No. 11-

In the Supreme Court of the United States

MARMET HEALTH CARE CENTER, INC., CANOE HOLLOW PROPERTIES, LLC AND ROBIN SUTPHIN,
Petitioners,

v.

CLAYTON BROWN, as guardian for and on behalf of Clarence Brown,
Respondent.

MARMET HEALTH CARE CENTER, INC.,
Petitioner,

v.

JEFFERY TAYLOR, personal representative of the Estate of Leo Taylor,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984). The first question presented is:

> Whether Section 2 of the FAA preempts a state-law rule that prohibits the enforcement of a pre-dispute arbitration agreement when a plaintiff asserts a personal injury or wrongful death claim.

The identical question is pending before this Court in *Clarksburg Nursing Home & Rehabilitation Center, Inc.* v. *Marchio*.

2. Whether the West Virginia court applied its state-law unconscionability doctrine in a manner that subjected Petitioners' arbitration provisions to special scrutiny, thereby contravening the FAA.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

Petitioners: From No. 35494 (W. Va.), Marmet Health Care Center, Inc. n/k/a MHCC, Inc.; Canoe Hollow Properties, LLC; and Robin Sutphin.

From No. 35546 (W. Va.), MHCC, Inc., f/k/a Marmet Health Care Center, Inc.

Respondent: From No. 35494 (W. Va.), Clayton Brown, as guardian for and on behalf of Clarence Brown. From No. 35546 (W. Va.), Jeffrey Taylor, personal representative of the Estate of Leo Taylor.

Other appellants below: In No. 35635 (W. Va.) Sharon A. Marchio, Executrix of the Estate of Pauline Virginia Willett.

Other appellees below: In No. 35635 (W. Va.) Clarksburg Nursing & Rehabilitation Center, Inc., a West Virginia Corporation, d/b/a Clarksburg Continuous Care Center; Sheila K. Clark, Executive Director of Clarksburg Nursing & Rehabilitation Center, Inc., d/b/a Clarksburg Continuous Care Center; and Jennifer McWhorter.

In No. 35494 (W. Va.), Genesis Healthcare Corporation; Genesis Healthcare Holding Company II, Inc.; Genesis Health Ventures, Inc. of West Virginia; Genesis Eldercare Corporation; Genesis Eldercare Network Services, Inc.; Genesis Eldercare Management Services, Inc.; Genesis Eldercare Rehabilitation Services, Inc.; Genesis Eldercare Staffing Services, Inc.; Genesis Eldercare Hospitality Services, Inc.; Marmet Snf Operations, LLC; 1 Sutphin Drive Associates, LLC; 1 Sutphin Drive Operations, LLC; Gene-

sis WV Holdings, LLC; Glenmark Associates, Inc.; and Shawn Eddy.

In No. 35546 (W. Va.), Canoe Hollow Properties, LLC; Genesis Healthcare Corporation d/b/a Marmet Health Care Center; Glenmark Associates, Inc.; Glenmark Limited Liability Company I; Glenmark Properties, Inc.; Genesis Healthcare Corporation; Genesis Health Ventures of West Virginia, Inc.; Genesis Health Ventures of West Virginia, LP; Genesis Eldercare Corporation; Genesis Eldercare Network Services, Inc.; Genesis Eldercare Management Services, Inc; Genesis Eldercare Rehabilitation Services, Inc.; Genesis Eldercare Staffing Services, Inc.; Genesis Eldercare Physician Services, Inc.; Genesis Eldercare Hospitality Services, Inc.; Horizon Associates, Inc.; Horizon Mobile, Inc.; Horizon Rehabilitation, Inc.; GMA Partnership Holding Company, Inc.; GMA–Madison, Inc.; GMA–Brightwood, Inc.; Helstat, Inc.; Formation Capital, Inc.; FC–Gen Acquisition, Inc.; Gen Acquisition Corporation; and Jer Partners, LLC.

