No. 21-1455

In the Supreme Court of the United States

NORTHPORT HEALTH SERVICES OF ARKANSAS, LLC, DBA SPRINGDALE HEALTH AND REHABILITATION CENTER, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In 2019, the Centers for Medicare and Medicaid Services finalized a rule that allows nursing homes that participate in Medicare and Medicaid to enter into arbitration agreements with residents, while also requiring them to abide by certain safeguards designed to protect the rights of residents. A nursing home's noncompliance with those safeguards may result in administrative remedies under the Medicare and Medicaid programs, but does not affect the validity, revocability, or enforceability of any arbitration agreement.

The questions presented are:

1. Whether the court of appeals correctly determined that the 2019 rule does not conflict with the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, because the rule does not affect the validity, revocability, or enforceability of any arbitration agreement.

2. Whether the court of appeals correctly determined that a federal administrative regulation does not require express statutory authorization to override the FAA where, as here, the challenged regulation does not conflict with the FAA and is part of a federal spending program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 14 F.4th 856. The opinion of the district court (Pet. App. 39-84) is reported at 438 F. Supp. 3d 956.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2021. A petition for rehearing was denied on December 14, 2021 (Pet. App. 38). On March 3, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including April 13, 2022. On March 31, 2022, Justice Kavanaugh further extended the time to and including May 13, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The federal government provides funding through the Medicare and Medicaid programs to pay for health care for individuals who are aged 65 or older, disabled, or low-income. See 42 U.S.C. 1395 *et seq.* (Medicare); 42 U.S.C. 1396 *et seq.* (Medicaid). Medicare and Medicaid beneficiaries can receive care at a variety of medical facilities, including—as relevant here—long-term care facilities (commonly known as nursing homes). See *Biden* v. *Missouri*, 142 S. Ct. 647, 650 (2022) (per curiam).

In order to be eligible as a covered provider for Medicare and Medicaid beneficiaries, a nursing home must agree to comply with statutory and regulatory requirements applicable to the Medicare and Medicaid programs. See 42 U.S.C. 1395i-3 (Medicare); 42 U.S.C. 1396r (Medicaid); 42 C.F.R. 483.1-483.95. The primary federal regulatory framework applicable to participating nursing homes is established under the Federal Nursing Home Reform Act (FNHRA), which Congress adopted as part of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330. See Tit. IV, Subtit. C, 101 Stat. 1330-160.

FNHRA charges the Secretary of Health and Human Services (Secretary) with the "duty and responsibility" of ensuring that "requirements which govern the provision of care in" participating nursing homes, as well as the enforcement of those requirements, are "adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys." 42 U.S.C. 1395i-3(f)(1), 1396r(f)(1). The statute itself requires that participating nursing homes "must protect and promote the rights of each resident," including the rights to free and informed medical choice, privacy, and confidentiality; to voice grievances with respect to care and treatment; and to prompt efforts by the facility to resolve such grievances. 42 U.S.C. 1395i-3(c)(1)(A), 1396r(c)(1)(A). The statute further authorizes the Secretary to "establish[]" "other right[s]" by regulation, 42 U.S.C. 1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi), and to promulgate "such other requirements relating to the health, safety, and well-being of residents * * * as the Secretary may find necessary," 42 U.S.C. 1395i-3(d)(4)(B); see 42 U.S.C. 1396r(d)(4)(B) (similarly requiring participating nursing homes to satisfy "such other requirements relating to the health and safety of residents * * * as the Secretary may find necessary").[1]

Participating nursing homes are required under FNHRA to undergo annual inspections to confirm "the quality of care furnished" and their "compliance with residents' rights." 42 U.S.C. 1395i-3(g)(2)(A), 1396r(g)(2)(A). If violations are found, FNHRA authorizes a range of administrative remedies that depend (among other things) on the seriousness and pervasiveness of the violations. See 42 U.S.C. 1395i-3(h); 42 C.F.R. 488.404-488.414 (remedies ranging from a "[d]irected plan of correction" and "in-service training" to denials of payment, civil penalties, and termination of program participation); 42 C.F.R. 489.53 (termination of provider agreements).

[1] The Secretary has delegated the relevant responsibilities to the Centers for Medicare and Medicaid Services, as the component of the Department of Health and Human Services charged with administering the Medicare and Medicaid programs. See 42 C.F.R. 483.1 *et seq.*

b. Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, to "overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). The FAA provides that arbitration agreements pertaining to transactions involving interstate commerce "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.

The initial clause of Section 2 "requires courts to enforce arbitration agreements according to their terms." *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1415 (2019) (citations and internal quotation marks omitted). The latter savings clause permits those agreements to "be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," that also apply to other contracts. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (citation and internal quotation marks omitted). Rules that specially defeat arbitration agreements but not other contracts—whether rendering them "invalid because improperly formed" or otherwise unenforceable in court—are not covered by the savings clause. *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1428 (2017).

2. a. In 2015, the Centers for Medicare and Medicaid Services (CMS) initiated notice and comment rulemaking to comprehensively update the regulations promulgated under FNHRA. See 80 Fed. Reg. 42,168 (July 16, 2015). The agency sought "to improve the quality of life, care, and services" in nursing homes and "optimize resident safety." *Id.* at 42,169.

