No. 17-365

In the Supreme Court of the United States

KINDRED HOSPITALS EAST, LLC,
dba KINDRED HOSPITAL OCALA,
Petitioner,

v.

ESTATE OF MARIANNE KLEMISH,
AND FRANK KLEMISH,
Respondents.

On Petition for Writ of Certiorari to the Fifth District Court of Appeal of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner has misstated the holding below and therefore incorrectly framed the question presented. Before this Court may determine whether to consider the merits of Petitioner's Federal Arbitration Act (FAA) preemption claim, it first must resolve questions of jurisdiction and the applicability of the FAA. Accordingly, the questions presented are:

1.) Whether Petitioner's failure to raise any federal or FAA argument in the trial court or the Fifth District Court of Appeal of Florida bars this Court from reviewing this case.

2.) Whether an arbitration agreement that expressly adopts and incorporates by reference state arbitration codes and law – and never refers to the FAA – can be enforced under the FAA.

3.) Whether Petitioner presented any evidence that the FAA governs an intrastate agreement between a Florida rehabilitation hospital and its Florida patient.

4.) Whether the FAA is a procedural rule that does not apply in state courts.

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JURISDICTION

This Court lacks jurisdiction because the judgment of the Fifth District Court of Appeal of Florida was not rendered in a case in which a party timely drew the validity of any Florida statute into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or claimed a right, title, privilege or immunity under the Constitution or laws of the United States, as required for jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition omits the pertinent statutory provisions listed below:

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The pertinent provisions of the Florida Arbitration Code and the Florida Medical Malpractice Act are lengthy, and therefore set out in the Appendix, as provided in this Court's Rule 14(f). The Appendix contains the following statutes:

Fla. Stat. § 682.03 (2011)
Fla. Stat. § 682.06 (2011)
Fla. Stat. § 682.08 (2011)
Fla. Stat. § 682.09 (2011)
Fla. Stat. § 682.10 (2011)
Fla. Stat. § 682.12 (2011)
Fla. Stat. § 682.13 (2011)
Fla. Stat. § 682.15 (2011)
Fla. Stat. § 682.20 (2011)
Fla. Stat. § 766.106 (2011)
Fla. Stat. § 766.201 (2011)
Fla. Stat. § 766.203 (2011)
Fla. Stat. § 766.204 (2011)
Fla. Stat. § 766.207 (2011)
Fla. Stat. § 766.209 (2011)

INTRODUCTION

This Court recently denied a nearly identical petition in *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016) ("*Crespo II*"), *cert. denied*, Case No. 16-1458, 2017 WL 2444694 (Oct. 2, 2017). This petition also should be denied because this case is not about the Federal Arbitration Act (FAA). The FAA does not apply to this case for four separate reasons. First, Petitioner never timely argued FAA preemption in the state courts, and this Court thus lacks jurisdiction to address Petitioner's newly asserted reliance on federal law. Second, the form arbitration agreement drafted by Petitioner expressly adopts and incorporates by

reference the *state* arbitration codes and never once mentions the FAA. Third, Petitioner never presented below any argument or evidence to support a finding that the agreement involves interstate commerce. Fourth, in accordance with Justice Thomas' view, the FAA does not apply to state court proceedings.

For many of these same reasons, the case would be a poor vehicle for deciding any issue of the scope of FAA preemption. Because the FAA issue was not raised below, the lower court did not address and flesh out the factors that would bear on the potential application of the FAA to the specific, interlocking features of Florida's statutory scheme for handling medical malpractice cases. Even assuming the relationship of the FAA to that scheme might at some point become an issue meriting review, a case in which the issues had been aired and addressed below would be a vastly superior choice for consideration by this Court. Not only is the instant case a poor vehicle, but Petitioner has failed to show a conflict amongst the lower courts or any other reason that warrants merits review by this Court.

Finally, there is no reason for this Court to grant the petition, vacate the decision below, and remand for reconsideration in light of this Court's recent decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). Petitioner already presented that decision to the Supreme Court of Florida in the form of a motion to reinstate the appeal, which was denied. In any event, assuming the FAA applies, *Kindred Nursing* did not announce a new rule of law applicable to this case, and the Fifth District Court of Appeal's decision does not run afoul of *Kindred*

Nursing or this Court's prior FAA decisions. Just as this Court recently declined to grant review of the Supreme Court of Florida's decision in *Crespo II*, 211 So. 3d at 19, *cert. denied*, Case No. 16-1458, 2017 WL 2444694 (Oct. 2, 2017), so too should it decline to review the decision of the Fifth District Court of Appeal in this case.

STATEMENT OF THE CASE

A. Proceedings below.

In the state trial court and the Fifth District Court of Appeal of Florida, Petitioner never once argued that the FAA applied to its arbitration agreement. This case followed in the wake of *Crespo v. Hernandez*, 151 So. 3d 495 (Fla. Dist. Ct. App. 2014) ("*Crespo I*"), a similar case dealing with medical arbitration agreements. Relying on *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), *cert. denied*, 134 S. Ct. 683 (2013), the Fifth District Court of Appeal in *Crespo I* held that the arbitration agreement there violated Florida public policy because it selectively incorporated some, but not all, of the provisions of the Florida Medical Malpractice Act. *Id.* at 496. *Crespo I* had already been decided when the parties to this case filed their briefs in the Fifth District Court of Appeal. Resp't App. 23 n.1, 35 (briefs filed in 2015).

Although *Crespo I* relied on *Franks*, and *Franks* specifically discussed and rejected FAA preemption, 116 So. 3d at 1249-51, Petitioner did not argue FAA preemption in its brief to the district court of appeal. This omission is reflected in the opinion of the court, which never mentions the FAA or preemption. *See*

Klemish v. Villacastin, 216 So. 3d 14 (Fla. Dist. Ct. App. 2016); App. 1a-8a.

