-10 school years, for-profit schools' receipt of Pell grants increased six-fold, from $1.1 billion to $7.5 billion. *Id.* at 25, AR-G-001383. During that same time period, the Pell grant program grew four and a half times. *Id.*

Despite this flood of federal cash, some for-profit career training programs provide students with a substandard education, marked by poor quality instructors, few if any support services, and high rates of withdrawal. These programs are a far cry from the beneficial programs that APSCU conjures in its brief. The National Consumer Law Center, which frequently provides legal assistance to students attending for-profit programs, noted in rulemaking comments that its clients often "complained about unqualified instructors, a school's failure to provide books or other materials, the lack of up-to-date, operational or sufficient instructional equipment, and internships that do not involve any of the skills the students have learned." National Consumer Law Center Comments at 4, ED-2014-OPE-0039-0585, AR-H-029557; *see also, e.g.*, Veterans' Student Loan Relief Fund Fact

Sheet, ED-2014-OPE-0039-2368, AR-H-107861-66 (collecting veterans' experiences with low program quality at for-profit schools).

Low program quality is due in part to relatively low expenditures on instruction: Instead of directing additional funding to improve instructional quality, many for-profit schools use students' tuition and fees to pad school profit margins and pay for recruitment and marketing. HELP Committee Report at 6, AR-G-001364. On average, for-profit institutions that responded to a document request by the Senate HELP Committee spent $2,050 per student on instruction in 2009—a spending level that generally fell below that for public and non-profit schools. *Id.* at 86-87, AR-G-001444-45. In 2009, the Apollo Group—which owns for-profit University of Phoenix—spent less than $900 per student on instruction, compared to per-student instructional costs exceeding $11,000 at the University of Arizona, a public school. *See* HELP Committee Report (Part II) at 289-90, *available at* http://1.usa.gov/1e1MM0U, *as cited in* Veterans Education Success Comment at 3, AR-H-110054.

Some for-profit schools keep instructional costs low, in part, by shortchanging students. They often use part-time faculty, a tactic that may lead to worse student outcomes. HELP Committee Report at 94-95, AR-G-001452-53. At those for-profit institutions examined by the HELP Committee, 80 percent of faculty were part-time. *Id.* at 94, AR-G-001452. At one school, more than 98 percent of faculty were part-time. *Id.* For-profit schools often cut corners with respect to student support services as well. The HELP Committee found that for-profit institutions included in its analysis employed roughly ten recruiters for every career services professional, despite the requirement that these schools' programs prepare students for gainful employment. *Id.* at 7, AR-G-001365. Two of the largest for-profit schools "provide[d] *no* career services" at all. *Id.* at 162, AR-G-001520.

D. Many Students Drop Out of For-Profit Institutions, and Graduates Often Have Low Earning Potential and Few Job Prospects.

Far from benefiting from their education, many students at for-profit institutions face devastating outcomes after enrolling in for-profit schools' programs. A significant share never graduate from career training programs at for-profit schools. Gainful Employment Rule, 79 Fed. Reg. at 65,033. More than half a million students (or 54 percent) who enrolled in the 2008-2009 school year in thirty for-profit institutions examined in the HELP Committee Report dropped out without a degree or certificate by the middle of 2010. HELP Committee Report at 73, AR-G-001431. At some institutions, withdrawal rates were even higher. For example, 59 percent of students who enrolled in the 2009-10 school year at for-profit Ashford University withdrew *in a single year*. *Id.* at 128, AR-G-001486.

