

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

THRIVENT FINANCIAL FOR LUTHERANS,

Plaintiff,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR,
and UNITED STATES DEPARTMENT OF
LABOR,

Defendants.

Case No. 16-cv-03289-SRN-HB

**Brief of AARP, AARP Foundation, the American Association for Justice,
Americans for Financial Reform, Better Markets, Inc.,
Consumer Federation of America, and
the Public Investors Arbitration Bar Association
as *Amici Curiae* in Support of Defendants**

Deepak Gupta
(pro hac vice pending)
Matthew W.H. Wessler
Matthew Spurlock
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
Tel.: (202) 888-1741
Fax: (202) 888-7792
deepak@guptawessler.com

Vildan A. Teske
TESKE MICKO KATZ KITZER &
ROCHEL PLLP
222 South Ninth Street
Suite 4050
Minneapolis, MN 55402
Tel: (617) 746-1558
Fax: (651) 846-5339
teske@teskemicko.com
Counsel for Amici Curiae

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INTRODUCTION

Since 1992, the Financial Industry Regulatory Authority (FINRA)—under the oversight of the Securities and Exchange Commission (SEC)—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 and Consumer Protection 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 schools and colleges), the Department of Health and Human Services (to protect nursing-home patients), the Federal Trade Commission (to protect consumers asserting warranty claims), and the National Labor Relations Board (to ensure that workers can band together).

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.” AR at 100. 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*, 132 S. Ct. 2566, 2600 (2012).

Both features unmistakably differentiate this rule from the California and NLRB rules struck down in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011), and *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016), respectively. Those rules were held to violate the Federal Arbitration Act (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.

Finally, the rule is compatible with the “strong federal policy in favor of arbitration.” *Thrivent Br.* 17. 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). In any event, because the rule and the statute both have the force of federal law, the Court can—and therefore must—read them in harmony with one another.

INTEREST OF AMICI CURIAE

AARP—with approximately 38 million members—is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people’s financial security, health, and well-being.

AARP’s charitable affiliate, **AARP Foundation**, creates and advances effective solutions that help low-income individuals fifty and older to secure the essentials so that they do not fall into poverty during retirement.

Through, among other things, participation as amicus curiae in state and federal courts, AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pensions and other employee benefits that countless members and older individuals receive or may be eligible to receive. A major priority has been to assist Americans in accumulating and effectively managing the assets they will need to supplement Social Security, so that they can maintain an adequate standard of living in retirement. The shift from defined benefit plans to defined contribution plans has transferred significant responsibility to individuals for investment decisions that will directly impact the adequacy of the assets available to fund their future retirement needs.¹ This shift has made the goal of achieving and maintaining an adequate income in retirement more challenging. Conflicted investment advice should not be one of the barriers millions of Americans face as they work to save for their retirement. For these reasons, AARP and AARP Foundation have supported the Department of Labor's rulemaking concerning conflicts of interest in retirement plans.

The American Association for Justice (formerly known as the American Trial Lawyers Association) 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. AAJ has taken a

¹ See U.S. Dep't of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs (1975-2013)* 1, 5, 13, 17, 21, 25–27 (Sept. 2015), <http://www.dol.gov/ebsa/pdf/historicaltables.pdf> (by every measure, defined contribution plans have become the nation's primary retirement vehicle).

leadership role in advocating for limitations on forced arbitration in Congress and across the full range of federal regulatory agencies, including the Department of Labor. Along with allied groups, AAJ files this brief to place the Department's rulemaking in the appropriate context, and to show that the Department acted within its authority when it conditioned exemptions from its rule on the preservation of investors' ability to participate in class actions.

Americans for Financial Reform is a nonpartisan, nonprofit coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups. *See* AFR Membership List, <http://ourfinancialsecurity.org/about/our-coalition/>. AFR works to lay the foundation for a strong, stable, and ethical financial system—one that serves the economy and the nation as a whole. Through policy analysis, education, and outreach to its members and others, AFR seeks to build public will for substantial reform of the American financial system. AFR engages actively in policy issues relating to securities regulation, investor protections, and civil access to justice, including participating in rulemaking proceedings related to retirement security and arbitration.

