No. 11-394

In the
Supreme Court of the United States

CLARKSBURG NURSING & REHABILITATION CENTER, INC.; SHEILA K. CLARK 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 the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN HEALTH CARE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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October 28, 2011

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MOTION OF THE AMERICAN HEALTH CARE ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), the American Health Care Association (AHCA) respectfully moves for permission to file the attached brief *amicus curiae*. Petitioners have consented to AHCA's filing of a brief.[1] In accordance with Rule 37.2(a), AHCA has provided notice to counsel for Respondent of AHCA's intent to file a brief. Respondent has not consented.

[1] The letter expressing consent is being filed with the Clerk of the Court along with this motion and brief.

AHCA is the nation's largest association of long term care and post-acute care providers, representing the interests of nearly 11,000 non-profit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities.[2] AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term care and post-acute care provider community. One way in which AHCA fulfills the mission of promoting the interests of its members is by participating as an *amicus curiae* in cases with far-ranging consequences for its members. Such cases include those involving the proper interpretation of the Federal Arbitration Act in relation to state legislative and judicial efforts seeking to prohibit skilled nursing facilities from utilizing arbitration to resolve disputes.

AHCA's interest in this case is driven primarily from its concern that nursing homes across the United States be treated equitably under the law, and enjoy the benefits of federal legislative protections ensuring the uniform treatment of arbitration agreements. This case involves interpretation of the reach of the Federal

[2] AHCA's interests are directly tied to West Virginia and West Virginia long term care providers through the West Virginia Health Care Association (WVHCA), a state affiliate of the AHCA. Approximately 118 AHCA members are located in West Virginia, including the Petitioner.

Arbitration Act (FAA) and whether the FAA preempts the anti-waiver provision of the West Virginia Nursing Home Act and a judicially-enacted prohibition of pre-dispute arbitration agreements in personal injury matters created by the West Virginia Supreme Court of Appeals. More particularly, the arbitration agreement at issue in the underlying litigation is based on a model agreement developed first in 2002 by the AHCA as a service to its members and their residents. The Court's decision in this case will have broad implications for the ability of and need for AHCA members to resolve disputes in a timely and cost-effective manner.

Moreover, as advocates for the continued availability of services for frail, elderly, and disabled Americans, AHCA and its members have an interest and need for efficient and cost-effective alternatives to traditional civil litigation for resolving disputes. The availability of alternative dispute resolution helps to reduce the cost of resolving disputes, thereby making more public funds available for resident care and services. In this age of limited resources and growing demands, the need to create efficiencies to ensure that resources are not diverted from providing care is compelling. AHCA and its members also have an interest in preserving the rights of residents and providers in the long-term care and post-acute care communities to enter into contracts that allow the parties to resolve disputes in the forum of their own choosing. Congress and the courts have consistently recognized that residents of long-term care facilities have the right to self-determination. That right to self-determination takes many forms, including the traditional right to enter into contracts, including those calling for arbitration of disputes.

Respectfully submitted,

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Interest of the Amicus

Amicus curiae American Health Care Association (AHCA) is the nation's largest association of long term care and post-acute care providers, representing the interests of nearly 11,000 non-profit and proprietary facilities.[1] AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities.[2] AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term care and post-acute care provider community. One way in which AHCA fulfills the mission of promoting the interests of its members is by participating as an *amicus curiae* in cases with far-ranging consequences for its members. Such cases include those involving the proper interpretation of the Federal Arbitration Act in relation to state legislative and judicial efforts seeking to prohibit skilled nursing facilities from utilizing arbitration to resolve disputes.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of AHCA's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief.

[2] AHCA's interests are directly tied to West Virginia and West Virginia long term care providers through the West Virginia Health Care Association (WVHCA), a state affiliate of the AHCA. Approximately 118 AHCA members are located in West Virginia, including the Petitioner.