A variety of factors contribute to these high withdrawal rates, including low program quality and students' inability to continue to pay the high cost of a for-profit education. *See, e.g.*, *id.* at 43-44, AR-G-001401-02 (describing internal documents from for-profit institutions that discuss the impact various changes in tuition and fees will have on enrollment). Students may also find themselves unprepared for or incapable of completing the programs because, in their quest to obtain federal student aid, for-profit institutions often admit students who have no realistic prospect of graduating. For example, a former DeVry salesman testified before Congress that the company instructed recruiters to enroll service members even if they were not ready for the program or were going to be deployed. *See* Veterans Education Success Comments at 5, AR-H-110056. One report indicated that the for-profit Ashford University "signed up a Marine with traumatic brain injury convalescing in a military hospital" who was injured to such an extent that, although he knew that he had enrolled at the school, he could not remember what course he was taking. *Id.* at 4, AR-H-110054. In another case, a woman "was pressured into signing up for a proprietary school medical assistant program even though she dropped out of school in ninth grade and had only a sixth grade reading level." National Consumer Law Center Comments at 5, AR-H-029558. Unsurprisingly, that student did not complete the course and defaulted on her student loan. *Id.* In another example, a person with limited English proficiency was misled into signing up for a cosmetology program after a Spanish-speaking representative falsely told her that the school's instructors were bilingual. *Id.* at 6, AR-H-029559. Although students withdraw for a variety of reasons, one thing is certain: Many students incur loan debt before withdrawing, and, without the credential they sought, they do not receive the bump in earning potential that would enable them to repay their debt.

Even students who do graduate from career training programs at for-profit colleges often struggle to pay off their loans due to low earning potential and few job prospects. *See* Gainful Employment Rule, 79 Fed. Reg. at 65,031. For example, more than a quarter of career training programs that will be subject to the debt-to-earnings measures under the challenged rule produce graduates with mean and median earnings below $15,080 per year, the earnings of a full-time worker at the federal minimum wage. *Id.* In addition, for-profit schools often have appalling records with respect to job placement. The National Consumer Law Center reported that "[a] large percentage of the many clients [it had] represented attended for-profit schools" and "[o]nly a handful reported finding a job in the field related to their program of instruction." National Consumer Law Center Comments at 1, AR-H-029554. Indeed, many of the organization's clients were "told by employers that they never hire graduates from the for-profit schools the[] [students] attend." *Id.* at 5, AR-H-029558. These real-life stories cast serious doubt on the Chamber of

Commerce's claim that career training programs unable to meet the rule's accountability requirements nevertheless benefit the public by supplying employers with skilled workers. In addition, the earnings data suggest that, to the extent some businesses rely on for-profit graduates and their skills, they do so by paying low wages that are insufficient to repay the graduates' debt.

E. Students at For-Profit Institutions Often Default on Student Loans, with Dire Consequences for Students and U.S. Taxpayers.

For-profit institutions' mix of high student debt, low program quality, and poor employment prospects unsurprisingly leads to high rates of student loan default. The Department estimated that more than one in five students who attend career training programs subject to the accountability metrics in the rule will default on their federal student loans within the first three years of repayment. Gainful Employment Rule, 79 Fed. Reg. at 65,031. Student loan default rates are "consistently . . . highest among students attending for-profit institutions." *Id.* at 65,033; *see also* HELP Committee Report at 114, AR-G-001472 (stating that students who attend for-profit schools "default at nearly three times the rate of students who attend[] other types of institutions"). In fact, although the share has fluctuated in recent years, the HELP Report found that nearly half of all student loan defaults were held by students who attended for-profit educational institutions. HELP Committee Report at 114, AR-G-001472.

Although the default rates among for-profit schools are generally high, the rates at some programs stand out. For example, internal e-mails between executives at Apollo Group, a large for-profit company, estimated lifetime default rates for students in a two-year program in one of the company's schools to be greater than 77 percent. *Id.* at 117, AR-G-001475. An analysis conducted by the Institute for College Access and Success "found 114 programs—all at for-profit colleges—where there were more defaulters in a single cohort year of defaults than there were graduates in a two-year period." The Institute for College Access and Success Comments at 3, AR-H-087211. Put another way, students receiving federal aid to attend these "parasitic programs" were "more likely to default than they [we]re to complete the credential they sought." *Id.*

