No. _____

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

PETITION FOR WRIT OF CERTIORARI

KIRKMAN T. DOUGHERTY
HARDIN, JESSON & TERRY, PLC
500 Rogers Ave.
Suite 500
Fort Smith, AR 72903

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
KASDIN M. MITCHELL
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
erin.murphy@kirkland.com

Counsel for Petitioners

May 13, 2022

QUESTIONS PRESENTED

The Federal Arbitration Act (FAA) prohibits rules that single out arbitration for disfavored treatment. While Congress can override the FAA in later statutes, it must do so clearly. In the Medicare and Medicaid Acts, Congress did not clearly empower the U.S. Department of Health and Human Services (HHS) to restrict the use of arbitration agreements by long-term care facilities. In fact, Congress has rejected several such proposals. Undeterred, HHS in 2016 invoked decades-old Medicare and Medicaid Act provisions related to health and safety to issue a rule declaring pre-dispute arbitration agreements "unconscionable" and prohibiting facilities from using them as a condition of participation in Medicare and Medicaid. After a federal court blocked that rule, HHS in 2019 invoked the same provisions to promulgate another rule that still singles out arbitration for disfavored treatment and threatens facilities with draconian HHS-imposed penalties for noncompliance. In the decision below, the Eighth Circuit upheld that rule. Splitting from decisions of this Court and three circuits, it held that the FAA allows states and federal agencies to penalize the use of arbitration agreements so long as they leave such agreements theoretically enforceable in court. Then, without mentioning the FAA or statutes that expressly override it, the court afforded *Chevron* deference to HHS' anti-arbitration interpretation of the Medicare and Medicaid Acts after declaring their silence about arbitration "ambiguous."

The questions presented are:

1. Whether the FAA is indifferent to rules that penalize parties for using arbitration agreements but

leave enforceable any theoretical agreements parties enter into despite those penalties.

2. Whether HHS may promulgate a rule that concededly singles out arbitration agreements for disfavored treatment even though Congress has nowhere expressly empowered HHS to override the FAA or its federal policy favoring arbitration.

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are: Northport Health Services of Arkansas, LLC, doing business as Springdale Health and Rehabilitation Center; NWA Nursing Center, LLC, doing business as The Maples; Ashland Place Health and Rehabilitation, LLC; Aspire Physical Recovery Center at Cahaba River, LLC; Aspire Physical Recovery Center at Hoover, LLC; Aspire Physical Recovery Center of West Alabama, LLC; Athens Health and Rehabilitation, LLC; Civic Center Health and Rehabilitation, LLC; Columbiana Health and Rehabilitation, LLC; Cordova Health and Rehabilitation, LLC; Crossville Health and Rehabilitation, LLC; Florala Health and Rehabilitation, LLC; Georgiana Health and Rehabilitation, LLC; Gulf Coast Health and Rehabilitation, LLC; Hunter Creek Health and Rehabilitation, LLC; Huntsville Health and Rehabilitation, LLC; Jacksonville Health and Rehabilitation, LLC; Legacy Health and Rehabilitation of Pleasant Grove, LLC; Lineville Health and Rehabilitation, LLC; Luverne Health and Rehabilitation, LLC; Moundville Health and Rehabilitation, LLC; Northport Health Services of Arkansas, LLC, doing business as Covington Court Health and Rehabilitation Center, doing business as Fayetteville Health and Rehabilitation Center, doing business as Springdale Health and Rehabilitation Center, doing business as Legacy Health and Rehabilitation Center, doing business as Paris Health and Rehabilitation Center; Northport Health Services of Florida, LLC, doing business as Crystal River Health and Rehabilitation Center, doing business as

Ocala River Health and Rehabilitation Center, doing business as Daytona Beach Health and Rehabilitation Center, doing business as St. Augustine Health and Rehabilitation Center, doing business as West Melbourne Health and Rehabilitation Center; Northport Health Services of Missouri, LLC, doing business as Joplin Health and Rehabilitation Center, doing business as Webb City Health and Rehabilitation Center, doing business as Carthage Health and Rehabilitation Center, doing business as Warsaw Health and Rehabilitation Center, doing business as Pleasant Hill Health and Rehabilitation Center; Northway Health & Rehabilitation, LLC; Oak Knoll Health and Rehabilitation, LLC; Opp Health and Rehabilitation, LLC; Ozark Health and Rehabilitation, LLC; Palm Gardens Health and Rehabilitation, LLC; Park Manor Health and Rehabilitation, LLC; Prattville Health and Rehabilitation, LLC; South Haven Health and Rehabilitation, LLC; South Health and Rehabilitation, LLC; Sumter Health and Rehabilitation, LLC; Tallassee Health and Rehabilitation, LLC; Valley View Health and Rehabilitation, LLC; Wetumpka Health and Rehabilitation, LLC; AFNC, Inc., doing business as Eaglecrest Nursing and Rehab; Beebe Retirement Center, Inc.; BNNC, Inc., doing business as Alcoa Pines Health and Rehabilitation; BVNC, Inc., doing business as Alcoa Pines Health and Rehabilitation; CNNC, Inc., doing business as Corning Therapy and Living Center; FPNC, Inc., doing business as Twin Lakes Therapy and Living; GVNC, Inc., doing business as Gassville Therapy and Living; HBNC, Inc., doing business as Southridge Village Nursing

