No. 19-1154

IN THE

Supreme Court of the United States

ROBINSON NURSING AND REHABILITATION CENTER, LLC, D/B/A ROBINSON NURSING AND REHABILITATION CENTER; CENTRAL ARKANSAS NURSING CENTERS, INC.; NURSING CONSULTANTS, INC.; AND MICHAEL MORTON,

Petitioners,

v.

ANDREW PHILLIPS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOROTHY PHILLIPS, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF DOROTHY PHILLIPS, AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Respondents do not dispute the importance of the questions presented, but use misdirection and misrepresentation to confuse the issues. Many of their arguments relate to factual matters and development of the record, none of which are needed for the Court to decide the legal questions presented here. If anything, the lower courts' refusal to allow the record to be developed before striking down the arbitration agreements, underscores their hostility to the Federal Arbitration Act ("FAA"). In this way, the Brief in Opposition ("BIO") emphasizes the need for this Court to grant the Petition and remove several common excuses state courts across the country and some Circuits have developed for treating arbitration agreements differently from other contracts.

The need for this Court's action, particularly on the mutuality-of-obligation question presented, was underscored by two developments since the Petition was filed. First, the Supreme Court of Arkansas issued another arbitration ruling that Respondents repeatedly cite in the BIO. *See Jorja Trading, Inc. v. Willis*, 2020 Ark. 133, ---S.W.3d--- (Ark. 2020). *Jorja* involved a different compilation of Arkansas justices than the case at bar and resulted in a different outcome. The opinion, concurrence, and dissent highlight the heated controversy over whether mutuality-of-obligation can require more than consideration, but a mutual obligation to arbitrate.

Specifically, the author of *Jorja*, who admits courts cannot "require that every provision in an arbitration agreement be bilateral without violating

the FAA," did not participate in the case at bar. *Id.* The concurring opinion called on the court to finally "eliminate the antiquated mutuality-of-obligation requirement in arbitration provisions." *Jorja*, at *10 (Brown S.J. concurring). And, the dissent urged the court to follow its "precedent regarding mutuality of obligation," citing to the case at bar. *Id.* at *13 (Wynne J. dissenting).

Second, the New Mexico Supreme Court issued a ruling illustrating the haphazard results from the misapplication of this doctrine, namely requiring a mutual obligation to arbitrate claims and looking beyond the contract to determine whether the arbitration requirements are indeed mutual. *See Peavy v. Skilled Healthcare Group, Inc.*, ___ P.3d ___, 2020 WL 1672428 (N.M. 2020). In the past, the New Mexico court upheld agreements, as here, that establish monetary thresholds above which claims are to be arbitrated. *Id.* at *17. In *Peavy*, it struck down agreements that identified types of claims to be arbitrated when they were largely the ones consumers would bring. *See id.* at *13 (finding such requirements unconscionable). It did not explain how this state mutuality-to-arbitrate law comports with the FAA; it did not even mention the FAA or this Court's extensive jurisprudence on the FAA.

The Court should grant the Petition to stop lower courts from ignoring the FAA and the Court's rulings. Respondents did not provide any rationale for why the Court should not address the issues presented, which involve a multitude of ways state courts impose unique requirements on arbitration agreements. Respondents' procedural and factual hurdles are red herrings and should be ignored.

I. The FAA's Authority Over the Arbitration Agreements Has Been Petitioners' Core Argument at Each Stage of this Litigation.

Respondents first argue Petitioners did not present the supremacy of the Federal Arbitration Act ("FAA") to the Arkansas courts (BIO at 1-4). Not so; Petitioners raised the FAA at every stage of this litigation:

- The arbitration agreements stressed they were governed by the FAA.

- Petitioners' motions to compel arbitration stated the FAA governed the agreements and cited this Court's authority asserting the FAA's supremacy. *See* Motion to Enforce Arbitration Agreements Signed by Responsible Parties at 6.

- The very first section of Petitioners' opening brief to the Arkansas Supreme Court asserted the FAA governed the agreements and required arbitration clauses to be treated like other contracts. *See* Brief to the Arkansas Supreme Court at 2. It also cited this Court's decisions establishing the FAA's supremacy over conflicting state laws. *Id.* at Arg 1 (citing *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)).