Since at least 2003, CMS had recognized that "quality of care * * * may be compromised" by certain arbitration agreements, and had made clear that discharging or retaliating against residents for failing to sign or comply with binding arbitration agreements would be a violation of residents' rights. Pet. C.A. App. 335; see *id.* at 335-336. Other entities had likewise recognized the potential for abusive use of arbitration agreements in the nursing-home context. See, *e.g.*, Gov't C.A. App. 104–114 (2009 American Bar Association recommendation opposing the use of mandatory pre-dispute arbitration agreements between nursing homes and residents); *id.* at 103 (announcement by the American Arbitration Association that it was ending its administration of pre-dispute arbitration agreements in medical-services cases). CMS's 2015 Notice of Proposed Rulemaking accordingly acknowledged, and sought input on, "concerns about nursing homes either requiring or pressuring nursing home residents to sign [arbitration] agreements" as a condition of admission. 80 Fed. Reg. at 42,241.

Following consideration of over 9800 public comments, CMS published a final rule in 2016 that prohibited any binding pre-dispute arbitration agreements between Medicare- or Medicaid-funded nursing homes and residents. See 81 Fed. Reg. 68,688 (Oct. 4, 2016).

The arbitration provisions of the 2016 rule did not take effect, however. The American Health Care Association, an industry trade group, brought suit asserting that the rule was unlawful inasmuch as it banned all pre-dispute arbitration, and obtained a nationwide preliminary injunction preventing CMS from implementing that restriction. See *American Health Care Association* v. *Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016). In issuing the preliminary injunction, the district court determined that the administrative record was likely inadequate to justify an "effective ban" on pre-dispute arbitration agreements. *Id.* at 934.

b. Following the district court's preliminary injunction order, CMS announced that it would no longer seek to enforce a prohibition on pre-dispute arbitration agreements. See 82 Fed. Reg. 26,649, 26,650 (June 8, 2017). Instead, CMS proposed a new rule that would "remove provisions prohibiting binding pre-dispute arbitration" from the agency's regulations, while "strengthen[ing] requirements regarding the transparency of arbitration agreements." *Id.* at 26,649. The agency explained that it believed this would better account for the "advantages and disadvantages" of arbitration agreements and "strike a better balance" between "competing policy concerns" related to the use of such agreements by nursing homes. *Id.* at 26,650, 26,652.

In 2019, CMS published the final rule, which is the focus of this litigation. 84 Fed. Reg. 34,718 (July 18, 2019). In the preamble to the final rule, CMS recognized that arbitration can provide "an appropriate forum to resolve disputes," *id.* at 34,729, and determined that rather than the prohibition the agency had previously adopted, a "different approach would better serve both residents and facilities," *id.* at 34,723. See *id.* at 34,718 (explaining that CMS had "reevaluated the provisions to determine if a policy change would achieve a better balance between the advantages and disadvantages of pre-dispute, binding arbitration for residents and their providers"). As anticipated, therefore, the 2019 rule repealed the earlier prohibition against pre-dispute arbitration agreements. *Id.* at 34,733.

Instead, the 2019 rule welcomed the use of both pre-dispute and post-dispute arbitration agreements by nursing homes that participate in Medicare and Medicaid, while requiring participating nursing homes to adopt basic arbitration-related safeguards "to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys." 84 Fed. Reg. at 34,718 (quoting 42 U.S.C. 1395i-3(f)(1), 1396r(f)(1)); see, *e.g.*, *id.* at 34,718-34,720.

First, under the 2019 rule, a nursing home that receives Medicare or Medicaid funding may not withhold healthcare from a current or incoming resident based on the resident's refusal to accept a binding arbitration agreement. 42 C.F.R. 483.70(n)(1); see 84 Fed. Reg. at 34,719. Second, such a facility must inform the resident of this protection and must explain the terms of any arbitration agreement in an understandable manner. 42 C.F.R. 483.70(n)(1) and (2)(i)-(ii); see 84 Fed. Reg. at 34,720-34,721, 34,732. Third, the terms of the agreement must (a) provide for the selection of a neutral arbitrator in a convenient forum; (b) allow the resident to rescind the agreement within thirty days of signing; and (c) "may not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials." 42 C.F.R. 483.70(n)(5); see 42 C.F.R. 483.70(n)(2)(iii)-(iv) and (3); 84 Fed. Reg. at 34,723-34,724. Finally, when a facility and resident resolve a dispute through arbitration, the facility must retain the final arbitral decision and the signed arbitration agreement for five years for potential inspection by CMS or its designee. 42 C.F.R. 483.70(n)(6); see 84 Fed. Reg. at 34,721.

In adopting these standards, CMS explained that it had "concluded that the Secretary's statutorily-mandated duty to protect the health and safety of residents mandate[d] that [it] create protections that assist [nursing home] residents in knowingly and willingly entering into arbitration agreements that provide a neutral and fair arbitration process." 84 Fed Reg at 34,721. CMS reasoned that as a matter of health and safety, individuals in need of long-term care from Medicare- and Medicaid-funded nursing homes should not be made to "choose between receiving [that] care and signing an arbitration agreement." *Id.* at 34,728; see *id.* at 34,727 (recognizing that those seeking nursing-home care are often in "crisis" or "a time of stress" and face "severely limited" options).