Petitioner sought review of the Fifth District Court of Appeal's decision in the Supreme Court of Florida, but review was stayed pending that court's resolution of *Crespo II*, 211 So. 3d at 19, *cert. denied*, 2017 WL 2444694. It was not until after the Supreme Court of Florida issued its opinion in *Crespo II* that Petitioner first suggested a FAA preemption argument in response to the state supreme court's order to show cause. App. 12a, 26a, 28a; Resp't App. 6. Even then, Petitioner's 11-page response was devoted almost entirely to state-law grounds. It mentioned FAA preemption in only three sentences (*see* App. 26a, 28a), without sufficient development under Florida's preservation rules.

Petitioner's more-developed FAA argument was not made until *after* the Supreme Court of Florida had already dismissed the petition, when Petitioner improperly moved the court to reinstate its appeal. App. 9a, 31a-36a. The motion for reinstatement was improper because it was an unauthorized motion for rehearing. Resp't App. 10-11. Further, the court reinstates appeals only in cases where dismissal has resulted from procedural violations, not following a decision declining to exercise jurisdiction on the merits. Resp't App. 10-11.

Most critically, because the Supreme Court of Florida declined to review this case, Petitioner is asking this Court to issue a writ of certiorari to the Fifth District Court of Appeal, which has *never* been presented with the FAA preemption argument now raised.

B. The arbitration agreement and the Florida law it incorporates.

The parties agreed in paragraphs 5 and 6 of the agreement to be bound by the presuit and arbitration provisions of Chapter 766, Florida Statutes. Chapter 766 is commonly referred to as the Florida Medical Malpractice Act, and it has multiple provisions concerning arbitration and presuit dispute resolution. *See Franks*, 116 So. 3d at 1241-42; *e.g.,* Fla. Stat. §§ 766.106, 766.207 (2011).

Specifically, paragraph 5 of the parties' arbitration agreement provides in pertinent part:

> in connection with any claim for medical malpractice as defined in Florida Statutes Section 766.106, or any similar successor law, or any claim or Request involving medical negligence, the Parties shall comply with the presuit investigation and presuit notification requirements under Chapter 766, Florida Statutes, or any similar successor laws (the "Presuit Statutes") prior to filing a Request for ADR.

App. 46a.

Paragraph 6 provides:

> 6. Arbitration of Damages. If prior to the filing of a Request for ADR either Party offers to have Patient's damages determined by arbitration in accordance with Chapter 766, Florida Statutes, and the other Party accepts such offer, the Parties shall arbitrate damages in accordance with Chapter 766, Florida

> Statutes, and the other terms and conditions of this Agreement shall not apply to such claim. If the recipient of such an offer to arbitrate damages rejects the offer, the provisions of this Agreement shall remain in full force and effect and the statutory limitations shall apply to any subsequently filed Request.

App. 46a. Additionally, in paragraph 1 of the agreement, the parties expressly agreed: "Except as expressly set forth in this Agreement or in the NAF Rules of Procedure, the provisions of the Florida Arbitration Code, Chapter 682, Florida Statutes shall govern the arbitration." App. 44a; *see also* App. 45a (paragraph 3, selecting Florida code rules for appointment of arbitrator if parties are unable to agree).

The agreement makes no mention of the FAA. App. 42a-50a. Nor does the agreement evidence how the transaction in question – an Ocala, Florida rehabilitation hospital providing services to a Florida resident – involves interstate commerce. *Id.*

Given that the agreement expressly adopts and incorporates the presuit dispute-resolution and arbitration provisions of Florida's Medical Malpractice Act and Arbitration Code, we explain the pertinent provisions of these two Florida laws.

1. The Florida Medical Malpractice Act.

The Florida Medical Malpractice Act sets forth detailed dispute-resolution procedures that must be followed before a medical malpractice claim is initiated. First, a claimant must conduct a presuit investigation. Fla. Stat. §§ 766.201(2)(a), 766.203(2) (2011). During

the investigation, the claimant typically must request her medical records from the defendant doctor. *See* Fla. Stat. § 766.204 (2011). Then, the claimant must provide those records to an expert, who, in turn, must provide a verified written opinion corroborating that reasonable grounds exist to believe the defendant doctor was negligent. *Id.*; Fla. Stat. §§ 766.106(2)(a), 766.203(2) (2011). After conducting this investigation, and "prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant" of her intent to file suit. Fla. Stat. § 766.106(2)(a) (2011). A claim is subject to dismissal if this procedure is not followed. *See Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991) (dismissal affirmed where presuit notice was not timely given); *Kukral v. Mekras*, 679 So. 2d 278, 283-84 (Fla. 1996) (failure to timely provide corroborating expert opinion is fatal).

The claimant must then allow the defendant doctor ninety days to conduct a review of the claim before filing suit. Fla. Stat. § 766.106(3)(a) (2011). The parties are also required to engage in informal discovery during this presuit period. Fla. Stat. § 766.106(6)(a) (2011). A claim may be dismissed where a claimant fails to provide presuit discovery. *See Robinson v. Scott*, 974 So. 2d 1090, 1093 (Fla. Dist. Ct. App. 2007). After conducting his or her own investigation, the doctor may reject the claim, make a settlement offer, or offer to arbitrate under the Medical Malpractice Act, in which case "liability is deemed admitted and arbitration will be held only on the issue of damages." Fla. Stat. § 766.106(3)(b) (2011). If a claimant rejects a physician's offer to arbitrate, non-economic damages in any subsequent lawsuit are capped and only 80% of lost wages are awarded. Fla. Stat. § 766.209(4) (2011).