- Petitioners Reply Brief to the Arkansas Supreme Court began with a discussion of the FAA's primacy over the arbitration agreements.

> Petitioners Reply Brief at Arg. 1. Citing *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), Petitioners emphasized the FAA is "a congressional command requiring [courts] to enforce, not override, the terms of the arbitration agreements before [them]." It further explained that Respondents asked the Court "to do exactly what the United States Supreme Court has prohibited: treat an arbitration differently from any other contract." Reply Brief at Arg 10-11 (citing *Kindred Nursing Ctrs.*, 137 S.Ct. at 1421).

The decision below was not a product of failing to bring the FAA's primacy to the attention of the lower courts. It was a product of how courts, despite the FAA and this Court's precedent, continue to brazenly impose unique burdens on arbitration agreements.

II. Petitioners Assert Solely Legal Issues, and the Factual Issues Respondents Raise Can be Resolved on Remand.

Respondents' remaining arguments largely center on ripeness for review due to the *factual* record supposedly being underdeveloped (BIO at 4-9, 9-26). Respondents complain their arguments below were "severely curtailed," and they were unable "to develop the facts" or attack "the validity of the arbitration agreements." (BIO at 5-7). Thus, the Arkansas Supreme Court was denied "the opportunity to address the relevant issues in a way that avoids the alleged federal problem." *Id.* at 7-8.

Respondents also argue the Court should deny the Petition because *Petitioners* did not offer factual support for the arbitration agreements. None of these

factual issues were relevant to the ruling below and can be resolved after the Court clarifies the law.

To be clear, Petitioners are not asking the Court to decide the validity of any of the 544 arbitration agreements at issue. Petitioners have presented three *legal* questions as to whether Arkansas law, as expressed by the Arkansas Supreme Court in this case, conflicts with the FAA. These *legal* questions were fully briefed to the Arkansas Supreme Court, which clearly was not restrained by the lack of a factual record to rule on them. With that briefing, the court's ruling, and the well-articulated dissent, there is an ample record for the Court to consider the questions presented. *See Boynton v. Commonwealth of Virginia*, 364 U.S. 454, 457 (1960) (limiting "review to the questions presented"). The Court can then remand for whatever additional proceedings are warranted.

Further, the irony of Respondents argument must not be overlooked. As Respondents explain, the trial court ruled in their favor and denied Petitioners' motions to compel arbitration before they filed their opposition. (BIO at 5-6). The trial court did so from the bench without warning during a hearing on a separate issue. *See id.* It never held an evidentiary hearing or issued any findings of fact or conclusions of law. The Arkansas Supreme Court upheld the denials without oral argument. Respondents now incredulously argue that the courts' blatant hostility to the FAA, this Court's precedent, and Petitioners' rights somehow prejudices them.

The Court should see through this false hubris and grant the Petition because the legal issues

presented are critical to achieving justice in this case and of pressing national concern.

III. Respondents Falsely Separate Arbitration Agreements from Admission Agreements to Strike Down Arbitration, But Not the Underlying Contracts.

Respondents repeatedly assert the false narrative that Petitioners did not argue that the arbitration agreements were part of the admission agreements. BIO at 10, 13, 20, 28-29. Separating the arbitration agreement from an underlying contract is a ploy used as a pretense to invalidate arbitration agreements while upholding the underlying contract.

To be clear, Petitioners continually stressed that each Arbitration Agreement was incorporated into the corresponding Admission Agreement, forming a single contract:

- The Arbitration and Admission Agreements state the Arbitration Agreements are fully incorporated into and part of the Admission Agreement.

- On the first page of the opening brief to the Arkansas Supreme Court, Petitioners explained the Arbitration Agreements "were executed in connection with each Resident's admission … and were addendums to and part of each Resident's Admission Agreement." Brief to Arkansas Supreme Court at SOC 1-2.

- In that brief, Petitioners repeatedly referred to the Admission and Arbitration Agreements as a unified, single contract. *See, e.g., id* at 7 ("the

> Residents cannot claim the benefits of the Admission Agreements and incorporated Arbitration Agreements without being bound by their limitations … the Residents must be bound by the Agreements' terms including the incorporated agreement to arbitrate disputes.").

