No. 21-1455

In The
Supreme Court of the United States

NORTHPORT HEALTH SERVICES OF ARKANSAS, LLC, doing business as SPRINGDALE HEALTH AND REHABILITATION CENTER, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE ARKANSAS HEALTH CARE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

GARY D. MARTS, JR.
Counsel of Record
WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, AR 72201
(501) 371-0808
gmarts@wlj.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE *AMICUS CURIAE*

The Arkansas Health Care Association (Arkansas HCA) was established in 1951.[1] A nonprofit corporation incorporated under the laws of the State of Arkansas, Arkansas HCA is the professional association for Arkansas's long-term care providers. In that role, Arkansas HCA represents 284 member facilities that make up more than 90% of the licensed long-term care providers in Arkansas. To represent those members' interests, Arkansas HCA works with various entities, including regulatory and other reviewing bodies, to promote the highest quality of care for residents of long-term care facilities, to develop the highest professional standards for facility staff, and to improve the quality of life for residents in Arkansas nursing facilities. Arkansas HCA works toward these goals through its member services, which include publications, comprehensive programs of education and hands-on training, legislation, and research.

Arkansas HCA's vital role in the development and promotion of high-quality care for residents of Arkansas long-term care facilities is reflected in the law of the state. *See* Ark. Code Ann. § 17-87-103(12)(D) (requiring the input of Arkansas HCA in promulgating

[1] As required by Rule 37.6, Arkansas HCA affirms that no counsel for a party authored this brief in whole or in part and that no person other than Arkansas HCA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days before the due date of Arkansas HCA's intention to file this brief. All parties consented in writing to the filing of this brief.

regulations with regard to licensure of nurses); Ark. Code Ann. § 20-8-102(b)(4) (requiring appointment of a member of Arkansas HCA to the Arkansas Health Services Permit Commission); Ark. Code Ann. § 20-8-702(b)(1)(G) (requiring appointment of a designee of Arkansas HCA to the Palliative Care and Quality of Life Interdisciplinary Task Force); Ark. Code Ann. § 20-77-2203(b)(2)(A)(i) (requiring a voting member nominated by Arkansas HCA on the Healthcare Quality and Payment Policy Advisory Committee); Ark. Code Ann. § 25-42-106(a)(3)(A)(xvi) (requiring appointment of a representative from Arkansas HCA to the State Health Alliance for Records Exchange).

Arkansas HCA also promotes the interests of its members by participating as an *amicus curiae* in cases that raise issues of concern to Arkansas long-term care providers. The petition here presents an issue of significant interest to Arkansas HCA and its hundreds of members, many of whom choose arbitration as an efficient means of dispute resolution. Those members choose arbitration relying on the Federal Arbitration Act's (FAA) strong policy in favor of arbitration, as well as this Court's decisions applying the FAA in the face of attempts to circumvent its advocacy of arbitration as a means of dispute resolution.

Given the preference of many Arkansas HCA members for arbitration, they risk harsh punishment from the U.S. Department of Health and Human Services (HHS) under the regulatory rule at issue. Among other things, that rule threatens Arkansas HCA members with civil monetary penalties and exclusion from

Medicare and Medicaid if they require their residents—even residents who are not covered by either of those programs—to agree to arbitration as a condition for admission or do not allow residents a 30-day window to rescind arbitration agreements. Exclusion from Medicare and Medicaid poses an existential threat to Arkansas HCA members because payment for most of their residents comes from those programs.

That threat looms over the head of every Arkansas HCA member that picks arbitration as a means of dispute resolution. Arkansas HCA members thus have a strong interest in this case, which challenges the HHS rule restricting arbitration.

SUMMARY OF ARGUMENT

The HHS rule threatens Arkansas HCA members and other long-term care facilities with severe sanctions—including outright exclusion from Medicare and Medicaid—for choosing arbitration protected by the FAA as a dispute resolution method. Like many other parties, members of Arkansas HCA have relied on this Court's precedent interpreting and applying the FAA when they decided to choose arbitration and drafted arbitration agreements. That precedent establishes that the FAA shields arbitration agreements from rules disfavoring arbitration. And arbitration is attractive to members of Arkansas HCA because of its increased efficiency and cost-effectiveness.

But the HHS rule penalizing long-term care facilities for using arbitration effectively nullifies the availability of arbitration as a dispute resolution method for Arkansas HCA's members. Like the residents of the petitioners' facilities, most of the residents in Arkansas HCA member facilities receive their care through Medicare and Medicaid, meaning that those facilities cannot simply choose to forgo participation in those programs to choose arbitration. The HHS rule thus tries to evade the FAA and this Court's precedent interpreting it by concealing its anti-arbitration discrimination as punishment rather than prohibition. And the threat of that punishment essentially leaves long-term care facilities unable to choose arbitration lest they accept what might be a fatal penalty.

