No. 11-

In the Supreme Court of the United States

CLARKSBURG NURSING HOME & REHABILITATION CENTER, LLC, d/b/a Clarksburg Continuous Care Center; SHEILA JONES; and JENNIFER MCWHORTER,

Petitioners,

v.

SHARON A. MARCHIO, Executrix of the Estate of Pauline Virginia Willett,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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 thus "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), a principle that this Court has repeatedly reaffirmed, including in *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008).

The Supreme Court of Appeals of West Virginia in this case adopted a rule of "public policy under West Virginia law" that invalidates any "arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death." App., *infra*, 85a-86a. And it held that the FAA permits application of that public policy rule to preclude enforcement of an otherwise-valid arbitration agreement. *Id.* at 85a.

The question presented is:

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

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: Clarksburg Nursing & Rehabilitation Center, LLC, a West Virginia LLC, d/b/a Clarksburg Continuous Care Center; Sheila Jones (formerly Sheila K. Clark); and Jennifer McWhorter.

Respondent: Sharon A. Marchio, Executrix of the Estate of Pauline Virginia Willett.

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

Other appellees below: 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; Genesis WV Holdings, LLC; Glenmark Associates, Inc.; Marmet Health Care Center, Inc. n/k/a MHCC, Inc.; Canoe Hollow Properties, LLC; Robin Sutphin; and Shawn Eddy.

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

Clarksburg Nursing & Rehabilitation Center, LLC, a West Virginia LLC, is ultimately a subsidiary of Integrated Commercial Enterprises, Inc. and KML, Inc, a privately-owned Delaware corporation and a privately-owned West Virginia corporation, respectively. Integrated Commercial Enterprises, Inc. and KML, Inc. have no parents and no publicly-held company owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Clarksburg Nursing & Rehabilitation Center, Inc., Sheila Jones, and Jennifer McWhorter 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-104a) is reported at ___ S.E.2d ___, 2011 WL 2611327. The orders of the Circuit Court of Harrison County, West Virginia (*Id.* at 105a-125a) is unreported.

JURISDICTION

The judgment of the West Virginia court was entered on June 29, 2011. App., *infra*, 3a. 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.

STATEMENT

This case arises from the Supreme Court of Appeals of West Virginia's refusal to enforce a predispute arbitration agreement because, and only because, the plaintiff asserted claims for personal injury or wrongful death.

There can be no question that the Federal Arbitration Act preempts the rule announced by the West Virginia court. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1747 (2011) (citing *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008)). The decision below thus violates seven precedents of this Court reaching back nearly 30 years, all of which hold that states may not place a class of claims off-limits to arbitration. See *Concepcion*, 131 S. Ct. at 1747; *Preston*, 552 U.S. at 353; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 446 (2006); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56, 58 (1995); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 623 n.10 (1985); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-11 (1984).

Because the decision below flouts the settled precedents of this Court, conflicts with decisions of lower courts across the country, and, if allowed to stand, would provide a roadmap for courts hostile to arbitration to exempt from the FAA entire classes of arbitration agreements—precisely what Congress sought to prohibit when it enacted the FAA—this Court's review is essential. Indeed, the lower court's defiance of this Court's precedents is so clear that the Court may wish to consider summary reversal.

A. The Arbitration Agreement

Petitioner Clarksburg Nursing and Rehabilitation Center, Inc. (Clarksburg), which does business as Clarksburg Continuous Care Center, is one of eleven nursing homes operated by American Medical Facilities Management, Inc., a West Virginia company. The individual petitioners, Sheila Jones (formerly Sheila Clark) and Jennifer McWhorter, are Clarksburg employees. App., *infra*, 21a.

On May 25, 2006, respondent Sharon A. Marchio signed an admission contract with Clarksburg on behalf of her mother, Pauline Virginia Willett. App., *infra*, 20a. The admission contract includes an optional arbitration agreement that is entitled "RESIDENT AND FACILITY ARBITRATION AGREEMENT." *Id.* at 102a. Immediately underneath that title is the caption "READ CAREFULLY," which also appears in all capital letters. *Ibid.*[1]

The arbitration agreement provides that "any legal dispute * * * or claim * * * that arises out of or relates to the Resident Admission Agreement or any

[1] The entire arbitration agreement is reproduced as Appendix 2 to the decision below. App., *infra*, 102a-104a.

service or health care provided by the Facility * * * shall be resolved exclusively by binding arbitration." App., *infra*, 102a. It applies not only to Willett, but also "to her 'successors and assigns' including her 'child, guardian, executor, administrator, legal representative or heir.'" *Id.* at 21a. The arbitration agreement provides that it "shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. §§ 1-16." *Id.* at 104a. In all capital letters, it states that "BY ENTERING THIS ARBITRATION AGREEMENT [THE PARTIES] ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY." *Id.* at 103a-104a.

Clarksburg Continuous Care Center does not condition admission on the resident's agreement to arbitration. App., *infra*, 104a. To the contrary, the provision is entirely optional and specifically states that "the execution of this Arbitration Agreement is *not* a precondition to the furnishing of services." *Id.* at 104a (emphasis added). Furthermore, even after the arbitration agreement has been executed, it "may be rescinded by written notice to [Clarksburg] * * * within 30 days of signature." *Ibid.* Because respondent did not rescind acceptance of the arbitration agreement, it has remained in full effect at all relevant times.