Section 766.207, Florida Statutes, sets forth the Medical Malpractice Act's arbitration rules and procedures. Those rules provide significant incentives for patients to forgo their jury trial rights and have damages determined in arbitration. Those incentives include:

- the admission by physicians of liability, Fla. Stat. §766.106(3)(b) (2011);
- the right to have independent arbitrators, Fla. Stat. § 766.207(5) (2011);
- requiring physicians to pay the arbitration costs, Fla. Stat. § 766.207(7)(g) (2011);
- requiring physicians to pay interest on all accrued damages, Fla. Stat. § 766.207(7)(e) (2011);
- requiring physicians to pay the claimant's attorney's fees up to 15% of the award, Fla. Stat. § 766.207(7)(f) (2011); and
- making all defendant physicians jointly and severally liable for the award, Fla. Stat. § 766.207(7)(h) (2011).

2. The Florida Arbitration Code.

The agreement requires that ". . . the provisions of the Florida Arbitration Code, Chapter 682, Florida Statutes shall govern the arbitration" – not the FAA. App. 44a. There are significant differences between the FAA and the Florida Arbitration Code, including:

- Under the Florida code, a judge determines issues as to the making of an arbitration

provision; under the FAA, a jury resolves the issues. *Compare* Fla. Stat. § 682.03(1) (2011) *with* 9 U.S.C. § 4.

- The Florida code has a section specifying that the arbitrators may hear the evidence even if a party fails to attend arbitration, and that the parties are entitled to be heard, to present evidence, and cross-examine witnesses. Fla. Stat. § 682.06 (2011).

- The Florida code permits depositions to be taken of witnesses who cannot be subpoenaed or are unable to attend in person. Fla. Stat. § 682.08(2) (2011).

- The witness fees are less under the Florida code than under the FAA. *Compare* Fla. Stat. §§ 92.142, 682.08(4) (2011) *with* 9 U.S.C. § 7, 28 U.S.C. § 1821.

- Under the Florida code, the court may order the arbitration award to be made within a fixed time. Fla. Stat. § 682.09(2) (2011).

- Under the Florida code, there is no time limit for a party to apply to the court to confirm the arbitration award; under the FAA, a party has only one year to apply to the court for confirmation, and may apply only if the parties' agreement specified that a judgment of the court shall be entered. *Compare* Fla. Stat. § 682.12 (2011) *with* 9 U.S.C. § 9.

- Under the Florida code, a party may apply to the arbitrators within twenty days of delivery of the award to modify or correct the

award if there is a miscalculation or the award is imperfect as a matter of form, Fla. Stat. § 682.10 (2011); the FAA has no similar provision.

- Under the Florida code, the time for moving to vacate an award is ninety days after delivery of the award, or in the case of corruption, fraud, or other undue influence, within ninety days after such grounds are known or should have been known; the FAA establishes a firm three-month deadline with no extension for the grounds enumerated in the Florida code. *Compare* Fla. Stat. § 682.13(2) (2011) *with* 9 U.S.C. § 12).

- Under the Florida code, the court may award the costs associated with confirming, modifying, or correcting an award. Fla. Stat. § 682.15 (2011).

- Under the FAA, a party may appeal an order vacating an award; under the Florida code, a party may only appeal an order vacating an award that does not direct rehearing. *Compare* 9 U.S.C. § 16(a)(1)(E) *with* Fla. Stat. § 682.20(1)(e) (2011).

REASONS FOR DENYING THE PETITION

I. The petition should be denied, and the FAA does not apply, because Petitioner failed to timely and properly raise any federal issue in the state courts.

Petitioner's failure to timely and properly raise the FAA preemption argument in the state courts means that this case does not properly present any FAA issue. This failure provides three independent grounds for this Court to deny the petition. First, this Court lacks jurisdiction under 28 U.S.C. § 1257. *See* Section I.A., *infra*. Second, as a matter of prudence, this Court should not decide matters not properly raised in the state courts. *See* Section I.B., *infra*. Third, an independent and adequate state-law ground supports the judgments of the state courts. *See* Section I.C., *infra*.

A. This Court lacks jurisdiction because, in the state courts, Petitioner did not draw the validity of Florida's Medical Malpractice Act into question on federal grounds.

This Court lacks jurisdiction to review Petitioner's newly-minted FAA preemption argument. This Court's jurisdiction is limited to the express grants of power set forth in the Constitution and federal statutes. *See Karcher v. May*, 484 U.S. 72, 77 (1987). The only basis for certiorari jurisdiction asserted by Petitioner is 28 U.S.C. § 1257(a). Pet. 2. That statute permits this Court to review by certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had … where the validity of

a statute of any State *is drawn into question on the ground of its being repugnant to the Constitution*, treaties, *or laws of the United States*, or where any title, right, privilege, or immunity *is specially set up or claimed under the … statutes of … the United States*." 28 U.S.C. § 1257(a) (emphasis added).

Accordingly, when the federal issue that is the subject of the certiorari petition was neither argued nor decided in the state courts below, this Court is without jurisdiction. *See Howell v. Mississippi*, 543 U.S. 440, 445 (2005) (addressing the "long line of cases clearly stating that the presentation requirement is jurisdictional" but also recognizing the "handful" of exceptions finding the rule prudential); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) ("With 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) (same); *Southland Corp. v. Keating*, 465 U.S. 1, 9 (1984) (finding no jurisdiction under predecessor statute where federal issue was not argued below); *Webb v. Webb*, 451 U.S. 493, 501-02 (1981) ("Because petitioner failed to raise her federal claim in the state proceedings and the [state supreme court] failed to rule on a federal issue, we conclude that we are without jurisdiction in this case."); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) ("we have no jurisdiction to consider whether the [federal law] preempted the [state law], for it does not affirmatively appear that that issue was decided below."); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973)

("We cannot decide issues raised for the first time here."); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (finding that if federal question was not presented to state courts "in such a manner that it was necessarily decided," this Court has "no power to consider it").