CMS also explained that other provisions of the 2019 rule were designed to "provide greater transparency in the arbitration process" and "avoid secrecy problems," and that those provisions would promote quality care by aiding federal, state, and local authorities' oversight investigations. 84 Fed. Reg. at 34,725, 34,728; see *id.* at 34,730 (explaining that the recordkeeping requirements would "ensure that CMS can fully evaluate quality of care complaints that are addressed in arbitration").

In promulgating the rule, CMS took into account the FAA and its "favorable view of arbitration," 84 Fed. Reg. at 34,732, as well as concerns about resident health and safety that are "unrelated to the reasons behind the FAA" but that FNHRA charges the Secretary with considering in this particular context, *id.* at 34,725. Ultimately, CMS determined that the rule "accommodates arbitration while also protecting * * * residents" of federally funded nursing homes, consistent with the Secretary's statutory responsibilities. *Id.* at 34,726. The agency emphasized that "[t]his rule in no way would prohibit two willing and informed parties from entering voluntarily into an arbitration agreement." *Id.* at 34,732.

3. Petitioners are nursing homes that voluntarily participate in both the Medicare and Medicaid programs. Pet. App. 3. They brought this suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, to challenge provisions of the 2019 rule imposing the four requirements discussed above: (1) that participating nursing homes not condition care on the acceptance of binding arbitration agreements, 42 C.F.R. 483.70(n)(1); (2) that they explain their agreements in an understandable manner so that residents knowingly and willingly enter into arbitration agreements that provide a neutral and fair arbitration process, 42 C.F.R. 483.70(n)(2)(i)-(iv); (3) that they allow residents to rescind agreements within 30 days, 42 C.F.R. 483.70(n)(3); and (4) that they retain copies of any arbitral decisions, and the corresponding arbitration agreements, for five years, 42 C.F.R. 483.70(n)(6). See Pet. App. 47.

The district court granted the government's motion for summary judgment, rejecting all of petitioners' claims. See Pet. App. 39-84.

First, the district court held that the 2019 rule comports with the FAA because it does "not undermine the validity or enforceability of [any] agreement when it comes before a court." Pet. App. 52. The court observed that a nursing home's violation of the rule's requirements "would *not* prevent enforcement" of the agreement against a resident because the rule "only establishes conditions of the facility's receipt of federal subsidies." *Id.* at 52-53.

The district court rejected petitioners' assertion that, under *Epic Systems Corporation* v. *Lewis*, 138 S. Ct. 1612 (2018), CMS could not impose the 2019 rule's arbitration-related conditions because it lacked "explicit authorization" from Congress to override the FAA. Pet. App. 54. The court observed that courts look for clear congressional intent when an agency claims that it is empowered to invalidate arbitration agreements, but emphasized that CMS has not claimed such power here. *Id.* at 55-57. Instead, CMS simply conditioned voluntary participation in federal spending programs on adherence to regulatory provisions that are "reasonably related to the federal interest" in those programs. *Id.* at 58; see *id.* at 56 (noting that petitioners did not cite "any precedent" holding that the FAA "limits an agency's prerogative to place conditions on the receipt of federal funding in order to achieve the goals of [its] federal program").

Second, the district court rejected petitioners' contention that the 2019 rule is not authorized under FNHRA. Pet. App. 64-71. The court explained that "CMS, recognizing that an agreement to arbitrate can be valuable to both parties if entered into knowingly and voluntarily, has reasonably chosen not to prohibit such agreements altogether, but to use regulations to protect the patient's health, safety, welfare, and rights." *Id.* at 70. The court noted that the conditions CMS placed on pre-dispute agreements "protect the resident by preventing the nursing home from leveraging the resident's need to access care to achieve other goals not related to that resident's medical care." *Id.* at 68. The court also observed that the 2019 rule's restrictions "are consistent with" other Medicare and Medicaid regulations establishing admissions-related protections, *ibid.*, including regulations requiring nursing homes to disclose "special characteristics or service limitations of the facility," 42 C.F.R. 483.15(a)(6), and barring them from conditioning care on residents agreeing to certain contractual clauses, such as waivers of facility liability for property loss, 42 C.F.R. 483.15(a)(2)(iii). Pet. App. 68-70; see 84 Fed. Reg. at 34,724. In addition, the court determined that CMS had reasonably found that the secrecy surrounding arbitration could inhibit oversight and "result in some facilities evading responsibility for substandard care." Pet. App. 70 (citation omitted).[2]

4. The court of appeals affirmed in a unanimous opinion. Pet. App. 1-37.

The court of appeals held that the 2019 rule does not present any conflict with the FAA or its "equal-treatment principle." Pet. App. 10; see *id.* at 10-11. The court rejected petitioners' contention that the rule's requirements "violate[] the FAA," explaining that that contention cannot be reconciled with the statute's "plain language and interpreting precedent and would significantly expand the scope of the FAA." *Id.* at 11. "Simply put," the court wrote, the 2019 rule "does not come up against the FAA because it does not limit or frustrate the enforceability of valid arbitration agreements." *Ibid.*

The court of appeals explained that "[i]nstead, [the rule] establishes the conditions for receipt of federal funding through the Medicare and Medicaid programs." Pet. App. 13. The court observed that a facility's violation of those conditions might result in "administrative remedies," reflecting the facility's status as a voluntary participant in the Medicare or Medicaid program, but

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[2] The district court also rejected petitioners' contention that the rule was arbitrary and capricious, see Pet. App. 71-78, and their claim under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, see Pet. App. 78-83.

would have no bearing on the validity or enforceability of any agreement. *Id.* at 14. The court noted that this Court "has never applied the FAA to prohibit" that type of regulation by a federal agency. *Id.* at 12.