RULE 29.6 STATEMENT

Petitioners Marmet Health Care Center, Inc., now known as MHCC, Inc. and Canoe Hollow Properties, LLC are privately held West Virginia entities. Neither has a publicly traded parent corporation.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App., *infra*, 1a-105a) is reported at ___ S.E.2d ___, 2011 WL 2611327. The orders of the Supreme Court of Appeals of West Virginia and of the Circuit Courts of Kanawha County, West Virginia (App., *infra*, 106a-124a) are unreported.

JURISDICTION

West Virginia court entered its opinion June 29, 2011. App., *infra*, 1a-105a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

> arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

The Court is respectfully referred to the Introduction found in the Petition for a Writ of Certiorari styled *Clarksburg Nursing Home & Rehabilitation Center, Inc.* v. *Marchio*, which is incorporated here by reference.

STATEMENT

The Court is respectfully referred to the Statement found in the *Clarksburg* Petition, which is incorporated here by reference. We set forth here the facts applicable to these petitioners specifically.

A. The arbitration agreement

1. Brown

On March 26, 2004, Respondent Clayton Brown, guardian of his brother, Clarence Brown, signed an admissions contract for Clarence's re-admission to Marmet Health Care Center, Inc. (Marmet). App., *infra*, 14a. That contract included a mandatory arbitration provision. App., *infra*, 127a. That arbitration provision required each party to arbitrate disputes regarding the health care received by residents, like Clarence Brown, at Marmet. Both parties had the same rights and obligations in arbitration, although Marmet reserved the right to civil relief for a resident's failure to pay or to secure discharge. App., *infra*, 127a. Marmet did not impose any limitation on

the relief or recovery available to Clarence Brown in arbitration. See App., *infra*, 126a. Marmet also did not limit Clarence Brown's rights to pursue any grievances or complaints with any state or federal agencies. See App., *infra*, 127a. Clayton Brown admits he read or was otherwise aware of the arbitration provision before he signed it; raised no objection to it; knew he had the right to consult counsel; never consulted with counsel any time over the more than three years after he signed the contract during which his brother remained at Marmet; and presented no evidence or claim that he was under duress, coerced, or felt forced to agree to arbitrate any health care disputes regarding his brother. Clayton Brown also failed to argue or to introduce any evidence that he had no other option for health care for his brother.

2. Taylor

In February 2006, Ellen Taylor admitted her husband, Leo Taylor, to Marmet. She signed an admissions contract which included an agreement to arbitrate any claim against Marmet arising out of the health care her husband received at Marmet. App., *infra*, 18a. The arbitration language accepted by Taylor was identical to that accepted by Brown. App., *infra*, 127a.

B. The underlying allegations

1. Brown

Respondent Brown's initial complaint against Marmet and several Genesis entities alleged that due to breaches of the applicable standard of care while Clarence Brown was a resident at Marmet through May 16, 2007, he developed pressure sores, dehydration, malnutrition, contractures and infections. App., *infra*, 15a. After Clarence Brown died

June 10, 2008 in Tennessee, Respondent Brown amended his complaint to include allegations of wrongful death. Clarence Brown had first been a resident at Marmet in 1996 and had spent most of the following eleven years as a resident there. He had suffered his entire life from severe infantile cerebral palsy and other debilitating diseases and conditions.

2. Taylor

Respondent Jeffery Taylor, personal representative of Leo Taylor's estate, filed his complaint January 23, 2009. He alleged that Marmet and various Genesis entities had breached the standard of care for nursing home facilities regarding his father, Leo Taylor, while he was a resident at Marmet from February 7, 2006, through December 6, 2006. App., *infra*, 18a. Jeffrey Taylor claimed these failures caused injury and led to his father's death on January 12, 2007. Jeffrey Taylor claimed that Leo Taylor had suffered at Marmet from falls, pressure sores and ulcers, contractions, dehydration, and sepsis.

C. Proceedings in the trial court

1. Brown

Respondent Brown filed his initial complaint January 7, 2008. Clarence Brown had last been a resident of Marmet on May 16, 2007, eight months earlier. Clayton Brown had taken Clarence Brown to Tennessee, where he admitted him to another nursing home. Initially, Respondent sued several Genesis entities, including Marmet, for alleged breaches of the standard of care during Clarence Brown's stays at Marmet. A few local businessmen had founded Marmet in 1986 to provide nursing home care to residents in eastern Kanawha County, West Vir-

ginia. Marmet was independently owned and operated until Genesis bought it November 30, 2006.