The ambiguity over whether the "not pressed or passed upon below" rule is jurisdictional or prudential arises from the history contained in *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983), where the Court explained the long line of precedent finding the requirement jurisdictional, but also citing two cases that treat the requirement as prudential. *See Howell*, 543 U.S. at 445. The only two cases cited in *Gates*, 462 U.S. at 219, for the prudential position are outliers in this Court's jurisprudence, with persuasive dissenting opinions. In *Vachon v. New Hampshire*, 414 U.S. 478, 483 (1974), Justice Rehnquist, joined by two other Justices, dissented, opining that "[s]ince the [state supreme court] was not presented with a federal constitutional challenge to the sufficiency of the evidence, resolution of this question by the Court is inconsistent with the congressional limitation on our jurisdiction to review the final judgment of the highest court of a State." And in *Terminiello v. Chicago*, 337 U.S. 1, 10 (1949), Justice Frankfurter dissented, opining that the Court has "no authority to meddle with [a state court] judgment unless some claim under the Constitution or the laws of the United States has been made before the State court whose judgment we are reviewing and unless the claim has been denied by that court." These dissents comport with the great weight of this Court's jurisprudence, discussed *supra* at 13, holding that the presentation requirement is jurisdictional.

Indeed, this Court's own rules indicate the failure to properly raise the federal claim in the state court is a jurisdictional bar. This Court's rules mandate that, in cases arising from state courts, a petitioner specify in the petition "the stage in the proceedings, *both in the court of first instance and in the appellate courts*, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, *with specific reference to the places in the record where the matter appears*…." S. Ct. R. 14.1(g)(i) (emphasis added). This information is required "to show that the federal question was timely and properly raised *and that this Court has jurisdiction* to review the judgment on a writ of certiorari." *Id.* (emphasis added). The same requirement is not imposed in cases arising out of the federal system. S. Ct. R. 14.1(g)(ii).

Petitioner cannot comply with this rule because it did not timely and properly raise an FAA preemption argument in the Florida trial court or the Fifth District Court of Appeal, and accordingly, the courts did not pass on the federal issue. Pet. 25-26; App. 1a-8a; 38a-40a; Resp't App. 5-6, 17-19, 20-29. Petitioner admits that it never raised its FAA preemption argument until after the Supreme Court of Florida decided *Crespo II*, 211 So. 3d at 19. Pet. 25. Petitioner then confuses the preservation rules by arguing that the Supreme Court of Florida rejected its FAA preemption argument when it declined to exercise jurisdiction. *Id.* But the court to which Petitioner asks this Court to direct its writ of certiorari is the Fifth District Court of Appeal – a court

that has never been presented with a FAA preemption argument. Resp't App. 6, 17-19; *see* Section I.C., *infra*.

Further, and directly contrary to Supreme Court Rule 14.1(g)(ii), Petitioner suggests that the "absence of any opinion below addressing the FAA issue is a reason favoring this Court's intervention." Pet. 25. The exact opposite is true. The absence of any opinion addressing FAA preemption is evidence that Petitioner wholly failed to preserve the issue and this Court is without jurisdiction to consider the case. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Adams*, 520 U.S. at 86 (citation omitted). Petitioner bears "the burden of defeating this assumption by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Id*. Petitioner cannot meet this showing.

From as early on as the trial court, the arguments concerning the enforceability of the agreement turned on the interpretation of the Supreme Court of Florida's opinion in *Franks*, 116 So. 3d at 1240; App. 1a-8a; Resp't App. 25-26. *Franks* contains a section explaining why the FAA does not preclude the holding on those specific facts. *Id.* at 1249-51. Despite this express notice that the FAA arguably might have some application on these facts, Petitioner never raised an FAA preemption argument in the trial court or the Fifth District Court of Appeal. In fact, had it intended to argue that the FAA preempted the Medical Malpractice Act, it would have been required under Florida law to file a notice of constitutional question, and serve such notice on the Attorney General or local

state attorney to allow the State to defend the constitutionality of the Medical Malpractice Act *See* Fla. R. Civ. P. 1.071. Petitioner failed to so do.

Moreover, at the time of the appeal in this case, the Fifth District Court of Appeal had already expressly held that a similar arbitration agreement "violates the public policy pronounced by the Legislature in the Medical Malpractice Act […] by failing to adopt the necessary statutory provisions." *Crespo I*, 151 So. 3d at 496; Resp't App. 23 n.1, 35. Yet Petitioner failed to alert the court about any potential FAA preemption problem it perceived. Thus, Petitioner failed to timely and properly raise the FAA in the Florida courts, and did not set its sights on the federal statute until far too late under Florida's issue-preservation rules. *See* Section I.C., *infra.*

On these facts, Petitioner cannot show that it properly presented the FAA preemption argument to the Florida courts. Petitioner is flatly mistaken when it represented to this Court that "the federal claim here was raised in the state court." Pet. 26, n.10. The claim was not raised and this Court lacks jurisdiction. *See Adams*, 520 U.S. at 87 ("Petitioners having thus failed to carry their burden of showing that the claim they raise here was properly presented to the [state supreme court], we will not reach the question presented.").

B. Even if the presentation rule is prudential, this Court should not pass upon issues raised for the first time here.

This Court recently affirmed its precedent that it is "'a court of review, not of first review.'" *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (citation omitted). Thus, where a state high court has not considered a contention, this Court will generally not reach it, even in a case in which it otherwise has jurisdiction. *Id.; see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (noting this Court "generally do[es] not address arguments that were not the basis for the decision below."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.").