Borrowers who default face severe consequences. Their loan balances frequently balloon due to fees related to late payment, collection activities, and legal action. *See* Department of Education, Understanding Default, https://studentaid.ed.gov/sa/repay-loans/default, *as cited in* Gainful Employment Rule, 79 Fed. Reg. at 65,031 n.217. Borrowers suffer from ruined credit, which may impair their ability to buy a car or home or even rent an apartment. *Id.* Borrowers who default face the constant threat of wage and Social Security garnishment and tax refund seizures. *Id.*; Education Trust Comments at 5, AR-H-074018 (noting that at the time of the comment there were 115,000 individuals "whose Social Security payments [were] being garnished for non-payment of student loans"). In addition, borrowers in default lose eligibility for additional federal student aid, thus closing the door to future attempts to obtain an education that would actually benefit them. Department of Education, Understanding Default, https://studentaid.ed.gov/sa/repay-loans/default. And students who file for bankruptcy, in all but the rarest cases, find that their student loans are not dischargeable. *See, e.g.*, Education Trust Comments at 5, AR-H-074018.

Student loan default, particularly among students attending for-profit schools, also poses a risk to U.S. taxpayers. Students attending career training programs received approximately $26 billion in federal student aid loans in Fiscal Year 2010. Gainful Employment Rule, 79 Fed. Reg. at 65,025. According to more recent research using 2014 data, thirteen of the twenty-five colleges with the largest total volume of outstanding student loans were for-profit schools, and those thirteen schools accounted for nearly 10 percent of all federal student loans. *See* Adam Looney and Constantine Yannelis, Media Summary: *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in The Institutions They Attended Contributed to Rising Loan Defaults* (2015), *available at* http://brook.gs/1LSzHBl. Students from the University of Phoenix alone owe $35 billion. *Id.* The financial exposure of U.S. taxpayers should these students default is substantial.[3]

* * *

As the discussion above demonstrates, the Department's rule is critical to protect students and the public from some of the worst career training programs. Permitting poorly performing programs to continue to receive federal funding harms students and ignores the threat that student loan default poses to the public.

CONCLUSION

For the foregoing reasons and those stated in the Brief for Appellees, this Court should affirm the district court's decision granting summary judgment to the government and upholding the Gainful Employment rule.

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[3] Taxpayers' financial exposure goes beyond the risk of default. If one of the large for-profit schools collapses under the weight of its misconduct, as poor-performing Corinthian Colleges did earlier this year, students may be eligible for debt relief based on their school's closure or evidence that the school defrauded students. *See, e.g.*, Department of Education, Information About Debt Relief for Corinthian Colleges Students, https://studentaid.ed.gov/sa/about/announcements/corinthian.

Respectfully submitted,

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Dated: November 24, 2015

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 5,712.

/s/ Julie A. Murray
Julie A. Murray

APPENDIX

ORGANIZATIONAL DESCRIPTIONS OF AMICI

Air Force Sergeants Association
The Air Force Sergeants Association represents its 110,000 dues-paying members by advocating for their interests to America's elected officials and military leaders. It is a federally-chartered, 501(c)(19) veteran service organization headquartered in Suitland, Maryland.

American Federation of Teachers, AFL-CIO
The American Federation of Teachers is a union of professionals that champions fairness; democracy; economic opportunity; and high-quality public education, healthcare and public services for our students, their families and our communities. We are committed to advancing these principles through community engagement, organizing, collective bargaining and political activism, and especially through the work our members do.

Center for Public Interest Law
The Center for Public Interest Law (CPIL), founded in 1980 at the University of San Diego School of Law, serves as an academic center of research and advocacy in regulatory and public interest law. In addition to its academic program, in which law student interns learn the substantive law governing the operation and decision making of state regulatory agencies, CPIL has an advocacy component in which it represents the interests of the unorganized and underrepresented in California's legislature, courts, and regulatory agencies.