and Rehab; HLNC, Inc., doing business as Heritage Living Center; HSNC, Inc., doing business as Village Springs Health and Rehabilitation; JBNC, Inc., doing business as Ridgecrest Health and Rehabilitation; Jonesboro Care and Rehabilitation Center, LLC, doing business as St. Elizabeths Place; JRNRC OPS, Inc., doing business as James River Nursing and Rehabilitation; Linco Health, Inc., doing business as Gardner Nursing and Rehabilitation; MHCNC, Inc., doing business as Care Manor Nursing and Rehab; MLBNC, Inc., doing business as Pioneer Therapy and Living; MMNC, Inc., doing business as The Lakes at Maumelle Health and Rehabilitation; MSNRC OPS, Inc., doing business as Magnolia Square Nursing and Rehab; Nashville Nursing & Rehab, Inc.; Northwest Health and Rehab, Inc., doing business as North Hills Life Care and Rehab; OCNC, Inc., doing business as Silver Oaks Health and Rehabilitation; OR OPS, Inc., doing business as Oak Ridge Health and Rehabilitation; PM OPS, Inc., doing business as Dierks Health and Rehab; RTNC, Inc., doing business as Rector Nursing and Rehab; Salco NC, Inc., doing business as Evergreen Living Center at Stagecoach; Salco NC 2, Inc., doing business as Amberwood Health and Rehabilitation; SCNC, Inc., doing business as Spring Creek Health & Rehab; Senior Living Management Group, LLC, doing business as Birch Pointe Health and Rehabilitation; SLNC, Inc., doing business as Southfork River Therapy and Living; SRCNC, Inc., doing business as The Crossing at Riverside Health and Rehabilitation; Timberlane Care and Rehabilitation Center, LLC, doing business as Timberlane Health & Rehabilitation; TXKNC, Inc., doing business as Bailey Creek Health & Rehab;

WCNC, Inc., doing business as Katherines Place at Wedington; Westwood Health and Rehab, Inc.; Windcrest Health and Rehab, Inc.; WRNC, Inc., doing business as Chapel Woods Health and Rehabilitation; Apple Creek Health and Rehab, LLC; Ashton Place Health and Rehab, LLC; Atkins Care Center, Inc.; Belvedere Nursing and Rehabilitation Center, LLC; Bradford House Nursing and Rehab, LLC; Briarwood Nursing and Rehabilitation Center, Inc.; Cabot Health and Rehab, LLC; Chapel Ridge Nursing Center, LLC; Colonel Glenn Health and Rehab, LLC; Dardanelle Nursing and Rehabilitation Center, Inc.; Nursing and Rehabilitation Center at Good Shepherd, LLC; Greenbrier Care Center, Inc.; Greystone Nursing and Rehab, LLC; Heather Manor Care Center, Inc.; Hickory Heights Health and Rehab, LLC; Innisfree Health and Rehab, LLC; Jamestown Nursing and Rehab, LLC; Johnson County Health and Rehab, LLC; Country Club Gardens, LLC; Lakewood Health and Rehab, LLC; Legacy Heights Nursing and Rehab, LLC; Lonoke Health and Rehab Center, LLC; Oak Manor Nursing and Rehabilitation Center, Inc.; Perry County Care Center, Inc.; Quapaw Care and Rehabilitation Center, LLC; Robinson Nursing & Rehabilitation Center, LLC; Russellville Car Center, Inc.; Salem Place Nursing and Rehabilitation Center, Inc.; Sherwood Nursing and Rehabilitation Center, Inc.; Shiloh Nursing and Rehab, LLC; Stella Manor Care Center, Inc.; Superior Health & Rehab, LLC; Eufaula Care Center, Inc.; Cherokee County Nursing Center, Inc.; Parks Edge Care Center, Inc.; Hendrix Health Care Center, Inc., doing business as Hendrix Health & Rehabilitation; and Glen Haven Health and Rehabilitation, LLC.

Respondents (defendants-appellees below) are: the U.S. Department of Health and Human Services; Xavier Becerra, in his official capacity as Secretary of the U.S. Department of Health & Human Services; the Centers for Medicare & Medicaid Services; Chiquita Brooks-LaSure, in her official capacity as the Administrator of the Centers for Medicare & Medicaid Services.