Additionally, the arbitration agreement imposes no limits on the damages that the arbitrator can award under applicable substantive law. App., *infra*, 103a. It is completely mutual—it applies to any claim that the resident might bring against the nursing home, as well as any claim that the nursing home might bring against the resident. *Id.* at 102a.

Finally, the agreement specifically preserves the residents' "right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency." *Id.* at 103a.

B. The Underlying Allegations

On May 21, 2006, about a week before she was admitted to Clarksburg Continuous Care Center, Willett went to the hospital "for treatment of several illnesses." App., *infra*, 20a. She had for some time "suffered from numerous ailments including Alzheimer's disease, ischemic cardiomyopathy, hypertension, chronic obstructive pulmonary disease, asthma, osteoarthritis, and osteoporosis." *Ibid.* Upon Willett's discharge from the hospital on May 27, she was transferred to Clarksburg Continuous Care Center. *Id.* at 21a.

The complaint alleged that in the five weeks following her admission to Clarksburg Continuous Care Center, "Willett lost weight, had severe urinary tract and other infections, and became withdrawn and lethargic." App., *infra*, 21a. On July 3, 2006, Willett was "transferred to a hospital, where she was found to be dehydrated, suffering from pneumonia, septicemia, an acute myocardial infarction, renal failure, and congestive heart failure." *Ibid.* Willett died three days later. *Ibid.*

C. Trial Court Proceedings

Respondent was appointed administrator of her mother's estate and brought suit in the Circuit Court of Harrison County, West Virginia against Clarksburg and two of its employees. App., *infra*, 21a. Her complaint alleged that petitioners "were negligent in failing to meet their obligations under the West Virginia Nursing Home Act, and thereby

caused or contributed to Ms. Willett's injuries and death." *Id.* at 21a-22a.

Petitioners filed a motion to compel arbitration of respondent's claims pursuant to the FAA and to dismiss the lawsuit. App., *infra*, 22a. "The *sole* argument made by" respondent in trying to avoid arbitration was that "the clause was 'null and void as contrary to public policy' under * * * Section 15(c) of the [West Virginia] Nursing Home Act." *Ibid.* (emphasis added). That section provides that "any written waiver by a nursing home resident of his or her right to commence a lawsuit for injuries sustained in a nursing home 'shall be null and void as contrary to public policy.'" *Ibid.* (quoting W. Va. Code § 16-5C-15(c)).

Instead of ruling on petitioners' motion to compel arbitration, the trial court certified to the Supreme Court of Appeals of West Virginia the question whether Section 15(c) of the West Virginia Nursing Home Act is preempted by the FAA in the context of the arbitration agreement employed by Clarksburg. App., *infra*, 121a-124a. For its part, the trial court "answered the certified question 'Yes,' and ruled that the Federal Arbitration Act preempts the West Virginia Nursing Home Act * * * 'insofar as the [Nursing Home Act] would require judicial consideration of claims brought under the [Act] and would lodge primary jurisdiction to hear cases under the [Act] in the" courts of West Virginia. *Id.* at 23a.

D. The Decision Below

The Supreme Court of Appeals of West Virginia accepted the circuit court's certified question and consolidated the case with two other matters in which it also granted review. App., *infra*, 12a, 23a.

Unlike respondent—who had challenged the enforceability of the agreement to arbitrate on the "sole" ground that the clause was void under Section 15(c) of the West Virginia Nursing Home Act, *id.* at 22a—the plaintiffs in the two other cases "also allege[d] that the arbitration clauses are unconscionable under the common law," *id.* at 23a. The decision below considered the asserted statutory and common-law grounds for unenforceability in turn.

1. The court first held that as a matter of state law, Section 15(c) invalidated any arbitration agreement contained within a nursing-home contract. App., *infra*, 59a. The remaining questions, then, were whether the arbitration agreements at issue were covered by the FAA and, if so, whether Section 15(a) was preempted by the FAA.

Section 2 of the FAA covers arbitration agreements taking the form of a "*written* provision in * * * a contract *evidencing a transaction involving commerce*." 9 U.S.C. § 2 (emphasis added). The West Virginia court acknowledged that both of these conditions were satisfied by the arbitration agreements before it. App., *infra*, 58a. It explained:

> First, the admission agreements are in writing, as required by Section 2 of the FAA. Second, there is substantial evidence that the nursing home admission agreements in question are contracts evidencing a transaction affecting interstate commerce under Section 2 of the FAA. * * * In the aggregate, the economic activities of these nursing home facilities have a significant impact on general practices subject to federal control, such as interstate commerce and transportation.

Ibid. "Hence, the FAA applies to our examination of this case." *Ibid.*

The West Virginia court concluded that Section 15(a) was preempted by the FAA. The court acknowledged that, under the plain text of the FAA and this Court's precedent, a state-law ground for invalidating an arbitration agreement that does not "exist at law or in equity for the revocation of *any* contract" cannot stand. 9 U.S.C. § 2 (emphasis added); App., *infra*, 57a. On the force of this authority, the court held that Section 15(c) was preempted by the FAA because it singled "out for nullification written arbitration agreements with nursing home residents, and does not apply to any other type of contractual agreements." *Id.* at 59a.