The Eighth Circuit erred when it allowed that anti-arbitration rule to stand, and its decision provides courts and regulators with new tools to evade the FAA's policy favoring arbitration. This Court's review is therefore essential to make clear that the FAA does not allow anti-arbitration rules in the guise of regulatory or other sanctions.

ARGUMENT

I. Arkansas HCA members have relied on this Court's precedents to enter into arbitration agreements.

As this Court recognized more than a quarter-century ago, "private parties have likely written

contracts relying on [the Court's FAA precedent] as authority." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). And the Court has built on that precedent since *Allied-Bruce*, crafting a body of authority that has rejected many attempts to create rules that discriminate against arbitration, whether directly or covertly through facially neutral rules that "oh so coincidentally" disfavor arbitration. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Rules subjecting arbitration agreements "to uncommon barriers" cannot "survive the FAA's edict against singling out [arbitration] contracts for disfavored treatment." *Id*. at 1427.

The Court's statement in *Allied-Bruce* about reliance interests is accurate for Arkansas HCA members, many of whom have included arbitration agreements in their standard admission agreements relying on the FAA and this Court's body of authority protecting the FAA's policy favoring arbitration from the depredations of rules that disfavor arbitration. Neither the FAA nor this Court's precedent have changed in any way to undermine that reliance, and Arkansas HCA members would like to continue choosing arbitration as a means of dispute resolution as the FAA guarantees.

In making that choice, Arkansas HCA members select arbitration because it is an effective, efficient means of dispute resolution. Arkansas HCA members prefer arbitration compared to litigation because arbitration offers "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve

specialized disputes." *Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

Those benefits are not merely theoretical—empirical studies have found that arbitrations offer efficiency advantages, with cases reaching resolution more quickly than in litigation. *See*, *e.g.*, Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019) (finding an average duration of 11 months for arbitrations as opposed to an average duration of nearly 27 months to verdict in litigation); Roy Weinstein, et al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, at 2 (Mar. 2017), available at https://tinyurl.com/micronomics (last accessed June 1, 2022) (concluding that cases submitted to arbitration made it to trial 12 months faster than cases pending in courts). Indeed, "few dispute the assertion that arbitration is faster than litigation." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572-73 (2005).

And other studies have confirmed that arbitration is cheaper than litigation, too. "The evidence indicates that arbitration tends to have lower process costs than litigation" and that "arbitration's process costs may be so much lower than litigation's as to more than make up for arbitration's higher adjudicator costs." Stephen J. Ware, *Is Adjudication A Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 Cardozo J. Conflict Resol. 899, 907 n.31 (2013).

Weinstein also discusses how arbitration's greater efficiency leads to costs savings by eliminating costs associated with delay. Weinstein at 16–21.

This cheaper, faster alternative to litigation has proven attractive to Arkansas HCA members, many of whom choose that alternative as part of their standard admission agreements. Those members choose arbitration's efficiency and lower costs in the particular context of an industry wracked by high and rising claims costs. *See* CNA, *Aging Services Claim Report* at 7 (11th ed.), available at https://tinyurl.com/r226k5mw (last accessed June 1, 2022) (concluding that 2021 data showed that the average cost of claims in the aging services industry had experienced "a broad-based increase" across all care settings since 2018). Arbitration's lower cost burden offers a way to ease some of those claim costs, making arbitration under the FAA an attractive option for Arkansas HCA's members.

II. The HHS rule threatens Arkansas HCA members and other long-term care facilities with potentially fatal penalties for their reliance on this Court's FAA precedent.

But the HHS anti-arbitration rule essentially removes the arbitration option for Arkansas HCA members and other long-term care facilities. That rule imposes burdensome requirements on long-term care facilities that receive Medicare or Medicaid if they choose arbitration under the FAA to resolve disputes. Those penalties essentially make it prohibitive for

long-term care facilities to enter into arbitration agreements, punishing long-term care facilities for entering into such agreements under the FAA. The rule thus effectively prohibits arbitration for those facilities, which both violates this Court's repeated rejection of anti-arbitration rules and carries negative consequences for long-term care facilities. And the Eighth Circuit's approval of that rule could give rise to a host of new anti-arbitration rules cloaked as punishment.