Better Markets, Inc. is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights for reforms that stabilize our financial system; protect investors from fraud, abuse, and conflicts of interest; and enhance transparency. Better Markets has submitted more than 175 comment letters to financial regulators, including the U.S. Department of Labor (DOL), and it has often filed amicus briefs in the federal courts, defending agency rules on legal and policy grounds. *See generally* Better

Markets, <http://www.bettermarkets.com> (including archive of comment letters and briefs). Better Markets is intimately familiar with the provisions of the DOL fiduciary duty rule and the exhaustive rulemaking process that DOL followed to craft it. Better Markets filed two extensive comment letters supporting the rule. *See* DOL comment letter file on the rule, <https://www.dol.gov/ebsa/regs/cmt-1210-AB32-2.html> (last visited Dec. 9, 2016). Better Markets testified at DOL's public hearings in August of 2015. *See* DOL Conflict of Interest Proposed Rule Public Hr'g, <https://www.dol.gov/ebsa/regs/1210-AB32-2-Hearing.html> (last visited Dec. 9, 2016). Better Markets is deeply committed to supporting the rule because it advances the public interest in multiple ways: It protects workers and retirees from conflicts of interest that enrich advisers at the expense of retirement savers; it increases transparency by requiring more disclosure about the conflicts of interest and fees linked to the sale of retirement investments; and, especially relevant in this case, it promotes accountability by ensuring that investors harmed by widespread or systemic conflicts of interest may seek relief in court via class actions.

Consumer Federation of America is a nonprofit association of more than 250 state, local, and national pro-consumer organizations, founded in 1968 to represent the consumer interest through research, advocacy, and education. More information about CFA's membership is available at <http://consumerfed.org.membership/>. For three decades, CFA has been a leading voice advocating strengthened protections for individual investors. CFA policy in this area is focused on ensuring that investors have a choice of appropriate investments and service providers, the information necessary to make informed choices, protection against fraud and abuse, and effective recourse when they

are the victims of wrongdoing. CFA's advocacy for a heightened standard of care when financial professionals offer investment advice dates back to at least 2000. Key letters and documents advancing that policy goal are available at <http://consumerfed.org/issues/investor-protection/investment-professionals/>.

In addition, AARP, AFR, Better Markets, and CFA are all co-founding and steering members of Save Our Retirement, a coalition of almost 100 public-interest, retirement, and labor organizations that has worked for years to support the Rule. *See* Save Our Retirement, Membership List (Sept. 8, 2015), <http://saveourretirement.com/2015/09/about-save-our-retirement/>.

The Public Investors Arbitration Bar Association is an international bar association whose members represent investors in disputes with the securities industry. PIABA's mission is to promote the interests of the public investor in securities and commodities arbitration by protecting public investors from abuses in the arbitration process; making securities and commodities arbitration as just and fair as systematically possible; and creating a level playing field for the public investor in securities and commodities arbitration. PIABA accomplishes this mission partly through active involvement in the administrative rule-making process. PIABA members represent investors in court and arbitration who have received conflicted advice from investment advisers, securities brokers, and insurance brokers, oftentimes in connection with their retirement accounts. PIABA members have seen firsthand the harm that has resulted from the current regulatory system. PIABA gives a voice to those investors in the rule-making process and advocates for their protection.

BACKGROUND

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

For decades, agencies across the federal government have regulated the use of arbitration—in comfortable coexistence with the FAA. The Department’s rule is but one of dozens of regulations found in the Federal Register that specify what arbitration procedures private parties may use when acting in a regulated space.

The regulations began in the financial sector. The Commodities Futures Trading Commission has had in place for forty years a rule that any arbitration agreement contained in a commodities contract must abide by certain restrictions. 41 Fed. Reg. 42,942 (Sept. 29, 1976). The SEC, too, was among the first to regulate arbitration to preserve class actions. In 1992, at the request of FINRA (a self-regulatory organization for broker-dealers), 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). That rule allowed individual arbitration but prohibited FINRA members from compelling arbitration against members of certified or putative class actions.² *Id.* For nearly twenty-five years, every FINRA member 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).

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. 52,659, 52,661 (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).

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 Freddie in Banning Mandatory Arbitration*, Wash. Post, Oct. 9, 2004, <http://wapo.st/2bm97eb>. Although lenders remain free to include pre-dispute forced arbitration provisions in their loan agreements, such loans “are ineligible for sale to, or securitization by,” either Fannie Mae or Freddie Mac. *See* B8-3-02: Special Note Provisions and Language Requirements (Aug. 20, 2013), <https://www.fanniemae.com/content/guide/selling/b8/3/02.html>.