Respondent filed an amended complaint for wrongful death July 2, 2008, while he was negotiating a settlement with Genesis. In the amended complaint, Respondent sought to pursue the former owners of Marmet and a former administrator who had owned and run the facility before Genesis bought it. Respondent settled with the Genesis entities shortly thereafter. Petitioners responded to the amended complaint and moved to dismiss it pursuant to the arbitration provision in the admissions contract.

The Circuit Court after hearing the argument of counsel and reviewing the record, including the Respondent's deposition, granted the motion to dismiss and to compel arbitration. It found that Respondent's claims arose out of the health care his brother received at Marmet; that Respondent and Marmet had agreed to arbitrate those health care claims; and that Respondent was compelled to do so. The Court entered an order compelling arbitration August 26, 2009. App., *infra*, 112a Respondent appealed that order to the Supreme Court of Appeals of West Virginia on November 16, 2009. That court agreed to hear the appeal by order dated March 4, 2010. App., *infra*, 108a.

2. Taylor

Petitioner Marmet moved to dismiss Respondent Taylor's Complaint based upon the arbitration clause in the admissions agreement. The court heard the motion to dismiss and to compel arbitration on August 27, 2009, and requested that the parties submit detailed findings of fact and conclusions of law. Both did so. The court accepted Marmet's order granting

the motion to dismiss and to compel arbitration and entered it September 29, 2009. App., *infra*, 115a. Respondent moved for reconsideration. The parties made additional filings with the court, which included the Affidavit of Petitioner Robin Sutphin. App., *infra*, 125a. The Court declined to revise its order. Respondent filed his petition for appeal with the Supreme Court of Appeals of West Virginia, which appeal the court agreed to hear by order dated April 14, 2010. App., *infra*, 110a.

D. The decision below

As relevant for Petitioners, the decision of the Supreme Court of Appeals of West Virginia had three principal holdings.

First, the West Virginia court held that the FAA preempted Section 15(c) of the West Virginia Nursing Home Act, which purports to declare "null and void as contrary to public policy" any waiver of a nursing home resident's ability to "commence an action in circuit court." App., *infra*, 61a-62a.

Second, the West Virginia court concluded that, as a matter of West Virginia public policy, all pre-injury agreements to arbitrate personal injury or wrongful death claims are unenforceable. App., *infra*, 88a. The West Virginia court further held that this categorical rule of "public policy" was not preempted by the FAA. App., *infra*, 88a. Applying the newly-announced rule to these cases, the court invalidated the arbitration agreements entered into by Brown and Taylor. App., *infra*, 88a, 96a.

Third, the West Virginia court concluded that the arbitration provisions at issue were procedurally and substantively unconscionable.[1]

Respondents have never questioned that the claims they seek to pursue must be arbitrated if the admissions contracts signed with Marmet are enforceable. However, Respondents have argued the arbitration provision is unenforceable because it is unconscionable. According to the court, the arbitration clause" in Respondent Brown's case was "procedurally unconscionable because it is a contract of adhesion that conditioned further medical treatment on acceptance of the arbitration clause." App., *infra*, 90-91a. The record is devoid of proof that Marmet conditioned Clarence Brown's further medical care on acceptance of the arbitration clause.

The court also purported to give "careful scrutiny to the adhesive admission agreement, and consider the relative positions of the parties, the adequacy of their bargaining positions, and the manner in which the agreement was adopted," and then agreed "with the plaintiff that the arbitration clause is procedurally unconscionable." App., *infra*, 91a. Without any evidence to support it, the West Virginia court concluded that Brown lacked "any meaningful alternative other than to sign the admission agreement."[2]

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[1] Unconscionability was not raised as a defense to the arbitration provision in *Clarksburg*. App., *infra*, 99a n.170.

[2] Although the court had previously held that the "burden of proving that a contract term is unconscionable rests with the party attacking the contract"—*i.e.*, *Respondent*—it faulted *Petitioners* for not identifying specific alternative "nursing homes" that had "available bed space," "offered services that * * * needed for [Brown']s treatment," and did not "contain[] arbitration clauses." App. A, *infra*, 91a.