- In the reply brief to the Arkansas Supreme Court, Petitioners again stressed the Arbitration agreements were executed "in conjunction with the Admission agreement and operate[] as an addendum to and part thereof."

Rather, it was the Arkansas Supreme Court that asserted without foundation that "the arbitration agreement was a separate contract from the admission agreement, regardless of whether it was incorporated into or operated as an addendum to the admission agreement." App. at 20a-21a.

Respondents also argue the arbitration clause is separate because it was presented on separate paper, not "nestled into an otherwise valid contract." (BIO at 11). But this presentation ensured it was properly highlighted and considered by the signee. Had it been so "nestled," Respondents would now undoubtedly argue it was not conspicuous enough.

IV. Respondents Confuse Consideration with a Mutual Obligation to Arbitrate.

Respondents also argue that requiring both sides to obligate themselves mutually to arbitration is the equivalent of requiring consideration. That is not so. This fallacy lies at the heart of the Circuit split and controversy that erupted in the Arkansas Supreme

Court in *Jorja*. This doctrine has been manipulated to create an elusive and inconsistent level of mutuality to arbitrate to qualify as consideration. If mutuality merely meant consideration, the arbitration agreements here, as well as many such agreements struck down in state courts under this contentious theory, would have been upheld.

Respondents seek to use two false devices to invalidate the arbitration agreement based on this mutual obligation to arbitrate doctrine. First, they separate the arbitration agreement from the broader contract so obligations in the broader contract cannot be consideration for the arbitration agreement.[1]

Second, even when the arbitration agreement's text imposes mutual arbitration obligations, as here, they try to balance the amounts and types of claims each party agreed to arbitrate and invalidate the agreement if the scales do not even out. See *Jorja*, 2020 Ark. at *13-14, Wayne J dissenting (The Court "repeatedly look[s] beyond the surface of an arbitration agreement purporting to equally bind both parties to hold that mutuality was destroyed.").

These assertions are contrary to the Court's precedent that parties may agree to limit the issues subject to arbitration. *See AT&T Mobility,* 563 U.S.

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[1] Respondents misread *Jorja* to suggest the Arkansas Supreme Court allowed the arbitration agreement to stand solely because it could not be removed from the larger contract. Rather, the court found both parties "bound themselves to arbitrate," which illustrates the inconsistency of this doctrine. *Id*. at *3.

at 344 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). They underscore the need for the Court to clarify whether mutuality to arbitrate is required when limiting these issues, or if other consideration is sufficient. Respondents' arguments also highlight the need for the Court to clarify that consideration can come from the larger contract or the arbitration clause itself.

For example, in *AT&T Mobility*, the agreement to arbitrate class actions would not apply to claims that AT&T might bring, but the Court found value in AT&T's obligations in the arbitration agreement. *See id.* at 352 (noting District Court concluded "the Concepcions were *better off* under their arbitration agreement"). Here, Petitioners agreed to pay the arbitrator's and court reporter's fees in consideration for the residents' agreement to arbitrate.

Thus, Respondents' suggestion Petitioners offered no evidence they were bound to do anything is false. Petitioners agreed to specific obligations should a resident file an arbitration claim, arbitrate its own claims in excess of $30,000, and, given that signing the arbitration was a condition of admission, admit and care for the resident. The Court should make clear that such arbitration contracts are valid.

Further, contrary to Respondents Arguments, this question is at the center of the Circuit split. The Circuits fully understand that lower courts employ this doctrine to require mutuality to arbitrate, not mutual consideration, and split on whether the FAA preempts this doctrine. Some Circuits hold the FAA preempts these state rulings, while others have not.

Respondents try to explain away this split by attacking the validity of the cases identified by the Petition, but these arguments ignore that the cases illustrate diametrically different approaches to FAA preemption. First, Respondents highlight that the state requirement addressed by the Eleventh Circuit in *Hull v. Norcom, Inc.,* 750 F.2d 1547 (11th Cir. 1985) was abandoned by the New York courts (BIO at 31), but that does not invalidate *Hull's* ruling on FAA preemption. *Hull* remains the law in the Eleventh Circuit. *See, e.g., Smith v. Beverly Hills Club Apts*., LLC, No 1:15-cv-23450-KMM, 2016 WL 344975 (S.D. Fla Jan. 28, 2016) (recognizing *Hull* but concluding Florida law did not require mutual arbitration).