In arriving at this conclusion, however, the West Virginia court criticized this Court's jurisprudence interpreting the FAA. App., *infra*, 51a-55a. Describing this Court's reasoning as "tendentious," it asserted that the FAA should be understood to "govern only contracts between merchants with relatively equal bargaining power who voluntarily entered arbitration agreements." *Id.* at 51a. The lower court accused this Court of "stretch[ing] the application of the FAA from being a *procedural* statutory scheme effective only in the federal courts, to being a *substantive* law that preempts state law in both the federal and state courts." *Ibid.* And it complained that this Court "ha[d] created from whole cloth the doctrine of 'severability,'" under which the validity of an arbitration provision must be challenged separately from the overall validity of the contract containing the provision. *Id.* at 53a.

2. After concluding with evident reluctance that Section 15(c) of the West Virginia Nursing

Home Act was preempted by the FAA, the West Virginia court nonetheless invalidated the arbitration agreements.

The court announced that, "as a matter of public policy under West Virginia law," any "arbitration clause in a nursing home agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death" is unenforceable. App., *infra*, 85a-86a. This rule "*systemically*" invalidates such "arbitration clauses in nursing home agreements" and "*per se*" declares them to be unenforceable under West Virginia law. *Id.* at 78a (emphasis added). The court stated this new rule of West Virginia "public policy" in categorical terms: "[A]rbitration clauses in nursing home admission agreements—which were signed prior to the alleged occurrence of negligence that resulted in the personal injury or wrongful death of a nursing home resident—cannot be enforced to compel arbitration of a later negligence action against the nursing home." *E.g.*, *id.* at 87a.[2]

The court below then held that this categorical "public policy" rule was not preempted by the FAA.

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[2] See also App., *infra*, 87a ("[A]rbitration clauses—which were signed prior to the alleged occurrence of negligence that resulted in the person [sic] injury or wrongful death of a nursing home resident—cannot be enforced to compel arbitration of the underlying disputes."); *id.* at 88a-89a ("Arbitration clauses in nursing home admission agreements—which were signed prior to the alleged occurrence of negligence that resulted in the person [sic] injury or wrongful death of a nursing home resident—cannot be enforced to compel arbitration of a later negligence action against the nursing home.").

It acknowledged this Court's holding that "'[w]hen state law prohibits outright the arbitration of a particular type of claim, the [preemption] analysis is *straightforward*: *The conflicting rule is displaced by the FAA*." App., *infra*, 44a (emphasis added; quoting *Concepcion*, 131 S. Ct. at 1747). And it recognized that this Court has determined that the FAA's preemptive force reaches common-law doctrines and statutes enacted by state legislatives alike—it "forecloses courts from, in effect, doing 'what * * * the state legislature cannot.'" *Id.* at 45a (quoting *Perry*, 482 U.S. at 492 n.9).

The West Virginia court nonetheless asserted that Congress simply "did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act." App., *infra*, 85a. The decision below cited no authority to support this interpretation of the FAA. Instead, the court deemed it "important" that the "United States Supreme Court has not *directly addressed* the enforceability of an arbitration clause in a health care contract." *Id.* at 62a (emphasis added). Because the West Virginia court could not locate any decision from this Court applying the FAA in the precise "context of a personal injury or wrongful death claim," it concluded that the FAA (and this Court's precedents) lacked controlling effect in that context. *Id.* at 62a-64a.

Accordingly, the West Virginia court held, the FAA did not bar the application of the lower court's just-announced state-law rule of public policy that *per se* invalidates any "arbitration clause in a nursing home agreement adopted prior to an occurrence

of negligence that results in a personal injury or wrongful death." App., *infra*, 85a-86a. That was so even when, as here, the arbitration agreement was contained in a written contract evidencing a transaction involving interstate commerce, and so otherwise fell within the plain terms of Section 2 of the FAA. *Id.* at 58a.[3]

3. Before the trial court, respondent "did not raise any additional challenges to the arbitration clause other than arguing it was void under Section 15(c) of the Nursing Home Act." App., *infra*, 98a n.170. Having concluded that Section 15(c) was preempted by the FAA, the West Virginia court answered the trial court's certified question in the affirmative. *Id.* at 98a. The court then remanded the case to the trial court for further proceedings to determine the enforceability of the arbitration agreement. But the court left no room for doubt that, "as a matter of public policy under West Virginia law, the arbitration clause * * * adopted prior to the alleged violation of [Clarksburg's] duties * * * *should not be enforced to compel arbitration* of [respondent's] allegations." *Ibid.* (emphasis added). And the court pointedly reiterated its holding that "Congress did not intend" for pre-dispute agreements to arbitrate personal injury or wrongful death claims "to be governed by the Federal Arbitration Act." *Ibid.*

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[3] The arbitration agreements signed by the other plaintiffs in the consolidated cases—but not the agreement between Clarksburg and respondent—were also found to be unenforceable on the basis of what the West Virginia court characterized as a case-specific procedural and substantive unconscionability analysis. App., *infra*, 92a, 95a.

REASONS FOR GRANTING THE PETITION

The decision below warrants review for three reasons.

First, the West Virginia court defied this Court's settled precedent on the preemptive effect of the FAA. This Court has made clear repeatedly that, in "enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and 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*, 465 U.S. at 10. Thus, "even if a rule of state law would otherwise exclude such claims from arbitration," the FAA compels that the parties' arbitration agreement will be enforced. *Mastrobuono*, 514 U.S. at 58.

Because West Virginia's public policy rule "prohibits outright" the enforcement of *every* arbitration agreement in a nursing-home contract in *any* case in which the plaintiff asserts a personal injury or wrongful death claim, "the analysis is straightforward"—it is preempted by the FAA. *Concepcion*, 131 S. Ct. at 1747 (citing *Preston*, 552 U.S. at 353).