"In addition to the question of jurisdiction arising under the statute controlling [the Court's] power to review final judgments of state courts, 28 U.S.C. s 1257, there are sound reasons for" declining to decide questions in the first instance. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). First, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams,* 520 U.S. at 90 (quotation omitted). When properly presented with the issue, the state courts may construe the statute in a way that avoids the federal problem, or "the issue may be blocked by an adequate state ground." *Cardinale*, 394 U.S. at 438*; see also Gates*, 462 U.S. at 221-222; *Webb*, 451 U.S. at 501. As explained in

section I.C., *infra*, an adequate and independent state law ground – Petitioner's failure to preserve the federal issue in Florida courts – exists for affirming the decision.

Second, when an issue is not raised below, the "record is very likely to be inadequate, since it was certainly not compiled with those questions in mind." *Cardinale*, 394 U.S. at 438. As explained in Section II.B., *infra*, that very consideration precludes review here, because, as a result of its failure to invoke the FAA in a timely fashion, Petitioner has presented no argument or evidence suggesting that the agreement involves interstate commerce, and thus, have not shown that the FAA even applies. Moreover, reviewing Petitioner's unpreserved preemption argument denies this Court the benefit of "a reasoned opinion on the merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

In short, even if this Court concludes that 28 U.S.C. § 1257 is a prudential rule, it still should not review the decision below because accepting review "would be contrary to the sound justifications" for declining to consider an issue that the state courts never had an opportunity to decide. *Gates*, 462 U.S. at 222. Indeed, in circumstances such as those here, the Court "almost unfailingly" refuses "to consider any federal-law challenge to a state-court decision." *Howell*, 543 U.S. at 443 (quoting *Adams*, 520 U.S. at 86).

C. The decisions below rest on independent and adequate state-law grounds.

Neither the Supreme Court of Florida's order denying Petitioner's petition for discretionary review nor its order denying Petitioner's motion for reinstatement of appeal (App. 9a, 11a), decided a federal question and rescued Petitioner from its failure to raise the question below. Nor did the opinion of the Fifth District Court of Appeal or order of the state trial court decide a federal question, as Petitioner never presented any federal question to those lower courts. App. 1a-8a; 38a-40a; Resp't App. 6, 17-19; 20-29. The petition therefore suffers from an additional jurisdictional deficiency: the judgments below are supported by an adequate and independent state law ground that is independent of the federal question—Florida's issue-preservation laws. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* Regardless of whether the state law ground is substantive or procedural, this "court has no power to review a state law determination that is sufficient to support the judgment." *Id.*; *see also Moore v. Texas*, 122 S. Ct. 2350, 2352 (2002).

Under Florida law, except in the case of fundamental error,[1] a party may not raise an issue for the first time on appeal. *See Rosado v. DaimlerChrysler Fin. Servs. Trust*, 112 So. 3d 1165, 1171 (Fla. 2013); *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005). Florida's issue-preservation law requires that "an issue be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbour*, 112 914 So. 2d at 928 (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)); *see also Rosado*, 112 So. 3d at 1171 (issue that was not raised in the trial court is unpreserved).

Petitioner failed to present the FAA preemption issue in the trial court, or in its brief before the Fifth District Court of Appeal. In short, it failed to comply with Florida's long-standing preservation rules. When Petitioner finally did raise the preemption argument in the Supreme Court of Florida, it did so in direct contravention of Florida's procedural rules. Specifically, in response to the court's show cause order, Petitioner spent only three sentences of its 11-page response suggesting the possibility of FAA

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[1] "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993). A party's failure to raise federal preemption in the trial court does not render the trial court's decision fundamentally erroneous. *See First American Bank & Trust v. Windjammer Time Sharing Resort, Inc.*, 483 So. 2d 732, 737 (Fla. Dist. Ct. App. 1986). Petitioner never argued fundamental error in its filings with the Supreme Court of Florida. App. 14a-29a; 31a-36a.

preemption. App. 26a, 28a. Even if timely (which it was not), by failing to develop the FAA preemption argument, Petitioner again waived any reliance on it. *See Doorbal v. State*, 983 So. 3d 464, 482 (Fla. 2008) (referring to arguments without elucidation is not sufficient to preserve the issues).

Then, after the appeal was dismissed, Petitioner improperly moved to reinstate the appeal (*see* Resp't App. 10-11), and for the first time developed the FAA preemption argument. The court properly denied Petitioner's motion. App. 11a. In short, the FAA preemption argument was first presented to the Supreme Court of Florida after that court had already dismissed the appeal. Petitioner never presented the argument to the Fifth District Court of Appeal, the court to which Petitioner asks this Court to direct its writ of certiorari.

One of the salient reasons that this Court requires federal issues to be presented first in the state courts is so "that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Webb*, 451 U.S. at 500. Petitioner never provided the Florida courts with this opportunity, and accordingly, cannot demonstrate that the "failure of the [Florida courts] to reach the federal issue was not grounded on an application" of its preservation rules. *Id.* at 498 n. 4. Accordingly, the Court lacks jurisdiction.

II. The FAA does not apply, and the petition should thus be denied, because the parties' contract agreed to apply Florida's arbitration laws, not the FAA.

A. The FAA does not apply when the parties to a contract specifically choose, and agree to follow, a state's arbitration laws.

A long-standing rule of law in arbitration cases is that the FAA does *not* preempt state laws where the parties contract to be bound by the state laws. *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468, 470 (1989) ("application of the California statute is not pre-empted by the [FAA] in a case *where the parties have agreed that their arbitration agreement will be governed by the law of California*.") (Emphasis added). The parties' agreement does not just state that Florida law in general would apply. It does far more. It specifically names two Florida arbitration and dispute-resolution codes (the Medical Malpractice Act and the Florida Arbitration Code) that would apply and govern the resolution of disputes between the parties, and it never mentions the FAA at all. App. 42a-51a. Petitioner fails to inform this Court about its adoption of the Florida Arbitration Code. Because Petitioner selected these *Florida* codes to govern the arbitration agreements, it cannot now argue that a *federal* code, the FAA, preempts those state codes or that the FAA applies to the agreements. *Id.* Because "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations," the FAA cannot preempt contractually-selected state

law. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011); *Volt*, 489 U.S. at 470.