The court of appeals further determined that there was no need to show that Congress had evinced a "clear and manifest" intention to empower CMS to promulgate rules overriding the FAA. Pet. App. 15 n.5 (citing *Epic*, 138 S. Ct. at 1624). The court explained that "[s]uch an intention is unnecessary where there is 'no conflict at all.'" *Ibid.* (quoting *Epic*, 138 S. Ct. at 1625).

Next, the court of appeals held that CMS acted within its authority under the Medicare and Medicaid statutes. Pet. App. 16-23. The court observed that the statutes, as amended by FNHRA, are "broadly worded to give HHS significant leeway in deciding how best to safeguard [nursing home] residents' health and safety and protect their dignity and rights"—for example, conferring authority to promulgate regulations "'relating to the health, safety, and well-being of residents.'" *Id.* at 18 (citation omitted) (discussing 42 U.S.C. 1395i-3(c)(1)(A)(xi), (d)(4)(B), and (f)(1); 42 U.S.C. 1395r(c)(1)(A)(xi), (d)(4)(B), and (f)(1)). The court found the 2019 rule to come comfortably within that authority, recognizing (for example) that a nursing home's attempt to "condition[] care on entering into a binding arbitration agreement may frustrate residents' access to treatment or jeopardize their health and well-being." *Id.* at 22 (citing 84 Fed. Reg. at 34,726-34,727). The court therefore concluded that the rule was "not ultra vires" but rather an appropriate exercise of the agency's authority "to protect residents' rights" and "the health, safety, and well-being of residents, particularly during the critical stage when a resident is first admitted to a facility." *Id.* at 22-23.[3]

5. Although the rule took effect for other participating nursing homes on September 16, 2019, the government agreed not to enforce it against petitioners while the case was pending in the district court. Pet. C.A. App. 541. After upholding the validity of the rule, the district court denied petitioners' request for a stay pending appeal but gave them sixty days to come into compliance on account of the coronavirus pandemic. *Id.* at 666. The court of appeals extended that compliance period by staying enforcement for the pendency of the appeal. Pet. App. 9. After the court denied petitioners' petition for rehearing en banc, the appellate mandate issued on December 21, 2021, ending the stay.

ARGUMENT

Petitioners contend (Pet. 18-35) that CMS's 2019 rule revising the Medicare and Medicaid program requirements related to arbitration is contrary to the Federal Arbitration Act and therefore invalid. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. No further review is warranted.

1. The court of appeals correctly determined (Pet. App. 10-23) that CMS's 2019 rule is fully consistent with the FAA and reflects an appropriate exercise of CMS's

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[3] The court of appeals also determined that the balancing of competing interests in the final rule was not arbitrary or capricious, Pet. App. 23-30, and rejected petitioners' attempt to invalidate the 2019 rule under the RFA, *id.* at 30-37.

authority to protect the rights of nursing-home residents.

Section 2 of the FAA provides that arbitration agreements in commerce "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 directs courts to enforce arbitration agreements as they would enforce other contracts—by applying "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)). Accordingly, courts may not use "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" to negate an agreement. *Ibid*. This Court has explained that Congress's purpose in enacting the FAA was to "revers[e] centuries of judicial hostility to arbitration agreements," *Scherk* v. *Alberto-Culver Co*., 417 U.S. 506, 510 (1974), and "ensur[e] that private arbitration agreements are enforced according to their terms," *Volt Info. Scis., Inc*. v. *Board of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468, 478 (1989).

CMS's 2019 rule does not make arbitration agreements invalid, revocable, or unenforceable on any grounds that are not equally applicable to any other contract. The rule requires nursing homes that participate in Medicare and Medicaid to implement and adhere to certain safeguards related to pre-dispute contracts to arbitrate, just as CMS requires nursing homes to abide by safeguards related to other potentially abusive contractual terms, such as clauses that "require residents or potential residents to waive potential facility liability for losses of personal property" as a condition of admission. 42 C.F.R. 483.15(a)(2)(iii); see Pet. App. 69. But those safeguards have no bearing on any court's legal analysis of, or relating to, arbitration agreements themselves.

Following adoption of the 2019 rule, state contract law continues to govern the validity, revocability, and enforceability of arbitration agreements in the same manner that it governs other contracts between nursing homes and their residents. See Pet. App. 13-14. As with other violations of conditions of participation in Medicare or Medicaid, violation of the rule's requirements may subject the nursing home to administrative penalties, but an arbitration agreement executed without observance of the safeguards in the 2019 rule is not rendered invalid or unenforceable on that basis. See 84 Fed. Reg. at 34,721; see also p. 3, *supra* (describing administrative remedies). Accordingly, no conflict exists between the 2019 rule and Section 2 of the FAA.