Second, Respondents complain the Eighth Circuit's decision in *Plummer v. McSweeney*, 941 F.3d 341 (8th Cir. 2019) has "strained analysis" and mischaracterizes Arkansas law." (BIO at 29) They cannot dispute, though, that the Eighth Circuit takes a decidedly different approach to FAA preemption of mutuality-of-obligation requirements than the Eleventh Circuit in *Hull*, the Seventh Circuit in *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997), and the Fourth Circuit in *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 613 (4th Cir. 2013). The Court should grant the Petition to address this hotly contested Circuit split.

V. Respondents Factual Assertions Aside, The Court Should Resolve the Circuit Split on Whether Arbitration Agreements Bind Third-Party Beneficiaries.

Respondents argue "Petitioners failed to present any evidence [the signees] had any authority whatsoever to contract on behalf of the residents." (BIO at 13). Yet, they are suing Petitioners over rights provided in those contracts. Respondents cannot have it both ways.

Specifically, Respondents raise two issues that underscore the importance of the Court's review. Respondents first argue a resident cannot be a third-party beneficiary of an arbitration agreement on its own. (BIO at 13). This argument is premised on the fallacy above that the arbitration agreement is separate from the admission agreement. Even if true, the arbitration agreement provides clear benefits to the resident. As the Arkansas Supreme Court later acknowledged in *Jorja*, arbitration "is a less expensive and more expeditious means of settling" claims. 2020 Ark. at *2. The Court should clarify that arbitration agreements convey benefits on their own.

Respondents' next argument runs right into the Circuit split. They argue the third-party beneficiary doctrine cannot apply because there was no evidence the Responsible Parties had authority to contract on the resident's behalf. (BIO at 13-15.) In *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596 (5th Cir. 2007), a relative signed the arbitration and admission agreement, and the patient was deemed a third-party beneficiary for purposes of enforcing the arbitration agreement. In *Northport Health Servs. of*

Ark., LLC v. Posey, 930 F.3d 1027 (8th Cir. 2019), a relative signed the arbitration and admission agreement, and the patient was not deemed a third-party beneficiary.

Respondents seek to avoid this split by arguing the courts applied "a uniform approach to the basic rule that a representative or agent must have authority to enter a contract on another's behalf." BIO at 27. While this is true, the Fifth Circuit also unequivocally held the contract was enforceable under the third-party beneficiary doctrine. 493 F.3d at 600. Respondents seek to brush this part of the ruling off as "perfunctory and unnecessary" (BIO at 28), but they cannot deny this ruling or the Circuit split, which warrants this Court's review.

As a practical matter, this legal uncertainty is critical to resolve. Many residents are admitted to health care establishments, such as long term care facilities, mental health facilities, and hospitals by relatives who do not have power of attorney and are not legal guardians. Petitioners, along with these other establishments, rely on the validity of these contracts to admit and care for the residents. Courts should facilitate, not burden, family members in these situations. If nursing homes refuse to admit residents under these circumstances, the harm will be felt by residents and their families.

VI. Respondents Factual Assertions Also Do Not Prevent the Mutual Assent Issue From Being Ripe for Review.

Finally, Respondents argue the Arkansas Supreme Court's holding on mutuality of assent did

not show hostility to arbitration agreements because Petitioners did not offer objective evidence of assent. BIO at 24-26. Again, Respondents' arguments are premised on their position that the arbitration agreements were separate contracts from the admission agreements. They also raise factual issues that can be resolved on remand.

The Court should resolve the key question of whether the Arkansas Supreme Court can treat arbitration agreements differently from other contracts. Under Arkansas law, incorporated documents must be read together. *See Pope v. John Hancock Mut. Ins. Co.*, 426 S.W.3d 557, 560 (Ark. Ct. App. 2013), and here, the arbitration agreements were unequivocally incorporated into the admission agreements. However, the Arkansas Supreme Court refused to treat them in the same manner as it treats other contracts, insisting they are separate contracts "regardless of whether it was incorporated into or operated as an addendum." App. at 20a.

CONCLUSION

Petitioners respectfully request the Court to grant their Petition. This Court may wish to consider summary reversal or vacatur for reconsideration.

Respectfully submitted,

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