B. Petitioner benefitted from its express selection of Florida arbitration laws rather than the FAA in its form agreement.

By expressly adopting the Florida Medical Malpractice Act and Florida Arbitration Code (rather than the FAA) to resolve any dispute with Respondents, Petitioner realized benefits that it would not have obtained in an arbitration agreement governed by the FAA. For example, as set forth *supra* at 7-8, the Medical Malpractice Act places a great number of burdens on claimants before they may file a claim, including providing presuit notice to Petitioners, obtaining verification from another medical professional that reasonable grounds exist to believe malpractice was committed, participating in informal discovery, and delaying litigation for ninety days to allow Petitioner to investigate the claim. *See* Fla. Stat. §§ 766.106, 766.201, 766.203 (2011). A patient who fails to comply with these pre-suit requirements will have her case dismissed. *E.g., Williams*, 588 So. 2d at 983. This is not true of general agreements to arbitrate governed by the FAA.

When Petitioner requested its patients to sign the form agreements, it apparently perceived that it would benefit from incorporating the procedural rules set forth in the Florida Arbitration Code. While there are a great number of differences between the FAA and the Florida code, *see supra* at 9-11, some of the more significant benefits to Petitioner under the Florida code include: if there is a dispute as to the making of the

agreement, the issue is determined by a judge rather than a jury; lesser witness fees; the arbitrators can modify the award if it contains minor defects rather than having to resort to the courts; and more limited appellate rights for Respondents if the court vacates the award. *See* Fla. Stat. §§ 682.03, 682.08, 682.10, 682.20(1)(e) (2011).

Thus, in drafting the agreement, Petitioner chose significant presuit and arbitral benefits afforded to it by Florida's arbitration laws, rather than any benefits that might flow from following the FAA's rules. It was not until the Supreme Court of Florida determined in *Crespo II*, as a matter of state public policy, that medical providers could not cherry-pick which portions of the Medical Malpractice Act to follow, that Petitioner claimed the protections of the FAA. App. 28a. But, as this Court explained in *Volt*, the FAA does not preempt state laws that the parties contractually agreed to follow. 489 U.S. at 470.

C. The Fifth District Court of Appeal properly held Petitioner to its contractual adoption of Florida's arbitration laws.

Despite invoking the Medical Malpractice Act and its physician-favorable provisions, the agreement does not accept the patient-favorable provisions that apply during arbitration under the Medical Malpractice Act. App. 42a-51a. Rather, the agreement inserts a series of provisions that conflict with the Medical Malpractice Act. *Id.* These conflicting provisions created a tension in the agreements that the Fifth District Court of Appeal, as a matter of state law, had to resolve.

Just as the Supreme Court of Florida subsequently did in *Crespo II*, 211 So. 3d at 26-27, the Fifth District determined that, if parties agree to abide by Florida's Medical Malpractice Act, then they must agree to *all* the Act's provisions. *Klemish*, 216 So. 3d at 16-17; App. 5a-7a. And just like the petitioners in *Crespo II*, Petitioner here misconstrues the opinion. It argues that, under the decision, all medical providers must arbitrate according to the terms of the Medical Malpractice Act. Pet. 4. This interpretation of the opinion is incorrect. To repeat, the Fifth District Court of Appeal merely held that *if medical providers expressly agree in their arbitration agreement to follow the Medical Malpractice Act*, then, as a matter of state law, they must follow all of the Act. *Klemish*, 216 So. 3d at 16-17; App. 5a-7a; *accord, Crespo II*, 211 So. 3d at 26-27. Medical providers could just as easily agree to arbitration contracts that do not incorporate the Medical Malpractice Act, in which case they are free to select the procedures and rules under which they arbitrate. Thus, Petitioner's suggestion that the decision below "makes it impossible" for medical providers "to agree in advance to arbitrate the merits of a patient's malpractice allegations" (Pet. 21), is misplaced.

The decision below is consistent with this Court's holding in *Volt*, 489 U.S. at 468. There, the parties entered into an arbitration agreement that specified that it "would be governed by the law of the place where the project is located [California]." *Id.* at 472 (internal quotations omitted). Following a contract dispute, one party moved under a California statute to stay the arbitration pending resolution of related litigation. *Id.* at 471. When asked to decide whether the

FAA preempted the California statute, the Court ruled that the FAA merely required that arbitration agreements be placed on equal footing with other contracts. *Id.* at 478. Thus, where "parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Id*. at 479.

In line with *Volt*, the Fifth District Court of Appeal held the parties to their agreement, which adopted and incorporated Florida's arbitration laws, including the arbitration provisions of the Medical Malpractice Act. The court simply clarified that, as a matter of state law and public policy, if the parties are going to operate within the terms of the Medical Malpractice Act, they must submit to all of its requirements, not cherry-pick only the favorable provisions. *Klemish,* 216 So. 3d at 16-17; App. 5a-7a. Because Petitioner agreed in its form arbitration agreement to select Florida's arbitration laws (not the FAA), it cannot ask this Court to use the FAA to invalidate the Fifth District Court of Appeal's interpretation of those state laws. This is the same decision and reasoning as the Supreme Court of Florida later affirmed in *Crespo II*, 211 So. 3d at 26-27, which this Court declined to review, 2017 WL 2444694 at *1. This case fares no better and is also not deserving of this Court's review.

III. The FAA does not apply, and the petition should therefore be denied, because Petitioner made no showing below that the agreement evidences a transaction involving interstate commerce.