CORPORATE DISCLOSURE STATEMENT

Petitioner NWA Nursing Center, LLC is a wholly owned subsidiary of RHC Operations, Inc., which is not a publicly traded company.

No other petitioner has any parent corporation, nor does any publicly held company hold more than 10% of any petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. Court of Appeals for the Eighth Circuit and the U.S. District Court for the Western District of Arkansas:

- *Northport Health Servs. of Ark., LLC, doing business as Springdale Health & Rehabilitation Ctr. v. U.S. Dep't of Health and Human Servs.*, No. 19-cv-5168 (W.D. Ark.) (memorandum and order granting defendants' cross-motion for summary judgment issued Apr. 7, 2020)
- *Northport Health Servs. of Ark., LLC, doing business as Springdale Health & Rehabilitation Ctr. v. U.S. Dep't of Health and Human Servs.*, No. 20-1799 (8th Cir.) (opinion issued Oct. 1, 2021; petition for rehearing denied Dec. 14, 2021)

There are no additional proceedings in any court that are directly related to this case within the meaning of this Court's Rule 14(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

This case concerns whether the Federal Arbitration Act (FAA) protects more than the bare enforceability of arbitration agreements. This Court has said so; the Eighth Circuit disagrees. Since Congress passed the FAA nearly a century ago, this Court has issued numerous decisions involving states and federal agencies alike that "place it beyond dispute that the FAA was designed to promote arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). Accordingly, it is bedrock law that a legal rule that "singles out arbitration agreements for disfavored treatment … violates the FAA." *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S.Ct. 1421, 1425 (2017). While Congress can override the FAA in later statutes, it must provide "clear and manifest" evidence of that intent. *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018). Congress therefore uses unequivocal language when it wishes to restrict arbitration, including when empowering federal agencies to restrict arbitration via rulemaking.

The Medicare and Medicaid Acts, which long post-date the FAA, do not give the U.S. Department of Health and Human Services (HHS) clear and manifest authority to restrict arbitration, much less the use of arbitration agreements by long-term care facilities (colloquially known as nursing homes). And while Congress has considered proposals over the years to override or limit the FAA in this context, each one failed. It is little surprise, then, that for decades HHS' regulatory requirements for such facilities included no restrictions on the use of arbitration agreements; to the contrary, HHS expressly supported their use.

Recently, however, HHS had a change of heart and sought to accomplish what Congress did not. In 2016, the agency dusted off 1980s-era statutory provisions related to "health," "safety," and the like to issue a rule declaring that, as a condition of Medicare and Medicaid participation, long-term care facilities are prohibited from using pre-dispute arbitration agreements with residents. HHS explicitly did so based on its newfound view that such agreements "are, by their very nature, unconscionable." 81 Fed. Reg. 68,688, 68,792 (Oct. 4, 2016).

After a federal court preliminarily enjoined that rule, HHS in 2019 invoked the same provisions to issue another rule addressing arbitration's purported "disadvantages." 84 Fed. Reg. 34,718, 34,718 (July 18, 2019). Although that new rule does not prohibit arbitration agreements, it still singles them out for disfavored treatment. For example, facilities may not require an arbitration agreement as a condition of a resident's admission (even though other conditions can be nonnegotiable), and they must provide residents with a 30-day period to rescind any such agreements they do sign. Facilities that fail to comply with this rule with any given resident (even one not covered by Medicare or Medicaid) face draconian HHS-imposed punishment, including civil monetary penalties and exclusion from Medicare and Medicaid.

In the decision below, the Eighth Circuit upheld that blatantly anti-arbitration rule. Remarkably, the court did so on the theories not only that purported "ambiguity" in the Medicare and Medicaid Acts suffices to empower HHS to discriminate against arbitration, but that HHS' rule does not implicate the

FAA at all. According to the Eighth Circuit, the FAA is indifferent to rules that unabashedly penalize the use of arbitration agreements, as it is concerned solely with whether arbitration agreements are enforceable in court. Thus, in the Eight Circuit's view, a federal agency or state could prohibit the use of arbitration agreements entirely, and threaten those who employ them with debilitating fines or even jail time, yet the FAA would care not a whit so long as a theoretical party with the temerity to defy those rules on pain of severe sanction could still enforce its agreement.

That decision is indefensible. This Court has already held (in the nursing-home context, no less) that the FAA is concerned with more than the bare enforceability of arbitration agreements—and rightly so, as to conclude otherwise "would make it trivially easy … to undermine" or "wholly defeat." *Kindred*, 137 S.Ct. at 1428. Sanctioning rules that literally *penalize* parties for entering into arbitration agreements would do exactly that, which explains why three circuits have rejected the theory the Eighth Circuit embraced. Making matters worse, this Court has repeatedly and recently admonished that statutory silence about arbitration precludes an agency from adopting anti-arbitration rules. Yet the Eighth Circuit nonetheless reflexively resorted to *Chevron* to permit HHS to deploy exceedingly generic language to issue a blatantly anti-arbitration rule.