2. Petitioners' contrary contentions (Pet. 18-21, 25-30) lack merit.

a. Petitioners first contend that the 2019 rule reflects "hostility to arbitration" that is inconsistent with the pro-arbitration policy embodied in the FAA. Pet. 18 (emphasis omitted). That contention is incorrect in two respects.

As an initial matter, the certiorari petition—like petitioners' briefing below—"largely ignores the extent to which the [2019 rule] *favors* arbitration as 'an appropriate forum to resolve disputes.'" Pet. App. 14 n.4 (quoting 84 Fed. Reg. at 34,729). The 2019 rule recognizes the "advantages" that arbitration can offer for both facilities and residents, and it was written to "accommodate[] the use of arbitration agreements" by federally subsidized nursing homes in a manner that would facilitate arbitration's "efficient and cost-effective operation," 84 Fed. Reg. at 34,718, 34,722, 34,725. A participating nursing home is thus free to ask incoming or current residents to sign a pre-dispute agreement to arbitrate, and is simply expected to explain the terms, provide adequate time for their consideration, and avoid any suggestion that acceptance of the agreement is required for the individual to obtain care or to continue receiving care in that federally assisted facility. 42 C.F.R. 483.70(n)(1), (2)(i)-(ii), and (3). CMS determined that these basic protections facilitate the formation of arbitration agreements between nursing homes and "willing and informed" residents who wish to avail themselves of "a neutral and fair arbitration process," while "ensur[ing] that arbitration agreements are not barriers to * * * care." 84 Fed. Reg. at 34,720-34,721, 34,732; see *Volt Info. Scis., Inc.*, 489 U.S. at 479 (noting that arbitration under the FAA remains "a matter of consent, not coercion"). That measured approach by HHS does not suggest "hostility to arbitration." Pet. 18.

In any event, the FAA does not speak to the sorts of requirements that a federal agency may adopt as voluntary conditions for participation in government spending programs. As the court of appeals correctly observed, this Court has "never applied the FAA to prohibit a federal agency" from adopting a regulation like the 2019 rule. Pet. App. 12; see *id.* at 56 ("There is nothing in the text of the FAA that limits an agency's prerogative to place conditions on the receipt of federal funding in order to achieve the goals of the federal program, nor have the parties cited * * * any precedent so holding."). Instead, the text of the FAA (which petitioners cite only once, Pet. 4) is directed to how courts evaluate the legal status of existing arbitration agreements—*i.e.*, their validity, revocability, and enforceability. See 9 U.S.C. 2. Federal regulations that do not affect those determinations are beyond the scope of the FAA. See *Casarotto*, 517 U.S. at 688.

Rather than invoking the statutory text, petitioners rely (*e.g.*, Pet. i, 4, 17, 20, 23) on general statements about the policies underlying the FAA. As this Court recently explained, however, statements about "the FAA's 'policy favoring arbitration'" simply reflect a statutory policy "to make 'arbitration agreements as enforceable as other contracts, but not more so.'" *Morgan* v. *Sundance, Inc.*, 142 S. Ct. 1708, 1713-1714 (2022) (citation omitted). Neither the FAA itself nor the policy underlying it authorizes courts to "devise novel rules to favor arbitration" more broadly. *Id.* at 1713; see *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 290 (2002) (explaining that courts must look to statutory texts rather than their own "evaluation[s] of the 'competing policies'" between the FAA and other statutes) (citation omitted). General statements about the pro-arbitration policies of the FAA accordingly cannot sustain petitioners' apparent view (see Pet. 18-20) that any federal regulation that specifically addresses arbitration is presumptively unlawful.

b. This Court's decision in *Kindred Nursing Centers Ltd. Partnership* v. *Clark*, 137 S. Ct. 1421 (2017), likewise does not support petitioners' position. See Pet. 21. There, this Court held that the FAA preempted a state court rule that "bar[red] agents without explicit authority from entering into arbitration agreements." *Kindred*, 137 S. Ct. at 1428. Petitioners contend that CMS's rule is similarly unlawful, because it too concerns "contract formation issues." Pet. 21 (quoting *Kindred*, 137 S. Ct. at 1428).

Contrary to petitioners' contention, the Court's reasoning in *Kindred* does not call into question the 2019 rule here. In finding that the rule at issue in *Kindred* was preempted, the Court emphasized that "[b]y its terms," the central concerns of the FAA are the "validity" and "enforcement" of arbitration agreements. 137 S. Ct. at 1428 (brackets omitted). Accordingly, a state rule "selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made." *Ibid.* But that reasoning has no application to the 2019 rule. As already discussed, CMS's 2019 rule does not alter the validity of any agreement to arbitrate. Agreements that fail to comply with the 2019 rule are not, on that account, deemed "invalid because improperly formed." *Ibid.* And while the substantial federal funding available through the Medicare and Medicaid programs plainly provides an incentive for nursing homes to comply with the arbitration-related safeguards set out in the 2019 rule voluntarily, that substantial funding also gives the federal government a substantial interest in the safe, fair, and transparent treatment of the vulnerable residents of such homes, and in the protection of their rights. *Kindred* does not suggest that such features in a federal spending program somehow implicate the FAA. See Pet. App. 58-59.

c. Petitioners additionally argue (Pet. 25-30) that the FAA's general statutory policy favoring arbitration imposes special arbitration-related limits on CMS's authority under FNHRA, and that the 2019 rule violates those limits. That argument lacks merit, as it rests on a flawed premise.