Petitioner assumes that the FAA covers the agreement. Putting aside that the agreement expressly adopts Florida arbitration laws (not the FAA), this assumption is wrong for the additional reason that the FAA applies only to "contract[s] evidencing a transaction involving commerce." 9 U.S.C. § 2. The agreement here governs a transaction between a Florida patient and an Ocala, Florida rehabilitation facility. Petitioner presented no argument or evidence to the Florida courts demonstrating that the agreement affected interstate commerce.

To be included within the coverage of the FAA, an arbitration provision must be contained in a contract evidencing a transaction involving commerce. *See* 9 U.S.C. § 2; *e.g., Volt*, 489 U.S. at 471. As pertinent here, "commerce" means "commerce among the several States…." 9 U.S.C. § 1. This Court has interpreted these provisions as extending the FAA's application to what Congress may regulate under the Commerce Clause of Article I of the Constitution. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995).

Petitioner's failure to invoke the FAA in the trial court, and its consequent failure either to allege or establish the commerce nexus that is the predicate for its application, precludes this Court from finding that the agreement affects interstate commerce. Whether a contract covers a transaction having a substantial

effect on interstate commerce is a factual determination that must be made in the trial court. *See Summit Health, Ltd. v. Pinhas,* 500 U.S. 322, 329 (1991) (interstate commerce nexus established because parties developed factual record that hospital performed services for out-of-state patients, generated revenues from out-of-state sources, and purchased supplies from out-of-state); *Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (parties developed a factual record that a substantial portion of food served in restaurant had moved in interstate commerce).

As a result of Petitioner's failure to raise FAA preemption below, the record contains neither evidence nor findings of fact that the agreement applied to transactions in interstate commerce as opposed to the intrastate provision of rehabilitation services. The absence of any factual findings that the agreement related to a transaction involving interstate commerce precludes this Court from determining that the FAA even applies. *See Wright v. New Jersey*, 469 U.S. 1146, 1153 n.8 (1985) (this Court cannot make factual findings in the first instance).

This Court reached the identical conclusion in *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 199 (1956). There, a New York resident entered into an employment contract with a New York corporation, in New York. Even though the employee moved to Vermont to perform under the agreement, there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." *Id.* at 199, 200-01. In the

absence of such a showing, this Court held that the FAA was inapplicable. *Id.* at 200-01. The same result must obtain here: in the absence of any factual record showing that the agreement between a Florida rehabilitation facility and its Florida patient governs an activity affecting commerce, this Court cannot conclude that the FAA applies to the agreement.

IV. The petition should be denied because, as Justice Thomas has opined, the FAA does not apply in state courts.

Although the FAA was enacted in 1925, the first time this Court declared it to be a substantive law applicable to the states was in 1984. *See Southland Corp.*, 465 U.S. at 11. Justice O'Connor, joined by Justice Rehnquist, dissented in *Southland*, persuasively opining that "Congress viewed the FAA as a procedural statute, applicable only in federal courts." *Id.* at 25 (O'Connor, J., dissenting). Indeed, in 1925, it was well-established that "'the enforcement of arbitration contracts [was] within the law of procedure as distinguished from substantive law.'" *Id.* at 26 (O'Connor, J., dissenting) (citation omitted).

Drawing on Justice O'Connor's dissent, Justice Thomas has consistently and repeatedly dissented from this Court's FAA decisions, arising out of state courts, on the ground that the FAA does not apply to proceedings in state courts. *E.g., Kindred Nursing*, 137 S. Ct. at 1429-30 (2017) (Thomas, J., dissenting); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting); *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting). In *Allied-Bruce*, 513 U.S at 287–88, Justice Scalia also joined in Justice Thomas's dissent, agreeing that *Southland* (in

which he had joined the majority opinion), "clearly misconstrued the Federal Arbitration Act." *Id.* at 284 (Scalia, J., dissenting). Justice Thomas further expanded on Justice O'Connor's reasoning in *Allied-Bruce*, writing that an "arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance." *Id.* at 288. Thus, where "a contractual provision deals purely with matters of judicial procedure, one might well conclude that questions about whether and how it will be enforced also relate to procedure." *Id.* Because Congress cannot regulate state courts' modes of procedure, the FAA cannot be applicable in state courts. *Id*. at 287-88.

Although a majority of this Court has declined to overrule *Southland*, the logic for doing so is compelling. If certiorari is granted, Respondents will expressly ask this Court to overrule *Southland* and adopt Justice Thomas's dissenting opinions. Even assuming the majority were to adhere to its view that the FAA applies in state courts, Justice Thomas's recent dissenting opinions make clear that he will continue to vote for merits dispositions that reflect his "view that the [FAA] does not apply to proceedings in state courts." *Kindred Nursing*, 137 S. Ct. at 1429. Justice Thomas's adherence to that view increases the likelihood that, even if the Court were to view this case as properly presenting some FAA preemption issue, no resolution of that issue would command a majority of the Court. The resulting likelihood of an indecisive resolution is yet another reason why the Court should deny the petition.

V. This case would be a poor vehicle for resolving whether the FAA preempts Florida's malpractice and arbitration laws, and in any event, such an issue does not merit resolution by this Court.

This case would be a poor vehicle for attempting to address the relationship between the FAA and state malpractice and arbitration laws. By drafting an agreement that incorporated *state* arbitration laws, and then failing to present any FAA arguments to the state courts, Petitioner created a case that could not be more poorly suited to the clean presentation of a federal-law issue. In the future, other Florida litigants may avoid these deficiencies and challenge on federal grounds the Supreme Court of Florida's interpretation of Florida's arbitration laws, or litigants raising similar issues as to laws of other states may present a fully fleshed-out FAA argument. Then, the state or lower federal courts will be presented with fully developed arguments on the federal question, and, ultimately, this Court may receive the benefit of a carefully considered decision from a lower appellate court based on a well-developed record. But this Court should not act on this case, given all of the deficiencies in Petitioner's presentation of the issue and the serious threshold questions as to whether the FAA is even applicable.