AHCA's interest in this case is driven primarily from its concern that nursing homes across the United States be treated equitably under the law, and enjoy the benefits of federal legislative protections ensuring the uniform treatment of arbitration agreements. This case involves interpretation of the reach of the Federal Arbitration Act (FAA) and whether the FAA preempts the anti-waiver provision of the West Virginia Nursing Home Act and a judicially-enacted prohibition of pre-dispute arbitration agreements in personal injury matters created by the West Virginia Supreme Court of Appeals. More particularly, the arbitration agreement at issue in the underlying litigation is based on a model agreement developed first in 2002 by the AHCA as a service to its members and their residents. The Court's decision in this case will have broad implications for the ability of and need for AHCA members to resolve disputes in a timely and cost-effective manner.

Moreover, as advocates for the continued availability of services for frail, elderly, and disabled Americans, AHCA and its members have an interest and need for efficient and cost-effective alternatives to traditional civil litigation for resolving disputes. The availability of alternative dispute resolution helps to reduce the cost of resolving disputes, thereby making more public funds available for resident care and services. In this age of limited resources and growing demands, the need to create efficiencies to ensure that resources are not diverted from providing care is compelling. AHCA and its members also have an interest in preserving the rights of residents and providers in the long-term care and post-acute care communities to enter into contracts that allow the parties to resolve disputes in the forum of

their own choosing. Congress and the courts have consistently recognized that residents of long-term care facilities have the right to self-determination. That right to self-determination takes many forms, including the traditional right to enter into contracts, including those calling for arbitration of disputes.

Summary of the Argument

The Petition for a Writ of Certiorari submitted by Clarksburg Nursing and Rehabilitation Center, LLC, et al., presents an important question regarding the ability of skilled nursing facility providers to rely on well-settled law to enforce arbitration agreements. *Amicus curiae* AHCA believes, as do the Petitioners, that this Court's established precedent is clear: state courts may not unilaterally establish a public policy banning the use of pre-dispute arbitration agreements in the personal injury context.

As the Petition explains, the ruling by the West Virginia Supreme Court of Appeals flouts this Court's decisions interpreting Section 2 of the Federal Arbitration Act (FAA) in numerous, significant ways. The Supreme Court of Appeals acknowledged that the West Virginia legislature's enactment of Section 15(c) of the Nursing Home Act, which attempted to prohibit the use of pre-dispute arbitration agreements between nursing homes and patients, violates Section 2 of the FAA and is preempted. Yet in the same breath, that court adopted the same policy, finding that Section 2 of the FAA did not apply to its judicially-enacted, arbitration-specific rule. This holding directly conflicts with *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and subsequent decisions of this Court holding that, no

differently than state legislative enactments, such state court holdings were preempted by Section 2. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.") (emphasis in original). By undermining arbitration's recognized advantages and creating powerful disincentives to the use of arbitration agreements, the decision of the West Virginia high court conflicts with the FAA's long standing "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).

While the conflict with the FAA and with this Court's well-settled precedent construing Congress' intent is enough to warrant the granting of the Petition, the reliance interests of nursing home residents and AHCA members in West Virginia and elsewhere requires this Court's action. This Court has recognized in other cases that reliance on well-settled law is an important business condition and legal principle. Left undisturbed, AHCA's members in West Virginia are singled out for different treatment in conflict with federal law from other members nationally. The decision will create an unpredictable business environment, leaving skilled nursing facilities in other states to wonder if, and when, their state supreme court could issue a similar opinion that would unravel the seemingly clear federal policy favoring arbitration in all settings and for

all litigants. This uncertainty substantially undermines the federal right to enforce arbitration agreements and conflicts with the FAA's purposes.

Finally, this case presents the FAA preemption issue in its most straightforward form. Misstating and misinterpreting Congressional intent and this Court's long history construing that intent, the West Virginia high court has adopted a *per se* rule making a significant class of arbitration agreements completely unenforceable. Such a rule simply cannot stand in light of this Court's clear precedent.

Argument

I. The Decision of the West Virginia Supreme Court of Appeals Directly Undermines the Reliance that AHCA Members in West Virginia, and Nationwide, Have Placed in this Court's Well-Established Interpretation of the FAA.

This Court should act to summarily reverse or grant plenary review to the decision below because it departs from well-settled law under the FAA in a manner that unlawfully impairs the reliance that nursing home residents and providers throughout the country have placed in this Court's FAA jurisprudence.

This Court has previously recognized the importance of well-settled rules on business expectations and reliance. For example, in the tax context, this Court noted that "a bright-line rule ... encourages settled expectations and, in doing so, fosters investment by businesses and individuals." *Quill Corp. v. North Dakota*, 504 U.S. 298, 316 (1992). Such reliance interests

are clearly implicated here, as this Court has established such "bright lines" concerning arbitration. As the Petitioners note, the decision below 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* Pet. at 2.

Predatory litigation against nursing homes and skyrocketing insurance costs has often led nursing homes in all states and their residents to turn to arbitration as a fair, cost-effective, and more efficient way of resolving disputes. The move by nursing home providers to seek agreements with residents and their families is a prudent and logical decision. Arbitration is a dispute resolution tool providing both parties an efficient forum to compensate residents for justified losses. In part, it also is a response to the litigation climate facilities face. A 2006 federal government review of nursing home liability issues and the public policy debate therein concluded:

> At the root of this policy issue are the views and perceptions of the American public. In negotiating settlements, plaintiffs and defendants make decisions about compensation for damages based upon their shared judgments of what juries would decide if cases were to go to trial. Most every person interviewed during this study, whether they were associated with the plaintiff side or the defendant side of the issue, agreed that the decisions of juries in nursing home negligence cases are virtually impossible to predict. One insurer said that it had conducted mock jury trials, testing the exact same case in the exact same manner, in front of

> multiple juries, with highly diverse results. Because the decisions of juries are so hard to predict, regardless of the facts of the case, both plaintiff and defense counsel almost always prefer to settle cases without a jury trial.

Recent Trends In The Nursing Home Liability Insurance Market, U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, June 2006 (available At Http://Aspe. Hhs.Gov/Daltcp/Reports/2006/Nhliab.pdf).

Ultimately, the transactional costs of nursing home litigation and increasing insurance expense for liability costs is borne by state and federal taxpayers, as well as residents and providers. This is so because nursing home resident care is predominately reimbursed by Medicare and Medicaid. Costs from general liability and professional liability consume five and one-half (5.51%) percent of the 2009 Medicaid *per diem* reimbursement rate for West Virginia providers. Approximately seventy (70%) percent of West Virginia nursing home care is paid for by Medicare and Medicaid. West Virginia has experienced one of the highest frequency of claims per licensed nursing home bed and a tripling of loss rates on nursing home claims since 2003. Long Term Care – 2011 General Liability and Professional Liability Actuarial Analysis, AON Global Risk Consulting, p.50 (available at http://www.ahcancal.org/about_ahca/Documents/2011_Long_Term_Care_Actuarial_Analysis_FINAL.pdf)

Reversal of the decision below is required to preserve the use of arbitration by residents, their

families, and providers in West Virginia and elsewhere. When fairly drafted, arbitration agreements are well-suited for the nursing home context, and they conserve public resources. And because the majority of nursing home care is reimbursed by the federal government through the Medicare and Medicaid programs, this Court should not condone a "West Virginia exception" for West Virginia nursing home providers, their residents and families that denies their access to arbitration. It is axiomatic that because the law allows residents and their families to make life-altering decisions about their health care, it should similarly not impair their fundamental right to contract if they so desire.

AHCA members in West Virginia and elsewhere have relied on the well-settled FAA jurisprudence developed by this Court since *Southland*, and since the enactment of the FAA. This reliance is supported by the effectiveness and utility of arbitration for both sides when agreed to by nursing homes and their patients. AHCA's research indicates that decreased litigation costs associated with arbitration means more of any award received goes to the most deserving party – the patient or resident (based on the data showing that 55.2% of the total amount of claims costs paid for GL/PL claims goes directly to attorneys). Long Term Care – 2008 General Liability and Professional Liability Actuarial Analysis, AON Global Risk Consulting, p.30 (available at http://www.ahcancal.org/research_data /liability/Documents/2008LiabilityActuarialAnalysis.pdf). Arbitration conserves resources for deserving claimants, rather than unfairly avoiding compensating them, as opponents would suggest.

The West Virginia high court's adoption of a broad public policy prohibiting arbitration in this context also impacts all AHCA members nationwide and creates a substantial unpredictability in arbitration law for its members. This is because nursing homes often use the AHCA arbitration agreement, or others very similar to it, in admissions contracts with patients nationwide. As the West Virginia high court noted,

> There is a substantial body of case law from other jurisdictions involving nursing home admission agreements which, like the instant cases, have challenged whether an arbitration clause in the admission agreement was binding and enforceable…. No jurisdiction has concluded that such arbitration clauses are unenforceable *per se*.

Pet. Appx. at 61a (emphasis added). Identical or near-identical provisions have been upheld in many jurisdictions. Prior to the decision below, no state court of last resort had found such a *per se* prohibition on arbitration agreements because the FAA precludes such *per se* prohibitions. This conclusion, and the resulting instability that the decision below creates is evidenced by a decision of the West Virginia federal district court reaching the opposite result in upholding and enforcing a pre-dispute nursing home arbitration agreement only three months earlier. *See Canyon Sudar Partners LLC v. Cole*, 2011 WL 1233320 (S.D. W. Va., March 29, 2011) (holding that application of West Virginia Code § 16-5C-15(c) is preempted by the FAA and rejecting the plaintiff's public policy argument).

"The FAA's displacement of conflicting state law is 'now well-established.'" *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995)). When a state supreme court chooses to adopt a precedent of questionable legal basis, similar challenges will likely occur in other states. Rather than being able to rely on settled precedent interpreting binding law when using arbitration agreements, AHCA members will now be forced to evaluate the uncertainty caused by the open invitation that the West Virginia high court's decision provides to raise challenges that are simply without merit under the FAA. As a result of the instability in the law, it will be exceedingly difficult, if not impossible, for all parties to reliably interpret how to draft arbitration agreements that will be fair and "universally enforceable." *Allied-Bruce*, 513 U.S. at 279.

II. There Is No Legal or Factual Basis Supporting the West Virginia Supreme Court of Appeals' *Per Se* Ban on Pre-Dispute Arbitration Agreements in the Nursing Home Context.

It is critically important for this Court to consider that Petitioners' case is procedurally distinct from the other consolidated cases. In resolving the Clarksburg matter, the lower court was presented only with a certified question regarding the preemption of the West Virginia statute. No allegations or findings were made relative to the arbitration agreement in use and challenged in the *Clarksburg v. Marchio* matter. The court below, therefore, made a determination that no such arbitration agreement could be enforced, even though a particular litigant could show that the agreement at issue was entirely fair and that the facts

surrounding its adoption were devoid of any aspect of unconscionability.

This case is one where the terms of the arbitration agreement are fair and treat the interests of both parties in an equitable and mutual manner. The arbitration agreement at issue is based on a model agreement developed first in 2002 by AHCA as a service to its members and the residents they serve for possible use in the admission process. It was designed to allow AHCA members and facility residents to embrace the efficiency and timeliness of arbitration as a dispute resolution tool. The agreement is consistent with the position taken on arbitration by the Centers for Medicare and Medicaid Services, the federal government agency that oversees nursing homes. *See* Dep't of Health and Human Services, Centers for Medicare and Medicaid Services, *Survey and Certification Memorandum* (S&C 03-10), Steven A. Pelovitz (January 9, 2003). AHCA's model agreement in no way alters the rights or remedies available to a resident under state tort law. It states in plain terms that entering into the arbitration agreement is not a condition of admission into the facility. Further, the model form provides a 30-day window for the resident or their representative to reconsider and, in writing, rescind the arbitration agreement after the initial admission. This 30-day "cooling off period" far exceeds the period of time found in most arbitration provisions. While AHCA should not be understood to suggest that such terms are necessary for an arbitration agreement to be enforceable, they validate this Court's pronouncements that arbitration can be beneficial to litigants. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Allied-Bruce*, 513 U.S. at 280.

Nothing in AHCA's argument should suggest that state courts cannot oversee and strictly enforce state contract law, as specifically allowed through the savings clause in Section 2 of the FAA. The savings clause preserves those "generally applicable contract defenses, such as fraud, duress, or unconscionability" *that can apply to any contract*. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The West Virginia Supreme Court of Appeals decision makes little pretense that its *per se* public policy rule fits within any of the categories saved from preemption under the FAA. The Court below made its decision despite its own determination that the concept of unconscionability requires consideration of "all of the facts and circumstances of a particular case." Pet. Appx. at 64a (citing to Syllabus Point 3, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 601, 346 S.E.2d 749, 750 (1986) ("An analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.")). It is clear that no such consideration was given to Petitioners below.

III. The Decision of the West Virginia Supreme Court of Appeals Directly Impedes Congress' Intent With Regard to Arbitration and Should Be Summarily Reversed.

It is axiomatic that, where Congress has acted within its authority to override state law, this Court must interpret such enactments in order to give them their full and intended effect. As this Court held:

> For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.

Savage v. Jones, 225 U.S. 501, 533 (1912). Because the lower court's decision clearly frustrates the clear purpose of the FAA, Petitioners present a compelling case demanding this Court's attention.

This Court's long line of cases consistently finding preemption of state policies hostile to arbitration is consistent and extends to its most recent opinions. As Justice Thomas stated in his concurrence in *AT&T Mobility LLC v. Concepcion*: "If § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to 'any contract.'" 131 S. Ct. 1740, 1753 (2011). The decision below clearly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *AT&T Mobility*, 131 S. Ct. at 1753 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). Indeed, the West Virginia high court conceded this by holding that "[a] state statute, rule, or common-law doctrine, which targets arbitration provisions for disfavored treatment and which is not usually applied to other types of contract provisions, stands as an obstacle

to the accomplishment and execution of the purposes and objectives of the Federal Arbitration Act, 9 U.S.C. § 2, and is preempted." Pet. Appx. at 57a.

Notwithstanding this concession, however, the West Virginia high court incorrectly held that Congress "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." Pet. Appx. at 85a. This assertion is further juxtaposed against that court's earlier recognition that "the United States Supreme Court's expansive jurisprudence interpreting the FAA implies that arbitration contracts be interpreted to compel arbitration of allegations of negligent conduct." Pet. Appx. at 79a. The ultimate holding below simply does not take account of this Court's precedent.

Lastly, it is significant that Congress has recognized that it would have to modify the FAA in order to allow the type of *per se* rule adopted below – but Congress has not chosen to do so. Indeed, Congress recently examined the issue of the use of pre-dispute arbitration agreements in nursing homes and in other contexts, but has not amended the FAA to encompass the West Virginia policy.[3] Such congressional hearings

[3] *See* Hearing on Arbitration: Is It Fair When Forced? United States Senate, Committee on the Judiciary, 112th Cong., 1st Sess. (Oct. 13, 2011); Hearing on H.R. 6126, the "Fairness in Nursing Home Arbitration Act of 2008" Before the U.S. House of Representatives, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, 110th Cong., 2nd Session (June 10, 2008); and Joint Hearing on S.

themselves demonstrate the error of the lower court's assertion as to the current state of the law. *Cf. United States v. Mauro*, 436 U.S. 340, 356 n.24 (1978) (congressional efforts to amend a statute to include a certain provision "may be read as confirming the conclusion" that the statute does not currently contain the substance of that provision).

2838, the "Fairness in Nursing Home Arbitration Act of 2008", United States Senate, Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary and The Special Committee on Aging; 110th Cong., 2nd Sess. (June 18, 2008). The Fairness in Nursing Home Arbitration Act has not been introduced in the current Congress.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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