Petitioners contend that an agency may adopt regulations touching on arbitration "only if Congress 'clearly and manifestly' empowers it to do so" using language specifically directed to arbitration. Pet. 25 (quoting *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018)). But neither the FAA nor *Epic* imposes a sweeping clear-statement rule of that sort in the circumstances presented here.

In *Epic*, this Court considered the relationship between the FAA and the subsequently enacted National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* The Court was asked to endorse the National Labor Relations Board's determination that the NLRA "outlaw[s]" certain arbitration agreements, thereby "overrid[ing]" the FAA and rendering invalid arbitration agreements that the FAA would otherwise require to be enforced. *Epic*, 138 S. Ct. at 1624. The Court explained that before accepting such a position, it would need to find in the NLRA a "clear and manifest congressional command to displace the [FAA]." *Ibid.* And the Court found no such command. See *ibid.*

But just as with the state court rule in *Kindred*, the Board's position in *Epic* had a critical feature that CMS's 2019 rule lacks: the Board's position would have rendered arbitration agreements invalid and unenforceable, thereby creating an "irreconcilable conflict[]" with the FAA. *Epic*, 138 S. Ct. at 1624. It was only in the context of the "suggest[ion] that [the] two statutes cannot be harmonized, and that one displaces the other," that this Court imposed "the heavy burden of showing '"a clearly expressed congressional intention"' that such a result should follow." *Ibid.* (quoting *Vimar*

Seguros y Reaseguros, S. A. v. *M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). Here, by contrast, CMS's rule creates no such conflict because, as already discussed, the rule does not affect the validity or enforceability of arbitration agreements entered into between nursing homes and their residents. In addition, the regulatory provisions here are part of comprehensive regulations governing nursing homes that receive substantial federal funding, whereas *Epic* did not involve a federal Spending Clause statute.[4]

If anything, *Epic* undermines *petitioners*' position. In adopting a heightened requirement for finding that one statute conflicts with, and displaces, another, the Court emphasized that "[r]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work." 138 S. Ct. at 1624. The Court also cautioned that "[a]llowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Ibid.* Together, those concerns support the court of appeals' determinations that

[4] Petitioners also observe (Pet. 27-28) that Congress has enacted statutory provisions specifically authorizing the Consumer Financial Protection Bureau (CFPB) and the Securities and Exchange Commission (SEC) to engage in rulemaking related to arbitration, but that CMS has no comparable specific authorization. The CFPB and SEC provisions, however, authorize those agencies to adopt limitations on the enforceability of covered arbitration agreements notwithstanding the ordinary enforceability of such agreements under the FAA. See 12 U.S.C. 5518(b) (authorizing CFPB to impose "limitations on the use of an agreement" to arbitrate); 15 U.S.C. 78*o*(*o*) (providing that the SEC "may prohibit, or impose conditions or limitations on the use of, [covered arbitration] agreements"). CMS's 2019 rule, by contrast, does not restrict the validity or enforceability of any arbitration agreement.

no conflict exists between Section 2 of the FAA and the 2019 rule, and that a general policy preference for arbitration provides no basis for overriding CMS's exercise of its statutory authority under FNHRA to ensure the safe, healthful, and fair treatment of nursing-home residents and the protection of residents' rights. See pp. 21-23, *infra*; Pet. App. 13-14; see also *Epic*, 138 S. Ct. at 1632 ("The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested.").

d. Finally, although petitioners do not ask the Court to review the court of appeals' determination that the 2019 rule was a reasonable exercise of statutory authority, see Pet. i-ii, they criticize the court of appeals' reliance on *Chevron* in analyzing the rule, Pet. 25 (emphasis omitted). That criticism is misplaced.

In FNHRA, Congress charged the Secretary with adopting regulatory measures that would protect vulnerable nursing-home residents at Medicare- and Medicaid-funded facilities. See Pet. App. 16-17; pp. 2-3, *supra*. In particular, Congress directed the Secretary to identify and address problems affecting the health, safety, and rights of nursing-home residents. See 42 U.S.C. 1395i-(3)(d)(4)(B) (authorizing the Secretary to impose "other requirements relating to the health, safety, and well-being of residents * * * as the Secretary may find necessary"); 42 U.S.C. 1395i-(3)(f)(1) (assigning the Secretary the "duty and responsibility of" ensuring requirements are "adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys"); 42 U.S.C. 1395i-(3)(c)(1)(A)(xi) (authorizing the

Secretary to establish "other right[s]" of nursing-home residents that are appropriate for protection).