Under the rule, Arkansas HCA members, like all long-term care facilities, cannot require arbitration as a condition for admission. 84 Fed. Reg. at 34,735–36. Facilities must also allow rescission of any arbitration agreement within 30 days. *Id*. Facilities must inform residents of their right not to sign the arbitration agreement and must explain the agreement to the resident "in a form and manner that he or she understands." *Id*. at 34,735. And the facility must maintain copies of arbitration agreements for five years so HHS can inspect them. *Id*. at 34,723, 34,736. Not following those requirements, even for residents who do not receive Medicare or Medicaid benefits, can subject facilities to harsh sanction, including denial of Medicare and Medicaid payments or even outright termination from those programs.

Like the petitioners, most Arkansas HCA members who have chosen arbitration have not drafted arbitration agreements that comply with the HHS rule. And also like the petitioners, most Arkansas HCA members would prefer to continue using their existing arbitration agreements. But the harsh possible

sanctions for long-term care facilities continuing as they did before the HHS rule make such continuation impossible. The impossibility arises from the fact that most Arkansas long-term care facility residents—like the vast majority nationwide—receive their care through Medicare and Medicaid. *See* Kaiser Family Foundation, *Medicaid's Role in Nursing Home Care* (June 2017) available at https://tinyurl.com/kffmedi (last accessed June 1, 2022) (reporting that 62% of residents nationwide and 66% in Arkansas received care through Medicaid). Running afoul of HHS and being terminated from Medicare and Medicaid is therefore a risk that long-term care facilities like those represented by Arkansas HCA cannot take.

That risk reveals the weakness of HHS's justification for its rule. When the district court accepted that justification, it euphemistically referred to sanctions that might deprive facilities of two-thirds or more of their funding as "corrective action" that facilities "could rationally choose to accept" as the cost of choosing arbitration. Pet. App.53. The Eighth Circuit reached the same conclusion that accepting penalties for choosing arbitration is merely the "price of admission" for receiving Medicare and Medicaid. Pet. App.15 n.5. But facilities' dependence on funding from those programs makes that no choice at all, "rational" or otherwise. And forcing facilities to make that choice in the face of staunch government sanction for choosing arbitration conflicts unmistakably with the FAA by treating arbitration agreements differently from other contracts.

The rule thus forces facilities to abandon arbitration. But abandoning arbitration in response to the rule also harms Arkansas HCA members and other long-term care facilities because litigating claims rather than arbitrating them will result in higher costs for resolving disputes. Long-term care facilities have limited options for offsetting those costs, too, because they must accept what Medicare and Medicaid are willing to pay and thus cannot raise fees charged for the care that they provide. The anti-arbitration rule thus provides little choice for Arkansas HCA members—they lose no matter what they do under the HHS rule.

The Eighth Circuit's decision upholding the HHS rule thus deprives Arkansas HCA's members of their ability to choose arbitration as the forum for resolving disputes with their residents and leaves them in an untenable situation. And by sanctioning an end-run around the FAA that punishes those who choose arbitration rather than prohibiting arbitration altogether, the decision will likely give rise to similar efforts by the states, including Arkansas.[2] Every anti-arbitration

[2] Arkansas law is already hostile to arbitration. Its arbitration statute prohibits arbitration of tort lawsuits, employer-employee disputes, and insurance disputes. Ark. Code Ann. § 16-108-201(b). And Arkansas state courts still apply an unusual "mutuality" rule that federal courts have recognized to be preempted by the FAA. *See Southeastern Stud. & Components, Inc. v. American Eagle Design Build Studio*, 588 F.3d 963, 967 (8th Cir. 2009) (recognizing that Arkansas's treatment of mutuality of obligation is preempted by the FAA); *Northport Health Servs. of Arkansas, LLC v. Chancey*, 2022 Ark. App. 103, 6, 642 S.W.3d 253, 257 (applying mutuality rule). The Eighth Circuit's

artifice that this Court has rejected over the decades could be revived in the guise of "corrective action" for parties who choose arbitration to resolve disputes. And the "FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration," *Kindred*, 137 S.Ct. at 1428–29, so long as the discrimination came in the form of punishment instead of prohibition.

The HHS rule and the Eighth Circuit's decision upholding that rule contradict this Court's precedent by punishing long-term care facilities that choose arbitration in a way that frustrates the FAA's policy favoring arbitration. The Court should therefore grant review and correct the Eighth Circuit's error.

CONCLUSION

The petition for a writ of certiorari should be granted.

GARY D. MARTS, JR.
Counsel of Record
WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, AR 72201
(501) 371-0808
gmarts@wlj.com

Counsel for Amicus Curiae

decision here gives legislators, regulators, and courts in Arkansas and other states another tool to attack arbitration.