Beyond the consumer financial and investment-services industries, many other regulators have likewise moved to limit forced arbitration. The Department of Education has just adopted a rule that prohibits colleges and career-training programs that participate in its federal direct-loan program from entering into or relying on pre-dispute arbitration agreements with students for certain claims. *See* Unofficial Final Regulations, <http://www2.ed.gov/policy/highered/reg/hearulemaking/2016/index.html> (released Oct. 28, 2016). The Federal Trade Commission’s regulations implementing the Magnuson-Moss Warranty Act have barred the use, in consumer warranty agreements, of arbitration clauses that would result in binding decisions. *See* 80 Fed. Reg. 42,710 (July 20, 2015). The Department of Agriculture 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. 76,874 (Dec. 9, 2011). And the Department of Health and Human Services recently finalized new rules that limit the use of forced arbitration by any long-term care facility participating in Medicare and Medicaid. 81 Fed. Reg. 68688 (Oct. 4, 2016).

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 by requiring its 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 restricted 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). To protect our nation’s soldiers from predatory lending, Congress authorized the Department of Defense, under the Military Lending Act, to ban forced arbitration clauses 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 of the prohibition a misdemeanor); 80 Fed. Reg. 43,559 (July 22, 2015) (expanding definition of covered

³ The Eighth Circuit rejected the Board’s effort to restrict class waivers under the NLRA, *see Cellular Sales*, 824 F.3d at 774, though, as we explain below, the court’s holding and reasoning do not apply here. Recently, two other circuits have called the Eighth Circuit’s decision into question, *see Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), but, of course, it continues to remain controlling in this Circuit. At any rate, the Department’s rule does not contravene *Cellular Sales*.

consumer credit and banning arbitration clauses in such products). In other contexts, Congress 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) and Consolidated Appropriations Act 2016, Pub. L. No. 114–113, § 8096, 129 Stat. 2242, 2374 (2015) (enforcing such restrictions for large defense contractors as a condition of federal funding).

Finally, in May of this year—following a 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. 32,829, 32,830 (May 24, 2016).

As the history of these rules show, agencies (and Congress) have decades of experience carefully tailoring arbitration regulations to address important concerns. The Department of Labor’s rule is no different.

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.” CFPB Director Richard Cordray, 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), <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 simply channel claims into a cheaper, faster alternative forum. Instead, these clauses effectively suppress claims altogether and immunize companies from accountability. 81 Fed. Reg. at 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.

Statistics from established arbitration providers reinforce 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, March 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. at 32855; *see also id.* at 32830 (explaining that the study's findings establish 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.” AR at 98. 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. AR at 99. The Department also recognized that “[o]ften the monetary effect on a particular investor is too small to justify 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 more modest. By its terms, the rule denies “relief” under 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 of Financial Institution.” AR at 134.

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.” AR at 100. 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.” AR at 98.

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.” AR at 100, 76. 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.* 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. AR at 90.

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,” *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 114 (2008), 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. AR at 59. Allowing class actions in court is one of these standards.

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.” *AFL-CIO v. Donovan*, 757 F.2d 330, 343 (D.C. Cir. 1985); *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.

Given this, Thrivent wisely avoids directly challenging the Department’s authority under section 408(a) to condition an exemption on the availability of class actions. Nor does it argue that the rule exceeds the three statutory limits on the Secretary’s authority to grant a conditional exemption, which require that he “find[] 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 such plan.” 26 U.S.C. § 4975(c)(2). 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.” AR at 101. That determination is entitled to “great deference.” *AFL-CIO*, 757 F.2d at 343.

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. Thrivent argues that the rule violates this command, and frustrates the FAA’s purpose, because it would

“effectively ban and invalidate” Thrivent’s restrictions on the availability of class actions. Thrivent Br. 25.

But the rule here does no such thing: 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.” AR at 100. 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.* (“[I]f a Financial Institution enters into a contract requiring binding arbitration of class claims, the Department would not purport to invalidate the provision.”). Thrivent ignores these statements, instead arguing that the rule violates the FAA because it would “discriminate against and . . . invalidate” arbitration provisions in contracts covered by the rule. Thrivent Br. 20.

To win, Thrivent 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 Department cannot be trusted to explain its own rule. But Thrivent 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

“purpose behind its enactment”). Moreover, Thrivent never offers any reason to doubt the Department’s interpretation, to which this Court owes deference. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011). “When an agency interprets its own regulation,” courts, “as a general rule, defer[] to it unless that interpretation is plainly erroneous or inconsistent with the regulation.” *Decker v. New. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). The Court should take the Department at its word—not only because there is no basis to doubt its sincerity but also because principles of agency deference require that it do so.