Second, the West Virginia court's categorical rejection of the applicability of the FAA to *all* personal injury and wrongful death claims directly conflicts with the decisions of numerous other courts that have recognized no such subject-matter limitation on the FAA's reach. The decision below, which reasons that the FAA does not apply unless this Court has "directly addressed" the precise kind of contract in which the arbitration provision appears, is irreconcilable with these cases. App., *infra*, 62a.

Third, the decision below undermines the strong federal policy favoring enforcement of arbitration

provisions as written. Congress intended the FAA to allow parties to structure private dispute resolution as they see fit and to enforce them notwithstanding contrary state law, subject only to a narrow exception for "grounds * * * for the revocation of *any* contract. 9 U.S.C. § 2 (emphasis added). But it is clear that the state-law rule announced in the decision below is nothing of the sort. Rather, it is an undisguised attempt to carve out an entire class of arbitration agreements from the FAA. Left undisturbed, it would permit courts to invent new exceptions to the FAA simply because this Court has not yet spoken to the exact subject matter of the claim or the underlying contracts, opening the door to the very judicial hostility that the FAA was enacted to eliminate.

The consequence will be a balkanized and uneven landscape, in which only some kinds of arbitration provisions in transactions affecting interstate commerce are subject to the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The West Virginia court's illegitimate restriction on the applicability of the FAA should not be allowed to stand.[4]

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[4] The judgment of the court below is final within the meaning of 28 U.S.C. § 1257(a). This Court has frequently granted certiorari petitions seeking review of state-court judgments finally denying efforts to compel arbitration. See, *e.g.*, *Perry*, 482 U.S. at 489 n.7; *Southland,* 465 U.S. at 6-8; see also *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003) (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration provision without addressing jurisdiction); *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681 (1996) (same); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995) (same).

A. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

This Court has stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Bd. of Trustees*, 489 U.S. 468, 479 (1989); see also *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono*, 514 U.S. at 53-54. In particular, Section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2).

Despite recognizing that the nursing-home contract in which the arbitration provision was contained "evidenc[ed] a transaction affecting interstate commerce under Section 2 of the FAA," App., *infra*, 58a, and that it has never even been suggested by respondent that the arbitration provision is invalid on the basis of a "ground[] * * * for the revocation of any contract," *id.* at n.170, the West Virginia court held that, "as a matter of public policy under West Virginia law, the arbitration clause in [the] admission agreement * * * should not be enforced to compel arbitration" of respondent's claims, *id.* at 98a. According to the court, arbitration of such claims is *per se* inconsistent with West Virginia public policy because it creates the potential for nursing-home operators to "avoid *courtroom* scrutiny of * * * conduct that caused a personal injury or wrongful death," thereby (so the court asserted) depriving plaintiffs of

the ability to "publicly air[]" their state-law claims "in the *courts*." *Id.* at 84a-85a (emphasis added).[5]

This Court has on a number of occasions granted certiorari to prevent States from elevating state-law "requirement[s] that litigants be provided a judicial forum for resolving" a certain class of claims over the national policy mandating the "'rigorous[] enforce[ment]'" of arbitration agreements according to their terms. *Perry*, 482 U.S. at 490; see also, *e.g.*, *Concepcion*, 131 S. Ct. at 1747; *Preston*, 552 U.S. at 356; *Mastrobuono*, 514 U.S. at 56; *Mitsubishi Motors*, 473 U.S. at 623 n.10; *Southland*, 465 U.S. at 10-11. The West Virginia court's outright defiance of this Court's precedents cries out for this Court's intervention here.

1. Before Congress enacted the FAA, state courts routinely refused to enforce arbitration agreements as contrary to public policy. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted); see also *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate.").

Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, * * * 'save

[5] The arbitration agreement here does not impose any confidentiality requirements on the parties. App., *infra*, 102a-104a.

upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 492 n.9 (quoting 9 U.S.C. § 2). What a State absolutely may not do is "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10.

In an unbroken line of cases, this Court has instructed that the FAA preempts States' attempts to declare a category of state-law claims off limits to arbitration. For example, in *Southland* itself, after the California Supreme Court construed the California Franchise Investment Law to render claims under that law non-arbitrable, this Court reversed, declaring that "[s]o interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Southland*, 465 U.S. at 5, 10; see also *Buckeye Check Cashing*, 546 U.S. at 446 (*Southland* "rejected the proposition that the enforceability of the arbitration agreement turned on the state legislature's judgment concerning the forum for enforcement of the state-law cause of action").

Applying *Southland*, this Court in *Mitsubishi Motors* readily disposed of the respondent's assertion that claims arising under the Puerto Rico antitrust and unfair competition statute were non-arbitrable on account of a Puerto Rico law that purported to "render null and void" agreements to arbitrate such claims. 473 U.S. at 621 & n.8. It explained that "any contention that the local antitrust claims are nonarbitrable would be foreclosed by this Court's decision in *Southland* * * * where we held that the Federal Arbitration Act '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.'" *Id.* at 623 n.10 (quoting *Southland*, 465 U.S. at 10).

Shortly thereafter, this Court again reversed a decision of the California Supreme Court holding that the California legislature has the power to declare non-arbitrable claims to collect wages under the California Labor Code. *Perry*, 482 U.S. at 492-493. Explaining that California's "requirement that litigants be provided a judicial forum for resolving wage disputes" was in "unmistakable conflict" with Section 2 of the FAA and its underlying policy, the Court held that, "under the Supremacy Clause, the state statute must give way." *Id.* at 491.

