IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

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

Applicants,

v.

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

Respondents.

APPLICATION TO THE HON. BRETT M. KAVANAUGH FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Northport Health Services of Arkansas, LLC, doing business as Springdale Health and Rehabilitation Center, et al. (collectively, "Applicants") hereby move for an extension of time of 30 days, to and including April 13, 2022, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition is March 14, 2022.

In support of this request, Applicants state as follows:

1. The U.S. Court of Appeals for the Eighth Circuit rendered its decision on October 1, 2021 (Exhibit 1), and denied a timely petition for rehearing on December 14, 2021 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case concerns whether the U.S. Department for Health and Human Services (HHS) may invoke generic Medicare and Medicaid Act provisions related to

health and safety to impose a rule that discriminates against the formation and enforcement of arbitration agreements in long-term care facilities, even though Congress emphatically declared a liberal federal policy in favor of arbitration in the Federal Arbitration Act (FAA) that it has not expressly empowered HHS to override. *See* 84 Fed. Reg. 34,718, (July 18, 2019) (codified at 42 C.F.R. §483.70(n)).

3. Under the rule at issue, facilities that seek to enter into arbitration agreements with residents must abide by a range of burdensome requirements that, by their express terms, apply solely to arbitration agreements—*e.g.*, "[t]he facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission"; "[t]he facility must ensure that … [t]he agreement is explained to the resident and his or her representative in a form and manner that he or she understands"; and "[t]he agreement must explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it." 42 C.F.R. §483.70(n)(1), (2)(i), (3)). Facilities that do not comply with these arbitration-specific requirements face the prospect of severe punishment, including the loss of all Medicare and Medicaid funding and the imposition of civil monetary penalties. *See* Ex. 1 at 13-14.

4. Applicants filed suit alleging (among other things) that HHS' rule is inconsistent with the FAA and that HHS lacked authority under the Medicare and Medicaid Acts to impose it. After the district court granted summary judgment to HHS, the Eighth Circuit affirmed. According to the panel, the rule does not run afoul of the FAA because that statute is concerned only with the bare enforceability of

arbitration agreements in court; accordingly, HHS's effort to discourage the use of arbitration agreements "simply" by imposing penalties on facilities that do not comply with its anti-arbitration rule does not conflict with the FAA. *See* Ex. 1 at 11-14. Turning to HHS' statutory authority, the panel acknowledged that Congress did not clearly give HHS authority to regulate, let alone restrict, the use of arbitration agreements. *See* Ex. 1 at 17. But it concluded that Medicare and Medicaid Act provisions authorizing HHS to develop rules relating to the "health," "safety," "welfare," "well-being," and "rights" of residents of long-term care facilities are "capacious[]" and therefore "ambiguous" as to whether they encompass the power to restrict arbitration. Ex. 1 at 16-17. Invoking *Chevron* deference, and without mentioning the FAA or other federal statutes where Congress used clear language to empower other agencies to restrict arbitration, the panel deemed it "reasonable for [HHS] to conclude that regulating the use of arbitration agreements in … facilities furthers the health, safety, and well-being of residents." Ex. 1 at 20-21.

5. The Eighth Circuit's decision squarely conflicts with precedent from this Court and other courts of appeals. This Court has admonished that the FAA displaces rules that "single[] out arbitration agreements for disfavored treatment," *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S.Ct. 1421, 1425 (2017), and that federal agencies cannot "override" the FAA unless they have "clear and manifest" congressional authorization to do so, *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1620-30 (2018). This should therefore be the very last context in which congressional silence can be construed as the kind of ambiguity that empowers an agency to invoke *Chevron*

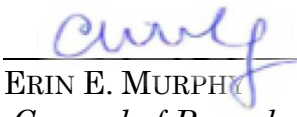
deference. Moreover, this Court has made clear that the FAA is concerned with more than just the bare enforceability of arbitration agreements in court, *see, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008), and at least three courts of appeals have held that penalizing or impeding the formation or enforcement of arbitration agreements is inconsistent with the FAA. *See Chamber of Com. of U.S. v. Bonta*, 13 F.4th 766, 780-81 (9th Cir. 2021); *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 722-26 (4th Cir. 1990); *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1122-24 (1st Cir. 1989).

6. Between now and the current due date of the petition, Applicants' counsel have substantial briefing obligations, including the brief for petitioner in *Kennedy v. Bremerton School District*, No. 21-418 (U.S.); an opening brief in *Estes v. 3M Co.*, Nos. 21-13131, 13133, 13135 (11th Cir.); an opening brief in *Baker v. 3M Co.*, No. 21-12517 (11th Cir.); an opening brief in *Perrigo v. AbbVie, Inc.*, No. 21-3026 (3d Cir.); and a response brief in *Fields v. Brown*, No. 21-328 (5th Cir.).

7. Applicants thus request a modest 30-day extension of time for counsel to prepare a petition that fully addresses the complex issues raised by the decision below and frames those issues in a manner that will be most helpful to the Court.

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time to and including April 13, 2022, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,



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