The FAA poses no barrier here. It “requires courts to enforce agreements to arbitrate according to their terms,” *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012), but it “does not confer a right to compel arbitration of any dispute at any time,” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (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 *Cellular Sales*, both of which directly conditioned the enforcement of arbitration clauses on the availability of class procedures. *Compare* 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* AR at 100 (rule’s “exemption does not purport to render an arbitration provision . . . invalid, revocable, or unenforceable”).

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 *Cellular Sales*.

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* AR at 81. Thrivent 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*, 132 S. Ct. 2566 (2012). Thrivent Br. 25. 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.” 132 S. Ct. at 2603. In any event, the rule’s exemptions are a far cry from the coercion inherent in the federal government’s threat to withhold all Medicaid payments from a State. *Id.* at 2607. These authorities do not support Thrivent’s hyperbolic claim that this rule is “tantamount to a prohibition of any approach to dispute resolution that relies on arbitration.” Thrivent Br. 27.

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.” 132 S. Ct. at 2600 (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 2593–94, 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 2597. 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 to be such by both Congress and the Supreme Court. *See* Pub. L. No. 93–406 § 2003(a) (2014) (amending the Code to add “Sec. 4975. Tax On Prohibited Transactions”); *Comm’r of Internal Revenue 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, Thrivent suggests (at 20) that the FAA’s policies impede agencies from even promoting a “regulatory preference” for arbitration contracts without class waivers. Nothing in existing FAA jurisprudence supports that suggestion.

To the contrary, the Supreme Court has made clear that a federal agency does not run afoul of the FAA’s pro-arbitration policies when it employs its general authority delegated from Congress to regulate and restrict arbitration procedures where “necessary or appropriate to further the objectives” of a federal statute or to “protect statutory rights.” *McMahon*, 482 U.S. at 233–34. Indeed, the rule here follows the path first charted by the SEC under the very authority approved in *McMahon*. There, the SEC’s congressionally delegated authority to regulate was general—it said nothing specific about arbitration—yet the Supreme Court definitively ruled that the congressional grant of authority nonetheless gave the SEC “expansive power” and “broad authority” to regulate “arbitration procedures” to ensure that arbitration was both “consistent with the requirements of the Act” and only being used to “further the objectives of the Act.” *Id.* at 233 (discussing the SEC’s authority under 15 U.S.C. § 78s). And the Court blessed the SEC’s authority in this respect notwithstanding the FAA’s “federal policy favoring arbitration.” *Id.* at 226. Not surprisingly, then, FAA-based challenges to the SEC’s rulemaking authority since *McMahon* have been soundly rejected. *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. Here, in fact, because the agency’s rule ensures that arbitration agreements are actually voluntary, it furthers the FAA’s “basic precept that arbitration is a matter of consent, not coercion.” *Stolt-Nielsen v. Animalfeeds*, 559 U.S. 662, 681 (2010).

Even assuming a tension between the rule and what Thrivent 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, *A New Framework For Resolving Conflicts Between Congressional Statutes And Federal Rules*, 51 Emory L.J. 677, 701–726 (2002). Here, the two are easily capable of coexistence.

CONCLUSION

The Court should hold that the contract requirements in the best-interest-contract exemption and the principal transactions exemption do not violate the Federal Arbitration Act.

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Respectfully submitted,

/s/
Vildan A. Teske
TESKE MICKO KATZ KITZER &
ROCHEL PLLP
222 South Ninth Street
Suite 4050
Minneapolis, MN 55402
Tel: (617) 746-1558
Fax: (651) 846-5339
teske@teskemicko.com

Deepak Gupta
(*pro hac vice* admission pending)
Matthew W.H. Wessler
Matthew Spurlock
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
Tel.: (202) 888-1741
Fax: (202) 888-7792
deepak@guptawessler.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 7.1(f) because it contains 6,209 words, excluding the parts of the brief exempted by Rule 7.1(f)(1)(C). This brief complies with the type size requirement of Local Rule 7.1(h) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 13-point Baskerville font.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, I electronically filed the foregoing amicus brief with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel required to be served.

/s/
Vildan A. Teske
TESKE MICKO KATZ KITZER &
ROCHEL PLLP
222 South Ninth Street
Suite 4050
Minneapolis, MN 55402
Tel: (617) 746-1558
Fax: (651) 846-5339
teske@teskemicko.com

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