In *Mastrobuono*, this Court reiterated that the FAA preempts state-law rules that "purport[] to require judicial resolution of certain disputes." 514 U.S. at 56. The Court thus held that New York's prohibition against arbitration of punitive-damage claims was preempted by the FAA. Put simply, when "contracting parties agree to *include*" certain claims "within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise *exclude* such claims from arbitration." *Id.* at 58 (second emphasis added).

And more recently still, in *Preston*, this Court held that a provision of the California Talent Agents Act ("TAA") that required disputes under that Act to be submitted to California's Labor Commissioner in the first instance was preempted by the FAA. *Preston*, 552 U.S. at 351. Noting that "[t]he FAA's displacement of conflicting state law is 'now well-established,'" the Court held that "the FAA supersedes" the California statute. *Id.* at 353, 359. The TAA "conflict[s] with the FAA," this Court deter-

mined, because it "grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate." *Id.* at 356.

These cases leave no doubt that Section 2 of the FAA forbids states from "prohibit[ing] outright the arbitration of a particular type of claim." *Concepcion*, 131 S. Ct. at 1747. State law rules declaring causes of action non-arbitrable—*e.g.*, requirements that all franchise disputes or wage collection claims be resolved in state courts or before state administrative tribunals—simply cannot stand. This principle applies equally to rules that have their source in judicially-fashioned common-law doctrines and to those that arise from statutes enacted by state legislatures. A court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * * the state legislature cannot." *Perry*, 482 U.S. at 492 n.9; see *Concepcion*, 131 S. Ct. at 1747.

The decision below represents a clear and indefensible departure from this principle. As articulated by the West Virginia court, that State's public policy categorically prohibits enforcement of pre-dispute arbitration agreements in nursing home contracts with respect to personal injury or wrongful death claims. App., *infra*, 85a-86a. Yet the FAA "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*, 465 U.S. at 10. Because the West Virginia "public policy" rule unmistakably "require[s] judicial consideration of claims" expressly covered by an agreement to arbitrate, it "directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause." *Id.*

2. The West Virginia court felt free to carve out an exception to the preemptive reach of FAA because this Court has never "directly addressed" whether "the Federal Arbitration Act applies to personal injury or wrongful death actions that arise after the execution of an arbitration contract." App., *infra*, 62a, 78a (quotation marks omitted). Ignoring the basic principle that "once the Court has spoken, it is the duty of other courts to respect [the Court's] understanding of the governing rule of law," *Rivers* v. *Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994), the West Virginia court concluded that the FAA (and this Court's precedents interpreting it) lack any "any controlling effect upon an agreement, adopted prior to the occurrence of negligent conduct, to arbitrate a personal injury or wrongful death action." App., *infra*, 64a.

The FAA itself and this Court's prior decisions (see *supra* pp. 16-18) clearly and directly answer the question whether the FAA governs arbitration agreements evidencing interstate commerce regardless of the underlying subject matter or the nature of the claim sought to be arbitrated. Certainly nothing in the text of Section 2 supplies any warrant for removing from the FAA's ambit pre-dispute arbitration agreements in nursing home admission contracts that evidence interstate commerce, or personal injury or wrongful death claims. See *Concepcion*, 131 S. Ct. at 1749 n.5 (rejecting dissent's suggestion that "Congress 'thought that arbitration would be used primarily where merchants * * * possessed roughly equivalent bargaining power'" as a "limitation [that] appears nowhere in the text of the FAA"); *Allied-Bruce Terminix*, 513 U.S. at 280-281 (rejecting argument that a narrow construction of the FAA was necessary to "protect consumers asked to sign form

contracts by businesses"); cf. *Conn. Nat'l Bank* v. *Germain*, 503 U. S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.").

And this Court has been equally explicit about the breadth of the FAA. The FAA, after all, "seeks broadly to overcome judicial hostility to arbitration agreements * * * in both federal and state courts." *Allied-Bruce Terminix*, 513 U.S. at 272-273 (rejecting narrow construction of "interstate commerce" language that would "carv[e] out an important statutory niche in which a State remains free to apply its anti-arbitration law or policy"). Its reach "coincid[es] with that of the Commerce Clause." *Id.* at 274-275 (citing, *inter alia*, *Perry*, 482 U.S. at 490, and *Southland*, 465 U.S. at 14-15). As such, federal law permits "*only* two limitations on the enforceability of arbitration provisions": (1) "they must be part of a * * * a contract 'evidencing a transaction involving commerce'" and (2) "such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" *Southland*, 465 U.S. at 10-11 (quoting 9 U.S.C. § 2; emphasis added). "[N]othing in the [FAA] indicat[es] that this broad principle of enforceability is subject to *any* additional limitations under State law." *Id.* at 11 (emphasis added). "Section 2 * * * embodies a clear federal policy of requiring arbitration *unless* the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable upon 'such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (emphasis added).