Additionally, even if the FAA applied, and Petitioner had preserved an FAA argument, the question whether the FAA preempts features specific to Florida's malpractice and arbitration laws would not merit review. Petitioner cites no decisions at any level holding that the FAA allows medical providers to selectively excuse themselves from state laws

governing malpractice claims by drafting arbitration agreements that incorporate only those parts of the laws that they favor. In particular, even though the Supreme Court of Florida addressed the relationship between the FAA and Florida malpractice and arbitration laws more than four years ago, *see Franks*, 116 So. 3d at 1249–50, Petitioner does not cite a single federal appellate or state supreme court decision from any jurisdiction that disagrees with, criticizes, or questions that ruling—because there are no such decisions. Absent any division of authority over the FAA preemption question, it remains as unworthy of review as it was when this Court denied review in *Franks* in 2013. 134 S. Ct. 683, and then again denied review in *Crespo II*, 2017 WL 2444694 at *1.

Given the proliferation of state laws addressing dispute resolution in medical malpractice cases, there may be opportunities for related issues to arise in many jurisdictions if medical providers seek to rely on the FAA to escape provisions of the laws they dislike. Conversely, it may be that differences among state laws are such that the issue Petitioner seeks to present is limited to Florida and lacks any broader significance. In any event, if a division of authority over FAA preemption eventually arises, an issue meriting review by this Court may present itself. Until then, however, it would be premature for this Court to step in and, potentially, thwart innovative state efforts to address ongoing debates over the best means of addressing malpractice claims.

VI. This Court should not grant, vacate, and remand for reconsideration in light of *Kindred Nursing*.

This Court should not grant the petition, vacate the decision below, and remand for reconsideration (GVR) in light of the recent decision in *Kindred Nursing*. 137 S. Ct. at 1421. In an appropriate case, a GVR order "conserves the scarce resources of this Court" and "assists the court below by flagging a particular issue that it does not appear to have fully considered." *Lawrence v. Charter*, 516 U.S. 604, 606 (1996); *see also Stutson v. U.S.*, 516 U.S. 193, 197 (1996) (reasoning that a GVR order allows a lower court "to consider potentially relevant decisions and arguments that were not previously before it."). But a GVR order is only beneficial where it is reasonably probable "that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 606.

A GVR order is not appropriate here because the Supreme Court of Florida had the opportunity to review this case in light of *Kindred Nursing* (App. 28a, 31a-36a), and because *Kindred Nursing* would not change the outcome of the decision below. Petitioner moved the Supreme Court of Florida to reinstate its appeal following this Court's decision in *Kindred Nursing*. App. 31a-36a. Although ultimately stricken, Respondents filed an opposition, explaining why the decision below is not in conflict with *Kindred Nursing*, and also pointing out that Petitioner did not preserve the FAA preemption argument. Resp't App. 13-15, 17-19. The Supreme Court of Florida thereafter denied the motion to reinstate appeal. App. 11a. By declining to

review this case, the Supreme Court of Florida's decision in *Crespo II*, 211 So. 3d at 19, remains the controlling law in Florida with respect to the intersection of the Medical Malpractice Act and medical arbitration agreements.

Notably, this Court recently denied a similar petition for certiorari directed at the Supreme Court of Florida's *Crespo II* decision. 211 So. 3d at 19, *cert. denied*, 2017 WL 2444694. As this Court declined to either review or enter a GVR order in *Crespo II*, there is no reason to enter such an order here. Indeed, a GVR directed to an intermediate appellate court could only cause confusion as the court attempts to reconcile the controlling precedent of the Supreme Court of Florida in *Crespo II* with this Court's suggested disapproval of that decision, despite its denial of certiorari review. Moreover, by entering a GVR order, the Court would permit Petitioner to thwart Florida's issue preservation rules by resurrecting a federal issue that it has long-since waived by failing to timely raise it.

Finally, assuming that the FAA applies and Petitioner did not waive its preemption argument, this Court specifically stated in *Kindred Nursing* that it was not announcing new law. *See id.* at 1428 n.2; Resp't App. 29. The Court also noted, "[w]e do not suggest that a state court is precluded from announcing a new, generally applicable rule of law in an arbitration case. We simply reiterate here what we have said many times before – that the rule must in fact apply generally, rather than single out arbitration." *Id.* Because the Fifth District Court of Appeal invalidated Petitioner's agreement on public policy grounds, just as Florida courts have invalidated

numerous non-arbitration agreements, the decision would not be in conflict with *Kindred Nursing* even if it were based on the FAA rather than on the Court's reconciliation of Florida's malpractice and arbitration law. Resp't App. 15; *e.g., Am. Cas. Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957, 958 (Fla. 1989) (holding that a construction contract waiving a statutory bond requirement enacted for the public's benefit is void as against public policy); *contra* Pet. 18.[2] In light of *Kindred Nursing*'s general affirmance of FAA law, with which the decision below is consistent – and the fact that this Court declined to review *Crespo II* – there is no reasonable probability that the Fifth District Court of Appeal would reverse itself if directed to consider the impact of *Kindred Nursing* on its holding.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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[2] In footnote 7, Petitioner attacks the Supreme Court of Florida's public policy rationale as astonishingly ironic. Pet. 18. This argument completely misses the point. The Florida legislature created a system to limit the expense of medical malpractice litigation that placed strict burdens on plaintiffs (pre-suit notice and verification), but also offered them certain incentives to skip a jury trial (a statutory arbitration scheme). The agreement here accepts the pre-trial burdens on plaintiffs without also accepting the legislatively-designed benefits for plaintiffs.

Respectfully submitted,

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November 27, 2017