Congress enacted such capacious authorizations to provide the Secretary with the flexibility necessary for ongoing problem-solving. Cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 587, 589 (1980) (supporting an expansive reading where broad residual authorities are expressly granted). And the 2019 rule reflects an appropriate use of that flexible authority: Relying on the Secretary's authority to address new health and safety problems as they arise, CMS undertook to consider the growing concerns about potentially abusive use of mandatory arbitration agreements in the nursing-home context. After a thorough rulemaking process, the agency ultimately adopted a rule that balances competing policy considerations, protecting nursing home residents from exploitation and facilitating effective oversight by federal, state, and local authorities, while at the same time allowing nursing homes and their residents to benefit from the advantages of arbitration. See Pet. App. 18-19. As the court of appeals correctly recognized, that rule reflects "a reasonable accommodation of manifestly competing interests." *Id.* at 23 (citation omitted).

In suggesting that the Secretary's rulemaking authority under FNHRA extends no further than regulations covering the "provision of healthcare," Pet. 28 (citation omitted), petitioners ignore other longstanding nursing-home regulations that restrict facilities' use of potentially abusive contracts. Those regulations include provisions barring nursing homes from conditioning care on residents' agreement to other contractual clauses, such as liability waivers for property loss, agreements to offer gifts or donations, and agreements to purchase additional services. See 42 C.F.R.

483.15(a)(2)(iii) and (4); 84 Fed. Reg. at 34,724. Moreover, FNHRA itself protects nursing-home residents' right to "voice grievances with respect to treatment or care," 42 U.S.C. 1395i-3(c)(1)(A)(vi), 1396r(c)(1)(A)(vi), a right that even petitioners acknowledge (Pet. 28) can relate to arbitration. By establishing safeguards concerning how pre-arbitration agreements are offered, accepted, and documented, the 2019 rule helps to ensure that that statutory right is protected and given meaningful effect.

3. Petitioners are also incorrect in their contention (Pet. 21-25) that the decision below conflicts with the decisions of three other courts of appeals. All three of the decisions on which petitioners rely involved state laws, and rest on principles of implied preemption that have no application to the federal regulation at issue here.

a. Petitioners first cite (Pet. 21-24) two decades-old cases—*Securities Industry Association* v. *Connolly*, 883 F.2d 1114 (1st Cir. 1989), cert. denied, 495 U.S. 956 (1990), and *Saturn Distribution Corporation* v. *Williams*, 905 F.2d 719 (4th Cir.), cert. denied, 498 U.S. 983 (1990)—in which courts of appeals held that the FAA impliedly preempted state laws prohibiting parties from entering into certain types of arbitration agreements. See *Saturn*, 905 F.2d at 723-724; *Connolly*, 883 F.2d at 1123-1125.

The FAA preempts state laws that directly conflict with its express terms, much as it might displace a directly conflicting federal rule under *Epic*. See 138 S. Ct. at 1624; pp. 18-21, *supra*. But under the Supremacy Clause, the FAA also preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343 (citing *Geier* v.

American Honda Motor Co., 529 U.S. 861, 872 (2000); and *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000)). Both *Connolly* and *Saturn* involved that latter form of obstacle preemption, which has no direct analogue in a case, like this one, involving another federal (rather than state) law.

In holding the challenged state laws preempted, the First and Fourth Circuits identified conflicts between those state laws and the FAA's underlying "purposes and objectives." *Saturn*, 905 F.2d at 722 (citations omitted); see *Connolly*, 883 F.2d at 1123-1124. They reasoned that it would "frustrate" the "national policy favoring arbitration" if a state could evade a finding of preemption by making the formation of certain arbitration agreements illegal. *Connolly*, 883 F.2d at 1123-1124; see *Saturn*, 905 F.2d at 723. The courts found that perceived frustration of federal policy sufficient to render the state laws preempted. See *ibid.*

As the First Circuit went out of its way to acknowledge, however, the obstacle preemption analysis that controlled the decisions in *Connolly* and *Saturn* would not apply to regulations that are "products of federal, not state, authority." *Connolly*, 883 F.2d at 1122 (distinguishing limitations on arbitration promulgated by the Securities and Exchange Commission and the Commodities Futures Trading Commission on the ground that those limitations "are products of federal, not state, authority," which "is a critical distinction"); see *Saturn*, 905 F.2d at 724 (observing that "[w]e find persuasive the reasoning of * * * *Connolly*"). Accordingly, no conflict exists between the Eighth Circuit's decision upholding CMS's 2019 rule here and the decisions of the First and Fourth Circuits holding that the state laws at issue in *Connolly* and *Saturn* were invalid under the Supremacy Clause.[5]

b. For similar reasons, the third case petitioners invoke (Pet. 24), *Chamber of Commerce* v. *Bonta*, 13 F.4th 776 (9th Cir. 2021), also does not aid them.

Bonta involved a provision of state labor law, Section 432.6 of the California Labor Code, that prohibits employers from engaging in certain arbitration-related activities. Specifically, Section 432.6 makes it unlawful for employers (1) to condition employment or benefits on the signing of certain types of arbitration agreements or (2) to threaten or retaliate against employees for declining to sign arbitration agreements. *Bonta*, 13 F.4th at 772. Section 432.6 "does not create a contract defense that allows for the invalidation or nonenforcement of an agreement to arbitrate." *Id.* at 775. But by virtue of the provision's placement in the California Labor Code, any person violating Section 432.6 is guilty of a misdemeanor and subject to civil penalties under other provisions of state law. *Id.* at 772.