Here, the West Virginia court expressly admitted that "the nursing home admission agreements in question are contracts evidencing a transaction af-

fecting interstate commerce under Section 2 of the FAA." App., *infra*, 58a. And there can be no claim that the West Virginia "public policy" rule *per se* invalidating all pre-dispute agreements to arbitrate personal injury or wrongful death claims in the nursing home context is a "'ground[] * * * for the revocation of any contract'"; to the contrary, that rule "singl[es] out arbitration provisions for suspect status," *Doctor's Assocs.*, 517 U.S. at 686-687, precisely because of the West Virginia court's perception that all such provisions "warrant[] a wary examination," App., *infra*, 84a. It follows, therefore, that the FAA's "broad principle of enforceability," *Southland*, 465 U.S. at 11, controls this case, West Virginia's "judgment[s] concerning the forum for enforcement of the state-law cause of action" notwithstanding, *Buckeye Check Cashing*, 546 U.S. at 446.[6]

The Court may wish to consider summary reversal on account of the West Virginia court's "obvious" error, *Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006) (per curiam), in failing to follow the "straightforward" analysis directed by this Court's precedents, *Concepcion*, 131 S. Ct. at 1747. Alternatively, the Court should grant plenary review to reaffirm the FAA's broad preemptive effect on state-law doctrines that disfavor arbitration and preclude enforcement of agreements to arbitrate entire categories of claims.

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[6] The lower court's logic is somewhat mystifying. It held that FAA preempts the *statutory* non-arbitrability rule in Section 15(c) of the West Virginia Nursing Home, without acknowledging that under precisely the same reasoning, the FAA preempts its *common-law* public policy rule, which has the identical effect of placing an entire class of claims off-limits to arbitration. See *Perry*, 482 U.S. at 492 n.9.

B. The Decision Below Conflicts With Decisions Of Lower Courts Applying The FAA Without Regard To A Contract's Underlying Subject Matter.

In light of the patent incompatibility of the decision below with this Court's precedents, it should be no surprise that the West Virginia court's insistence that the FAA is not applicable to "personal injury or wrongful death claims," App., *infra*, 85a—and therefore that a state may declare such claims non-arbitrable—conflicts with numerous decisions of state and federal courts around the country. These other courts have held, in conformity with this Court's precedent, that the FAA preempts any State's public policy judgment—whether that judgment has its source in common-law or in a statute—that a category of state-law claim should be non-arbitrable notwithstanding the contracting parties' agreement to submit that claim to arbitration.

In the nursing home context alone, lower courts have held that a State's policy against arbitration of personal injury or wrongful death claims must give way in face of the FAA.

For example, the Illinois Supreme Court determined that, as applied to arbitration agreements that "satisf[y] the interstate commerce requirement of the FAA," an Illinois law forbidding nursing home residents from waiving their right to a jury by trial is preempted by the FAA. *Carter* v. *SSC Odin Operating Co.*, 927 N.E.2d 1207, 1212, 1214 (Ill. 2010). The court explained that the anti-waiver provision, because it "required resolution of the dispute in a non-arbitral forum" even when "the contract mandated arbitration," was "antiarbitration legislation, which is preempted by the FAA and the holding in *South-*

land." *Id.* at 1218-1219; see also *Fosler* v. *Midwest Care Ctr. II, Inc.,* 928 N.E.2d 1, 11 (Ill. App. Ct. 2009) ("[T]he FAA preempts any State law that denies enforcement of an arbitration clause in any contract involving interstate commerce, even when the claim at issue is a statutory claim based on the public policy of the State.") (internal quotation marks omitted).

New Jersey's intermediate appellate court has likewise rejected the contention that the FAA permits States to declare non-arbitrable wrongful death claims brought on behalf of nursing home residents. *Estate of Ruszala ex rel. Mizerak* v. *Brookdale Living Cmtys., Inc.*, 1 A.3d 806 (N.J. Super. Ct. App. Div. 2010). Because there was "little doubt that the residency agreements at issue here involve interstate commerce," the "arbitration provisions in the residency agreements * * * are subject to the FAA." *Id.* at 817-818. The court therefore "enforce[d] [the] federal policy in favor of arbitration" and found that New Jersey's "prohibition of arbitration agreements in nursing home contracts" was preempted by the FAA. *Id.* at 818, 822; see also *Triad Health Mgmt. of Ga., III, LLC* v. *Johnson*, 679 S.E.2d 785, 789-790 (Ga. Ct. App. 2009) (holding that a state statute precluding enforcement of pre-dispute agreements to arbitrate medical malpractice claims brought by nursing home residents (among others) was preempted by the FAA because it barred a "specific class of arbitration agreement and restrict[ed] the enforcement thereof counter to the 'liberal federal policy favoring arbitration agreements'").

Numerous courts have applied the FAA to compel arbitration of personal injury and wrongful death claims in other contexts.

In *Mehler* v. *Terminix International Co. L.P.*, 205 F.3d 44 (2d Cir. 2000), for example, the Second Circuit ordered arbitration of personal injury claims arising from termite extermination services, observing that "[t]here [was] no dispute" that the "FAA applies to the arbitration agreement at issue, which affects interstate commerce." *Id.* at 47. And in *Miller* v. *Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997), the Fifth Circuit rejected the plaintiff's contention that her claims were non-arbitrable "because Texas state law does not favor arbitration for personal injury or workers' compensation claims." *Id.* at 219. "The FAA preempts conflicting state antiarbitration law." *Ibid.*