Center for Responsible Lending
The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy advocacy organization that works to protect homeownership and family wealth by fighting predatory lending practices. Since we began in 2002, we have witnessed, studied, and fought against outrageous lending abuses that strip billions of dollars from American families. CRL strives to advance financial opportunity, security, and wealth for families and communities. We are particularly focused on promoting fair and sustainable lending practices and ending abusive financial practices that have a disproportionate impact on people of color, low- and moderate income families, and other populations including immigrants, students, seniors, women, and military personnel. These populations have too often received reduced access to responsible products and are intentionally targeted for predatory lending. Our affiliation with Self-Help, a lender to traditionally underserved borrowers, confirms that fairness and opportunity can be at the center of a thriving financial marketplace for all.

Children's Advocacy Institute

The Children's Advocacy Institute (CAI), founded at the nonprofit University of San Diego School of Law in 1989, is one of the nation's premier academic, research, and advocacy organizations working to improve the lives of children and youth. In addition to its academic component, in which CAI trains law students and attorneys to be effective child advocates, CAI seeks to leverage change for children and youth through impact litigation, regulatory and legislative advocacy, research, and public education at the state and federal levels.

Consumer Action

Through multilingual financial education materials, community outreach, and issue-focused advocacy, Consumer Action empowers underrepresented consumers nationwide to assert their rights in the marketplace and financially prosper.

Consumer Federation of California

The Consumer Federation of California (CFC) is a non-profit advocacy organization. Since 1960, CFC has been a voice for consumer rights, campaigning for state and federal laws that place consumer protection ahead of corporate profit. Each year, CFC testifies and advocates before the California legislature on dozens of bills that affect millions of our state's consumers, and it appears before state agencies in support of consumer regulations.

Demos

Demos is a public policy and research organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Demos views an affordable, quality higher education system as a pillar of our nation's commitment to equity and upward mobility and believes that a robust Gainful Employment rule is key to ending abusive practices among some institutions in our higher education system and ensuring that students are not overburdened by debt from institutions that provide little value in the job market.

The Institute for College Access & Success

The Institute for College Access & Success is an independent, non-profit organization that works to make higher education more available and affordable for people of all backgrounds. Through nonpartisan research, analysis, and advocacy, we aim to improve the processes and public policies that can pave the way to successful educational outcomes for students and for society.

Leadership Conference on Civil and Human Rights

The Leadership Conference on Civil and Human Rights (The Leadership Conference) is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Its member organizations represent people of all races, ethnicities, and sexual orientations.

League of United Latin American Citizens

The League of United Latin American Citizens (LULAC) is the nation's largest and oldest civil rights volunteer-based organization that empowers Hispanic Americans and builds strong Latino communities. Headquartered in Washington, DC, with 1,000 councils around the United States and Puerto Rico, LULAC's programs, services, and advocacy address the most important issues for Latinos, meeting critical needs of today and the future.

Mississippi Center for Justice

The Mississippi Center for Justice is a nonprofit, public interest law firm committed to advancing racial and economic justice. Supported and staffed by attorneys, community leaders, and volunteers, the Center develops and pursues strategies to combat discrimination and poverty statewide.

NAACP Legal Defense & Educational Fund, Inc.

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit legal organization that, for seventy-five years, has sought to redress injustice caused by racial discrimination and assist African-Americans and other people of color in securing their civil and constitutional rights. Throughout its history, LDF has engaged in significant litigation and advocacy to expand educational access in higher education, eliminate barriers to equal employment opportunities, and challenge unfair and predatory business practices targeted toward African-Americans.

National Council of La Raza

The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy in five key areas—assets/investments, civil rights/immigration, education, employment and economic status, and health. Given the disproportionate enrollment of Latino students at for-profit schools, their high loan default rates, and low graduation rates, NCLR and seven other civil rights organizations authored a white paper, available at http://www.nclr.org/publications/gainful-employment-a-civil-rights-perspective, calling for strong Gainful Employment regulations to protect thousands of Latino students from poorly performing for-profit institutions.