App., *infra*, 91a. As for substantive unconscionability, the West Virginia court was concerned that Marmet's arbitration provision gave "the nursing home the unilateral right to proceed in any forum it chooses to collect money due or to have a resident forcibly discharged, but limit[ed] residents' claims to arbitration." App., *infra*, 91a. Finally, the West Virginia court found that the filing fees under American Arbitration Association for a claim were too high and constituted "an unconscionable bar to relief." App., *infra*, 92a.

The West Virginia court invalidated the arbitration provision in Respondent Taylor's case on similar unconscionability grounds. App., *infra*, 96a. According to the court, Respondent Taylor "ma[de] many of the same arguments for unconscionability that [it] found compelling in [Respondent] Brown's case." App., *infra*, 96a. The court's opinion did not, however, even reference the affidavit of Robin Sutphin, administrator of Marmet, regarding the circumstances surrounding the admission of Leo Taylor to Marmet by Ellen Taylor, his wife. App., *infra*, 125a. The affidavit, which is uncontroverted, stated that Sutphin reviewed the admissions contract, including the arbitration provision, with Ellen Taylor, before she signed it. App., *infra*, 126a. The affidavit also stated that Ellen Taylor raised no questions or concerns about the arbitration provision and appeared relaxed and comfortable with her decision to admit Leo Taylor to Marmet. App., *infra*, 126a. Further, the affidavit stated that Marmet would have admitted Leo Taylor even if Ellen Taylor had refused to accept the arbitration provision. App., *infra*, 126a.

REASONS FOR GRANTING THE PETITION

The Court is respectfully referred to the Statement found in the *Clarksburg* Petition, which is incorporated here by reference. In the event that the Court grants a writ of certiorari in that case, it should also grant this petition, whose first question presented is identical to the question presented in *Clarksburg*.

Additionally, the Supreme Court of Appeals of West Virginia, in its zeal to invalidate the enforcement of the mutually agreed arbitration provision in the Brown and Taylor admissions agreements, found, without record support and in spite of compelling evidence mandating a contrary result, that Marmet's arbitration provision was unconscionable and unenforceable. This represents such a marked deviation from the generally applicable principles of West Virginia contract law as to be preempted by Section 2 of the FAA. Under the FAA, arbitration agreements may be invalidated under state law only "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts *generally*." *Perry* v. *Thomas*, 482 U.S. 483, 492-93 n.9 (1987) (second emphasis added). That principle does not merely prohibit the invalidation of "arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original). It also bars courts from impeding arbitration by fashioning rules that purport to function as broad concepts of contract law but in fact apply only to, or operate with particular harshness, in the arbitration setting.

The West Virginia court distorted existing principles of contract law in order to thwart Marmet's arbitration agreement. See *Iberia Credit Bureau, Inc.*

v. *Cingular Wireless LLC* , 379 F.3d 159, 167 (5th Cir. 2004) ("That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. * * * [S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny."); *Oblix, Inc.* v. *Winiecki*, 374 F.3d 488, 492 (7th Cir. 2004) ("no state can apply to arbitration (when governed by the [FAA]) any novel rule").

For example, although as a general matter of West Virginia law, the party seeking to avoid an agreement bears the "burden of proving that a contract term is unconscionable," App., *infra*, 66a, the West Virginia court placed the burden on Petitioners to demonstrate that Marmet's arbitration provision was *not* unconscionable. See supra note 2. The West Virginia court also failed to examine whether Marmet's arbitration provision gives Respondents a full and fair opportunity to pursue claims through arbitration. Marmet's arbitration provision can be deemed to be unconscionable only under an idiosyncratic unconscionability standard that does not apply equally to all contractual terms. Because the West Virginia court's unconscionability determination is preempted by the FAA, the second question presented in this petition also warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold the petition pending its disposition of the petition in *Clarksburg Nursing Home & Rehabilitation Center, Inc.* v. *Marchio.*

Respectfully submitted.

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SEPTEMBER 2011