State courts have reached the same conclusion. See *Cleveland* v. *Mann*, 942 So.2d 108, 113 (Miss. 2006) (en banc) (compelling arbitration of medical malpractice claims under the FAA because the "Clinic-Physician-Patient Arbitration Agreement" involved interstate commerce); *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 n.4 (Tex. 2005) (orig. proceeding) (rejecting argument that plaintiff's "personal injury claim cannot be arbitrated" because the "FAA not only contains no such limitation, but also preempts any state requirements"); see also, *e.g.*, *ATP Flight Sch., LLC* v. *Sax*, 44 So. 3d 248, 250 (Fla. Dist. Ct. App. 2010) (compelling arbitration of wrongful death claim brought by trainee's wife following a midair collision and holding that "FAA govern[ed] the parties' agreement to arbitrate"); *J.B. Hunt Transp., Inc.* v. *Hartman*, 307 S.W.3d 804, 809-810 & n.4. (Tex. Ct. App. 2010) (orig. proceeding) (compelling arbitration under the FAA of wrongful death claim filed after employee was killed while driving a truck owned by his employer notwithstanding state law "prohibit[ing] pre-injury waivers of personal in-

jury or death claims"); *Mercedes Homes, Inc.* v. *Colon*, 966 So. 2d 10, 14 (Fla. Dist. Ct. App. 2007) (similar; compelling arbitration of personal injury claims arising from allegedly negligent installation of landscaping).

Given the deep chasm separating the decision below from the other jurisdictions that have addressed this precise issue—*i.e.*, whether the FAA is "in any way" applicable to pre-dispute arbitration agreements when the plaintiff asserts a personal injury or wrongful death claim, cf. App., *infra*, 84a—certiorari and reversal are plainly warranted.[7]

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[7] More generally, state and federal courts around the country have concluded that the FAA precludes states from declaring all manner of state-law claims non-arbitrable. See, *e.g.*, *Seacoast Motors of Salisbury, Inc.* v. *DaimlerChrysler Motors Corp.* 271 F.3d 6, 10 (1st Cir. 2001) ("[T]he FAA's preemptive effect" makes "irrelevant" any decision by the "Massachusetts legislature [to] ma[ke] [state-law dealer protection] claims nonarbitrable."); *S+L+H S.p.A.* v. *Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1526 (7th Cir. 1993) ("The Supreme Court has rejected the argument that a state statute can void the choice of private parties to arbitrate a dispute."); *Sec. Indus. Ass'n* v. *Connolly*, 883 F.2d 1114, 1121-1124 (1st Cir. 1989) (FAA preempts Massachusetts regulations prohibiting arbitration of securities claims because "only Congress, not the states, may create exceptions to [the FAA]"); *Commerce Park at DFW Freeport* v. *Mardian Constr. Co.*, 729 F.2d 334, 337 (5th Cir. 1984) (FAA preempts no-waiver provision in Texas Deceptive Trade Practices-Consumer Protection Act); *Satomi Owners Assoc.* v. *Satomi, LLC*, 225 P.3d 213, 219 (Wash. 2009) ("We conclude that the [Washington Condominium Act's] judicial enforcement provision is preempted by the FAA"); *Heaberlin Farms, Inc.* v. *IGF Ins. Co.*, 641 N.W.2d 816, 818-819 (Iowa 2002) (FAA preempts Iowa law that prohibits enforcing arbitration provisions in contracts of adhesion); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 361 (Tenn. Ct. App. 2001) (FAA preempts Tennessee law

C. The Decision Below Is Exceptionally Important.

Just this past Term, this Court reaffirmed that when a state-law rule "prohibits outright the arbitration of a particular type of claim," it is "straightforward[ly]" preempted by the FAA. *Concepcion*, 131 S. Ct. at 1747 (citing *Preston*, 552 U.S. at 353). West Virginia's "public policy" that no pre-dispute "arbi-

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declaring Tennessee Consumer Protection Act claims non-arbitrable); *Conseco Fin. Servicing Corp.* v. *Wilder*, 47 S.W.3d 335, 341 (Ky. Ct. App. 2001) ("Even if the [Kentucky Consumer Protection Act] did create an exception to Kentucky's Arbitration Act, * * * that exception would have no bearing on Conseco's federally established rights, for when the FAA applies as we believe it does here, it supersedes incompatible state laws.") (footnote omitted); *In re Conseco Fin. Servicing Corp.*, 19 S.W.3d 562, 571 (Tex. Ct. App. 2000) (orig. proceeding) ("[A]lthough a federal statutory claim may escape an arbitration clause that is subject to the FAA, depending upon Congress's intent, a state statutory cause of action * * * may not."); *Duggan* v. *Zip Mail Services, Inc.*, 920 S.W.2d 200, 203 (Mo. App. E.D. 1996) ("Missouri [law] may not be used to defeat an arbitration provision of a contract which is covered by the FAA."); *Bleumer* v. *Parkway Ins. Co.*, 649 A.2d 913, 923 (N.J. Super. Ct. Law Div. 1994) ("[T]he public policy grounds for declining to compel arbitration of [New Jersey Conscientious Employee Protection Act] claims under state law, no matter how compelling, cannot dictate a similar result in cases arising under the FAA. That is so because the FAA has been held under the Supremacy Clause to preempt any state law or policy which would restrict arbitrability."); *Fairview Cemetery Ass'n of Stillwater* v. *Eckberg*, 385 N.W.2d 812, 816 (Minn. 1986) ("Because Congress has evidenced a preference for arbitration, this preference should override state interests in requiring litigation."); *Entrekin* v. *Internal Med. Assocs.*, 764 F. Supp. 2d 1290, 1294 (M.A. Ala. 2011) ("[T]o the extent that [Ala. Code] § 6–5–485 would limit the enforceability of arbitration agreements to after a claim has arisen, the statute is pre-empted as violating the Supremacy Clause.").

tration clause in a nursing home admission agreement" will be "enforced to compel arbitration" of any "personal injury or wrongful death" claim is just such a rule. App., *infra*, 85a-86a.