New Economy Project

New Economy Project works with New York City groups to promote community economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. New Economy Project employs a range of strategies—including direct representation, impact litigation, policy advocacy, coalition building, community education, and research—to address pressing economic justice issues. The issues raised in this litigation are of vital interest to the communities that New Economy Project serves, as many low-income New Yorkers have been saddled by student loan debt incurred after attending sham, for-profit schools.

Public Advocates Inc.

Public Advocates Inc. is a nonprofit law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing, and transit equity. We spur change through collaboration with grassroots groups representing low-income communities, people of color, and immigrants, combined with strategic policy reform, media advocacy, and litigation. We have been “making rights real” across California since 1971.

Public Citizen, Inc.

Public Citizen, Inc. is a non-profit consumer advocacy organization founded in 1971. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues, including consumer rights in the marketplace, financial regulation, and corporate accountability. Public Citizen supports robust regulation of predatory, for-profit educational institutions and student lending practices that leave many students with overpriced educations that do not prepare students for the workplace.

Public Counsel
Public Counsel is the largest not-for-profit law firm of its kind in the nation. It is the public interest arm of the Los Angeles County and Beverly Hills Bar Associations and is also the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County. In 2013, Public Counsel assisted more than 30,000 people with direct legal services and assisted hundreds of thousands more through filing impact lawsuits, influencing policy, and sponsoring legislation. Many of our clients suffer from the practices of for-profit colleges described in this brief, including foster youth, veterans, and at-risk students who are often the first in their families to go to college.

Public Good Law Center
The Public Good Law Center is a public interest organization dedicated to the proposition that all are equal before the law. Through participation in cases of particular significance for consumer protection and civil rights, Public Good seeks to ensure that the protections of the law remain available to everyone.

Public Law Center
The Public Law Center is committed to providing access to justice for Orange County, California, low-income residents, and does so by providing free civil legal services, including counseling, individual representation, community education, and strategic litigation and advocacy to challenge societal injustices. The Public Law Center regularly assists low-income students, including veterans, who have enrolled in for-profit schools because of false promises and misinformation and subsequently have to deal with paying for an education that they cannot use.

Service Employees International Union
The Service Employees International Union (SEIU) represents over two million members in health care, education, public services, and property services who need, for themselves or their families, accessible, quality higher education and training opportunities. SEIU also unites over 37,000 faculty who are an important voice for a higher education system that prioritizes student learning, invests in educators, and reduces student debt to build a 21st century workforce.

University of San Diego School of Law Veterans Legal Clinic
The University of San Diego School of Law Veterans Legal Clinic provides free legal services to veterans struggling to resolve disputes with for-profit education companies over the use of GI Bill funds and related loans. The Veterans Legal Clinic also represents veterans appealing Veterans Affairs disability determinations and veterans seeking to change the characterization of service of their military discharge.

Veterans Education Success
Veterans Education Success is a non-profit organization dedicated to protecting and defending the integrity of the GI Bill and other federal education programs for veterans and service members. Veterans Education Success provides individual assistance to veterans who have been deceived or defrauded by predatory colleges.

Veterans' Student Loan Relief Fund
The Veterans' Student Loan Relief Fund is a national non-profit organization that provides grants to veterans who have been defrauded by for-profit schools.

VetJobs
Sponsored by Veterans of Foreign Wars, VetJobs is the leading military job board on the internet assisting transitioning military, veterans, National Guard & Reserve, and their family members in finding quality employment.

Vietnam Veterans of America
Vietnam Veterans of America (VVA) is the nation's only congressionally chartered veterans service organization dedicated to the needs of Vietnam-era veterans and their families. VVA's founding principle is "Never again will one generation of veterans abandon another."

Woodstock Institute
Woodstock Institute is a leading nonprofit research and policy organization in the areas of fair lending, wealth creation, and financial systems reform. Woodstock Institute works locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity.

Young Invincibles
Young Invincibles is a national research and advocacy organization committed to amplifying the voices of young adults ages 18 to 34 and expanding economic opportunity for the Millennial generation.

CERTIFICATE OF SERVICE

I certify that on November 24, 2015, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray