No. 11-394

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition and the *amicus* briefs supporting certiorari demonstrate that the decision below squarely conflicts with seven precedents of this Court, all of which declare unambiguously that the Federal Arbitration Act bars States from refusing to enforce arbitration agreements with respect to specific classes of claims. That is precisely what the West Virginia court did here, holding invalid predispute agreements to arbitrate personal-injury or wrongful-death claims in the nursing home context. The West Virginia court's ruling also conflicts with decisions of numerous other lower courts that have held that the FAA preempts state-law rules barring arbitration of specific types of disputes—including state "policies" just like the one announced by the court below.

The brief in opposition devotes just four and one-half of its nineteen pages to defending the merits of the decision below. No doubt recognizing the impossibility of that task, respondent tries instead to change the subject, asserting that the arbitration agreement is not enforceable for other reasons that were neither raised in nor addressed by the court below. Those contentions, which are in any event meritless, do not provide any reason for this Court to decline to review the important FAA preemption issue decided by the West Virginia court. Indeed, the Court has repeatedly granted review in the face of similar contentions. *Perry* v. *Thomas*, 482 U.S. 483, 492 & n.9 (1987); accord Opp. at 14, *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23 (2011), *available at* 2011 WL 4073065; Opp. at 1 n.1, 14, *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681 (1996), *available at* 1995 WL 17047945.

A. The Decision Below Is Irreconcilable With The FAA, The Precedents Of This Court, And Decisions Of Numerous Lower Courts.

Respondent's meager attempt to reconcile the decision below with this Court's precedents is wholly unconvincing. In particular, respondent does not dispute that:

- This Court has consistently held that "[w]hen 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 (2008)); see also, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); Pet. 2, 16-18. Tellingly, respondent does not even mention *Conception*, *Preston*, or *Southland*, let alone try to reconcile them with the decision below.

- The court below announced a rule that "systematically" and *"per se*" (Pet. App. 78a, 87a) bars enforcement of every pre-dispute arbitration provision in a nursing-home contract when a personal-injury or wrongful-death claim is asserted. Respondent never denies that this rule was the sole basis for the court's refusal to enforce the arbitration provision. Pet. 9 & n.2, 14; cf. Opp. 18 (noting only that the rule does not apply to *post*-dispute agreements).

- The decision below conflicts with holdings of dozens of state and federal courts that the FAA preempts a state's policy barring arbi-

tration of a category of state-law claims. Pet. 22-25 & n.7.

- This Court's opinions—as well as the text of Section 2—establish that the FAA applies to all arbitration agreements evidencing interstate commerce, regardless of the nature of the controversy sought to be arbitrated. Pet. 19-21.

What little respondent does say on the merits is demonstrably incorrect. Even though the West Virginia court categorically declared that pre-dispute agreements to arbitrate personal-injury or wrongful-death claims are *per se* invalid, respondent argues that the court's conclusion represents nothing more than an application of "general" contract law principles, and therefore falls within the "savings clause" of Section 2 of the FAA. Opp. 15, 19. That contention cannot be taken seriously.

This Court has made clear that the savings clause does *not* permit invalidation of arbitration provisions "by defenses that apply only to arbitration." *Concepcion*, 131 S. Ct. at 1746. In particular, "[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." *Perry*, 482 U.S. at 492 n.9.

The rule announced in the decision below by its plain terms applies *only* to arbitration agreements—not to any other kind of contract. Thus, like the state law that this Court held preempted in *Doctor's Associates*, the West Virginia court's "public policy" rule "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity."

517 U.S. at 688.[1] That rule is not even remotely "a ground * * * 'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions." *Southland*, 465 U.S. at 16 n.11. Accordingly, it is not saved from preemption.

That the rule is not generally applicable is further confirmed by the West Virginia court's own explanation of the reasons for its holding. In the court's view, arbitration agreements warrant a "wary examination" because dispute resolution through arbitration supposedly is tantamount to permitting "exculpat[ion of] liability." Pet. App. 83a-84a; cf. Opp. 17-18 (insisting that court correctly analogized predispute arbitration agreements to "pre-injury exculpatory agreements"). That false equivalence betrays *exactly* the kind of judicial "mistrust of the arbitral process" (*Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 n.5 (1991) and "anachronistic judicial hostility" to arbitration (*Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14, 626-627 (1985)) that the FAA prohibits.

In short, the brief in opposition serves chiefly to underscore that the decision below is a prime candidate for summary reversal. That decision blatantly defies a long line of this Court's decisions that have uniformly held that the FAA forbids exactly what the West Virginia court did here: "[R]equir[ing] a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10.

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[1] *Doctor's Associates* involved a statute rather than a court's articulation of public policy, but the FAA preempts any "state law, whether of legislative or judicial origin," that disfavors arbitration. *Perry*, 482 U.S. at 492 n.9; Pet. 18.

B. The Issue Presented Is Of Exceptional Importance.

As the petition explained (at 26-30), the question presented here is one of far-reaching importance.

The three *amicus* briefs bear that point out, demonstrating that the West Virginia court's rule would, at minimum, invalidate thousands of arbitration agreements entered into by the *amici* and their members—all based on a construction of the FAA with respect to arbitration clauses in nursing-home contracts that greatly differs from the applicable standard applied by other courts, thereby causing confusion and uncertainty with respect to the validity of the hundreds of thousands of such contracts that exist across the country. See Br. of American Health Care Association ("AHCA Br.") at 4, 8-10; Br. of Beverly Enterprises-West Virginia et al. at 13-15; Br. of Seventeenth Street Associates LLC at 5, 7-13.

Respondent's statement that this case involves "the unique context of a nursing home[]" (Opp. 3) is no response, given that the effect of the decision below is to exempt that entire industry from the protection provided by the FAA.

Moreover, respondent does not even try to answer our argument (Pet. 27-28) that the rationale of the decision below cannot be limited to the nursing-home context. If the West Virginia court is allowed to place nursing home admission contracts outside the scope of the FAA based on nothing more than the observation that this Court has not yet spoken to that exact type of agreement, *any* state court could take *any* sort of contract outside the scope of FAA on the basis of such reasoning. That is a wholly illegitimate

limitation on the effect of this Court's authoritative pronouncements on the meaning of federal law.

C. This Case Is An Ideal Vehicle For Deciding The Question Presented.

This case is a textbook example of the dangers that arise when a lower court that is hostile to arbitration seeks to engineer an end-run around the FAA. It therefore is an ideal opportunity to confirm that *Southland*, *Perry*, and their progeny mean what they say—*i.e.*, that a State's "requirement that litigants be provided a judicial forum for resolving" a specified category of disputes is "unmistakabl[y]" preempted by Section 2 of the FAA. *Perry*, 482 U.S. at 490-491.

Respondent nevertheless contends that this case is not an appropriate vehicle because there supposedly are alternative bases for invalidating the arbitration agreement. She notes that the National Arbitration Forum (NAF) no longer conducts consumer arbitrations (Opp. 6-13) and asserts that discovery could support a finding that that the agreement is unenforceable under West Virginia unconscionability doctrine (*id.* at 13-15). These asserted vehicle problems are illusory.

1. To begin with, the "sole argument" pressed by respondent below was that the arbitration provision was unenforceable because of an anti-waiver provision in the West Virginia Nursing Home Act—a statute that all parties accept is preempted. Pet. App. 22a, 118a; Reply App., *infra*, 1a-13a (opposition to motion to compel arbitration). As the West Virginia court acknowledged, respondent "did not raise any additional challenges to the arbitration" agreement. Pet. App. 98a n.170.

The West Virginia court remanded the case to the trial court with the express direction that, "as a matter of public policy under West Virginia law," Clarksburg's "arbitration clause * * * should not be enforced to compel arbitration." Pet. App. 98a. That "public policy" ground was thus the sole basis invoked by the court for invalidating the provision—*i.e.*, the decision below did not address the unavailability of the NAF forum or unconscionability. The FAA preemption issue set forth in the petition is therefore cleanly presented.

2. The decision below arguably permits respondent to argue to the trial court that the arbitration provision is unconscionable. Pet. App. 12a.[2] But contrary to respondent's contention, the possibility that there might be additional litigation on remand if this Court were to decide that the FAA preempts the West Virginia public policy rule does not pose an obstacle to review. This Court so held in *Perry*, in which the Court reversed the ruling of a California state court and determined that the FAA preempted the state statute on which the lower court had based its refusal to enforce the arbitration agreement. In reaching that conclusion, the Court refused to address the plaintiff's argument that the arbitration agreement was an "unconscionable, unenforceable

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[2] There is a substantial argument that, by failing to raise it below, respondent has waived her distinct contention that the unavailability of the NAF renders the agreement unenforceable. The West Virginia court "le[ft] it to the parties to determine whether the [arbitration] clause may be challenged on some other ground." Pet. App. 98a n.170; cf. *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 897 (1990) ("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").

contract of adhesion" because that issue "was not decided below" and could "be considered on remand." 482 U.S. at 492 n.9. The Court specifically explained that "an alternative ground for denying arbitration" that was not decided below "does not prevent [the Court] from reviewing the ground exclusively relied upon by the courts below." *Id.* at 492.

Likewise, in *Doctor's Associates*, this Court reversed the Montana Supreme Court's decision, holding that a notice requirement applying only to arbitration provisions was preempted by the FAA. 517 U.S. at 688. The Court did so notwithstanding the respondent's contention that one of the petitioners was not entitled to enforce the arbitration provision because he was not a party to the franchise agreement containing it. See Opp. at 1 n.1, 14, *Doctor's Assocs.*, 517 U.S. 681; accord Opp. at 14, *KPMG*, 132 S. Ct. 23 (summarily reversing notwithstanding contention that state-law question not reached by Florida court was disputed).

Here, "the ground exclusively relied upon by the [West Virginia] court[] below," *Perry*, 482 U.S. at 492, is that the FAA does not preempt a categorical "public policy" rule invalidating all pre-dispute agreements to arbitrate personal-injury and wrongful-death claims in the nursing-home context. Respondent cannot insulate that erroneous holding from review by speculating that the state court on remand might find other ways to invalidate the provision. *Perry* squarely forecloses that contention.[3]

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[3] For similar reasons, jurisdiction lies under 28 U.S.C. § 1257 because the West Virginia court "finally decide[d] [the] federal issue" presented here regarding the FAA's preemptive scope and "'a refusal immediately to review the state-court decision

3. In addition, these alternative arguments are meritless.

a. The fact that the arbitration agreement named the NAF as the arbitral forum presents no obstacle to the agreement's enforcement. As respondent recognizes (at 8 n.3), the FAA provides a mechanism for appointment of a substitute arbitrator when "for any * * * reason there shall be a lapse in the naming of an arbitrator." 9 U.S.C. § 5. As the Eleventh Circuit explained in rejecting a similar claim, "[t]he unavailability of the NAF does not destroy the arbitration clause" because "[o]nly if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern[,]' will the failure of the chosen forum preclude arbitration." *Brown* v. *ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000). Here as in *Brown*, "there is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement." *Ibid.*

Substantial authority—which respondent ignores—supports the appointment of a substitute arbitrator. See *Brown*, *supra*; *Clerk* v. *Cash Cent. of Utah, LLC*, 2011 WL 3739549, at *6 (E.D. Pa. Aug. 25, 2011) (appointing substitute arbitrator when "the arbitration clause does not contain an express statement designating NAF as the exclusive arbitral forum and requiring it to administer arbitration" and "only requires application of the NAF's rules"); *Adler* v. *Dell Inc.*, 2009 WL 4580739, at *4 (E.D. Mich. Dec. 3, 2009) (agreement "clearly indicates that the parties expected their disputes to be resolved by arbitra-

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might seriously erode federal policy,'" *Southland*, 465 U.S. at 6; see *Perry*, 482 U.S. at 489 n.7; Pet. 13 n.4.

tion" and does not provide "for litigation in the event NAF is unavailable"; accordingly, the "unavailability of NAF to hear the arbitration should not frustrate the overriding intent to arbitrate").

Respondent contends that the absence of a severability clause in the arbitration agreement makes Section 5 of the FAA inapplicable. Opp. 12-13. But there was no such clause in *Brown*, *Clerk*, or *Adler*, and that was no obstacle to appointing a substitute arbitrator for NAF.

b. Respondent asserts in passing that "adequate discovery * * * of the circumstances surrounding the arbitration agreement will substantiate a finding" of unconscionability. Opp. 13. But this is pure—and baseless—speculation. Respondent did not argue below that the provision is unconscionable and none of the lower courts "consider[ed] the conscionability of the agreement." Pet. App. 87a. Moreover, there is nothing in the record that could support such a finding.

Far from being "buried" (cf. Opp. 14), the "RESIDENT AND FACILITY ARBITRATION AGREEMENT" conspicuously discloses in all capital letters that, by entering into agreement, the parties will be "GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT." Pet. App. 102a-104a; see also Pet. 3-5; AHCA Br. 11. The arbitration agreement imposes no limits on the damages that the arbitrator can award. Pet. App. 103a. Clarksburg does not condition admission to its facility on agreeing to arbitration; in

fact, it permits arbitration agreements to be rescinded within 30 days of signature. *Id.* at 104a.[4]

In short, respondent's speculation that unspecified "[a]dditional facts" (Opp. 14) might be discovered on remand that would demonstrate the unconscionability of the agreement is just plain wrong.[5]

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[4] Thus, Clarksburg's arbitration provision is far more fair than the arbitration provision declared unconscionable by the West Virginia court in the companion *Brown* cases. Unlike that provision, Clarksburg's provision is fully mutual—*e.g.*, it requires arbitration of debt-collection actions initiated by Clarksburg (cf. Pet. App. 90a); expressly makes arbitration optional, because the resident may receive services from Clarksburg without agreeing to arbitration (cf. *ibid.*); and permits a resident who agrees to arbitration to rescind that agreement within 30 days (*id.* at 104a).

[5] The *Brown* respondents further assert that respondent here lacked authority to enter into the arbitration agreement (Opp. in No. 11-391, at 21-22) and that wrongful-death claims are not within the agreement's scope (*id.* at 24-26). Because neither argument was advanced or ruled upon below, the contention that these issues provide a reason to deny review is—for the reasons discussed in the text—wholly erroneous. At any rate, neither argument has merit.

First, respondent here concedes that, "on behalf of her mother, [she] signed the subject arbitration agreement." Reply App., *infra*, 3a; *id.* at 16a ("Q: Were you your mother's power of attorney? A: Yes."). Furthermore, the decision to enter into an "*optional* revocable arbitration agreement[] in connection with placement in a health care facility * * * is a 'proper and usual' exercise of" an agent's powers under a medical power of attorney. *Garrison* v. *Sup. Ct.*, 132 Cal. App. 4th 253, 267 (2005) (emphasis added); *accord Moffett* v. *Life Care Cts. of Am.*, 187 P.3d 1140, 1142, 1145-1146 (Colo. App. 2008) (same; provision was optional and rescindable).

Second, under West Virginia law, a wrongful-death claim is "derivative," *Brooks* v. *City of Weirton*, 503 S.E.2d 814, 820-821

CONCLUSION

The Court should grant the petition and either set the case for plenary review or summarily reverse.

Respectfully submitted.

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(W.Va. 1998), and "rises and falls with" the decedent's right to "maintain[] an action." *Brammer* v. *Taylor*, 338 S.E.2d 207, 211 n.2 (W.Va. 1985). When, as here, the wrongful-death cause of action is "derivative" of the decedent's rights, the obligation to arbitrate extends to that cause of action. *E.g.*, *Graves* v. *BP Am., Inc.*, 568 F.3d 221, 223 (5th Cir. 2009); *Kane* v. *Rohrbacher*, 83 F.3d 804, 806 (6th Cir. 1996); see Pet. App. 102a-103a (provision applies to "any legal dispute" and binds, *inter alia*, "all persons whose claim is derived through * * * the Resident").