In undertaking its preemption analysis, the Ninth Circuit first held that Section 432.6 does not directly conflict with the FAA and is therefore not invalid under the doctrine of "impossibility" preemption. See *Bonta*,

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[5] Even under the preemption framework, this Court's decision in *Kindred* indicates that the relevant question is whether the state law imposes some impediment to the ultimate validity, irrevocability, or enforceability of an arbitration agreement. See 137 S. Ct. at 1428. The laws at issue in *Connolly* and *Saturn* satisfied that requirement because, while not expressly controlling judicial enforcement of arbitration agreements, they indirectly rendered noncompliant agreements unenforceable. See *Connolly*, 883 F.2d at 1123 & n.7, 1125; *Saturn*, 905 F.2d at 722-723. The same is not true for CMS's 2019 rule. See pp. 13-21, *supra*.

13 F.4th at 774-778. The court explained that unlike the provision at issue in *Kindred*, which rendered executed "arbitration contracts invalid because improperly formed," *id.* at 777 (quoting *Kindred*, 137 S. Ct. at 1428), "[Section] 432.6 cannot be used to invalidate, revoke, or fail to enforce an arbitration agreement," *id.* at 775. Accordingly, "it is not 'impossible' for [Section] 432.6 and the FAA to coexist." *Id.* at 776 (citation omitted).

The court of appeals then turned to "obstacle preemption." *Bonta*, 13 F.4th at 778. The court determined that it was "Congress' clear purpose [in the FAA] to ensure the validity and enforcement of consensual arbitration agreements according to their terms," and thus found it "difficult to see how [Section] 432.6, which in no way affects the validity and enforceability of such agreements, could stand as an obstacle to the FAA." *Id.* at 779. However, the court held that the criminal and civil sanctions that California law imposed for violations of Section 432.6 *would* "stand as an obstacle to the 'liberal federal policy favoring arbitration agreements,'" and were therefore preempted on that basis. *Id.* at 780 (citation omitted).

Petitioners ignore the *Bonta* court's determination that Section 432.6 does not directly conflict with the FAA because it does not render any arbitration agreement invalid or unenforceable. Instead, they focus (Pet. 24) just on the final portion of the *Bonta* decision, finding California's criminal and civil enforcement mechanisms invalid under a theory of obstacle preemption. But as with *Connolly* and *Saturn*, the *Bonta* court's obstacle preemption analysis is far afield from this case, which involves only administrative mechanisms and safeguards that apply as a condition of voluntary participation in the Medicare and Medicaid programs. And while petitioners note that the dissent in *Bonta* suggested that some aspects of the majority's analysis there conflicted with the obstacle preemption analysis in *Connolly* and *Saturn*, see Pet. 24 n.8 (citing *Bonta*, 13 F.4th at 787 (Ikuta, J., dissenting)), this case involving a federal regulation would present no occasion for addressing any asserted conflict over obstacle preemption of state laws under the FAA.

4. Finally, petitioners are wrong in their assertions that "the decision below poses an existential threat to the FAA," Pet. 30, and that CMS's rule will "give[] them 'no real option' but to abandon activity protected by the FAA," Pet. 19 (citation omitted). See Pet. 30-35.

As the court of appeals recognized, the "activity" that the rule seeks to prevent—namely, the use of potentially coercive tactics that may jeopardize the rights and well-being of nursing-home residents, as well as reliance on secrecy to impede oversight of federally funded facilities—is activity that Congress empowered CMS to regulate under the Medicare and Medicaid statutes. Pet. App. 16-23. Preventing such abuses does not force petitioners to "abandon activity protected by the FAA." Pet. 19. Instead, the key activities protected by the FAA are the formation and enforcement of valid arbitration agreements—and the 2019 rule unquestionably allows nursing homes to continue to make and enforce pre- and post-dispute arbitration agreements with residents to resolve all manner of disputes. See 84 Fed. Reg. at 34,732 (emphasizing that the "rule in no way would prohibit two willing and informed parties from entering voluntarily into an arbitration agreement").

Petitioners point to no indication that over the nearly three years since the rule took effect for other participating facilities (see p. 13, *supra*) nursing homes have been "abandon[ing]" arbitration, Pet. 19. Indeed, petitioners' view of the 2019 rule as unduly "burdensome," Pet. 18, appears to be an outlier. During the rulemaking that led to the 2019 rule, for example, the American Health Care Association (AHCA)—a national association representing more than 14,000 long-term care facilities—reported that its model arbitration agreement includes a 30-day rescission period, and that many nursing homes "have built in safeguards to the contracting process," such as a 30-day "cooling off period," "to ensure that residents and their families have a meaningful opportunity to consider whether to agree to arbitrate their claims." Administrative Record 35,335; see 84 Fed. Reg. at 34,730-34,731. And while AHCA led the challenge to the 2016 rule's ban on pre-dispute arbitration agreements, it has not challenged any aspect of the 2019 rule. That reality substantially undermines petitioners' assertions that the 2019 rule will effectively preclude nursing homes and their residents from obtaining the benefits of arbitration that the FAA is designed to secure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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