Reduced to its essentials, the West Virginia court's reasoning is that a lower court need not apply the FAA if this Court has not "directly addressed" the precise kind of contract in which the arbitration provision appears. App., *infra*, 62a. This cramped approach to respecting this Court's precedents is mistaken in a way that is extraordinarily significant.

In effect, the West Virginia court chose to treat *Southland*, *Perry*, *Preston*, and the Court's other precedents as tickets good for one ride only—*i.e.*, narrowly invalidating only the precise state-law rule of non-arbitrability before the Court in those cases. But the fact that a nursing home admission contract involves different subject matter than, as the West Virginia court put it, a "franchise agreement" (*Southland*), "employment * * * contract" (*Perry*), "contract[] between manufacturers and dealers" (*Mitsubishi Motors*), "deferred deposit agreement" (*Buckeye Check Cashing*), "attorney-client fee contract" (*Preston*), or "consumer cell phone contract" (*Concepcion*), see App., *infra*, 62a n.103, is hardly the type of difference that permits a lower court to refuse to apply this Court's precedent.

Indeed, the West Virginia court's approach is fundamentally irreconcilable with this Court's role in our judicial system, which is to resolve recurring legal issues and announce authoritative interpretations of federal law binding on *all* courts nationwide. *Rivers*, 511 U.S. at 312 ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to re-

spect that understanding of the governing rule of law."); cf. U.S. Const., Art. VI, cl. 2 ("the Judges in every State shall be bound" by federal law). And it is at war with the language and reasoning of this Court's decisions, which hold that the FAA preempts any state-law rule that purports to exempt from arbitration a class of state-law claims and to instead require a judicial forum for them. See *supra* pp. 16-18.

What makes the West Virginia court's reasoning even more troubling is that it has no limiting principle. Left to stand, it will tear gaping holes in the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24. The lower court's approach cannot be confined to nursing home admission contracts or personal injury and wrongful death claims, because there are many other contexts in which this Court has not yet had occasion to specifically apply Section 2 of the FAA. See, *e.g.*, *Mawing* v. *PNGI Charles Town Gaming, LLC*, No. 10-1999, 2011 WL 1636941, at *1-2 (4th Cir. May 2, 2011) (horse stall rental); *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1123-1124 (11th Cir. 2010) (satellite television services); *Bell v. Koch Foods of Miss., LLC*, 358 F. App'x 498, 499, 502 (5th Cir. 2009) (poultry raising); *1mage Software, Inc.* v. *Reynolds & Reynolds Co.*, 459 F.3d 1044, 1055-1056 (10th Cir. 2006) (software licensing); *James* v. *McDonald's Corp.*, 417 F.3d 672, 674-675, 676 (7th Cir. 2005) (promotional contest); *ATP Flight Sch.*, 44 So. 3d at 250 (flight school); *Cleveland*, 942 So.2d at 113 (medical services); *Abela* v. *Gen. Motors Corp.*, 669 N.W.2d 271, 278 (Mich. Ct. App. 2003) (consumer automobile purchase), *aff'd*, 677 N.W.2d 325 (Mich. 2004); *Bacon* v. *Grapetree*

Shores, Inc., No. 2010-cv-71, 2011 WL 1654423, at *1 n.1 (D.V.I. Apr. 28, 2011) (resort stay).

The West Virginia court in this case indulged the very "'ancient' judicial hostility to arbitration" that the FAA was enacted to end. *Mastrobuono*, 514 U.S. at 56. It made clear its view that arbitration "warrants a wary examination" because it ostensibly gives the defendant the ability to "avoid courtroom scrutiny of their [allegedly] negligent conduct." App., *infra*, 84a. As this Court explained a quarter-century ago, however, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors*, 473 U.S. at 626-627. And even two decades ago, the Court had already observed that "mistrust of the arbitral process * * * has been undermined by [its] [then-]recent arbitration decisions." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 n.5 (1991).

Arbitration necessarily involves a proceeding outside the courtroom; that characteristic of arbitration is not a valid basis to prohibit it. "By agreeing to arbitrate * * * [a party] trades the procedures * * * of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628; see also *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010). Indeed, "arbitration's advantages often would seem helpful to individuals," as well as corporations. *Allied-Bruce Terminix*, 513 U.S. at 280; see also *id.* ("[T]he [FAA], by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, . . . corporate interests [and] . . . individuals.'") (quoting

S. Rep. No. 536, 68th Cong., 1st Session, 3 (1924)). In all events, it is clear that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 131 S. Ct. at 1753.

Emboldened by the decision below, other courts hostile to arbitration might follow the West Virginia court's lead and invent a host of new categorical exclusions to the FAA based on nothing more than the observation that this Court has not yet addressed a factually indistinguishable case and specifically declared that the Act applies to the particular type of claim. If the decision below is allowed to stand, it would replace the FAA's uniform federal policy favoring arbitration—a policy that understandably has invited reliance on the part of parties and affected how they have structured their contractual relationships with one another—with an uneven patchwork of "one-off," unprincipled carve-outs from the FAA that differ from state to state.

This "new, unfamiliar test" for ascertaining the scope of the FAA is not only wholly at odds with this Court's precedent, but would also "unnecessarily complicat[e] the law and breed[] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix*, 513 U.S. at 275.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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