Certiorari is amply warranted and urgently needed. Indeed, if the decision below stands, "[t]he FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration." *Id.* at 1428-29.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 14 F.4th 856. App.1-37. The district court's opinion is reported at 438 F.Supp.3d 956. App.39-84.

JURISDICTION

The Eighth Circuit issued its opinion on October 1, 2021, and denied a timely petition for rehearing en banc on December 14, 2021. Justice Kavanaugh extended the deadline for filing a petition to May 13, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

HHS' rule and the relevant provisions of the FAA, the Medicare Act, and Medicaid Act are included at App.85-89.

STATEMENT OF THE CASE

A. Statutory Framework

1. Congress passed the FAA in 1925 to counteract "hostility to arbitration." *Kindred*, 137 S.Ct. at 1428. Section 2 is the "primary substantive provision," *Concepcion*, 563 U.S. at 339, and it provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. §2. Section 2 thus establishes "a liberal federal policy favoring arbitration agreements" that displaces "substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Preston v. Ferrer*, 552 U.S. 346, 353 (2008). That policy governs states and federal agencies alike. *See Epic*, 138 S.Ct. at 1629-30

(refusing to defer to NLRB's view that NLRA displaces FAA); *cf. FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 299-300 (2003) (affirming "the fundamental principle that federal agencies must obey all federal laws, not just those they administer").

In line with this policy, the Court has emphasized that §2 requires states and federal agencies to "place[] arbitration agreements on an equal footing with other contracts." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). By virtue of this "'equal-treatment' rule," *Epic*, 138 S.Ct. at 1622, the FAA prohibits "singling out" arbitration agreements for "disfavored treatment," *Kindred*, 137 S.Ct. at 1427. That is, the FAA does not tolerate special rules that "apply only to arbitration." *Concepcion*, 563 U.S. at 339.

"Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). But this Court "come[s] armed with the strong presumption … that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic*, 138 S.Ct. at 1624 (alterations omitted); *see CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012). Thus, to displace the FAA, Congress' intent "must be clear and manifest," and "the absence of any specific statutory discussion of arbitration … is an important and telling clue that Congress has not displaced the [FAA]." *Epic*, 138 S.Ct. at 1624, 1627. In some statutes, including some conferring rulemaking power on federal agencies, Congress has used the requisite explicit language to override the FAA. *See, e.g.*, 12 U.S.C. §5518(b); 15

U.S.C. §78*o*(o); *cf.* 7 U.S.C. §26(n)(2); 10 U.S.C. §987(e)(3); 12 U.S.C. §5567(d)(2); 15 U.S.C. §1226(a)(2); *id.* §1639c(e)(1); 18 U.S.C. §1514A(e)(2). But, consistent with the strong federal policy favoring arbitration, such statutes are few and far between.

2. Congress first passed the Medicare and Medicaid Acts in 1965. *See* 42 U.S.C. §1395 *et seq.* (Medicare Act); *id.* §1396 *et seq.* (Medicaid Act). Medicare provides health insurance to those 65 and older and those with certain disabilities; Medicaid does the same for those with low incomes. *See Biden v. Missouri*, 142 S.Ct. 647, 650 (2022) (per curiam). The HHS Secretary, acting through the Centers for Medicare and Medicaid Services, administers both programs. *See id.*

Medicare and Medicaid largely depend on private entities—including long-term care facilities—to provide care to program beneficiaries. To participate in the programs, facilities must enter into provider agreements that require them to abide by various conditions. *See* 42 U.S.C. §§1395i-3(g), 1396r(g). Noncompliance can result in severe penalties, including appointment of new management, denial of Medicare and Medicaid payments, total exclusion from the programs, and civil monetary penalties of $10,000 for each day of noncompliance (amounting to $3,650,000 annually). *See id.* §§1395i-3(h), 1396r(h). Although Congress itself has imposed many of those conditions, it has also given authority to HHS to develop others. *See* Pub. L. No. 100-203, 101 Stat. 1330 (1987). Since 1987, both Acts have included (1) subsections titled "General Responsibility," which give HHS "the duty and responsibility … to assure that

requirements which govern the provision of care in [long-term care] facilities … are adequate to protect the health, safety, welfare, and rights of residents," 42 U.S.C. §§1395i-3(f)(1), 1396r(f)(1); (2) subsections titled "Miscellaneous," which give HHS the authority to develop "such other requirements relating to the health, safety, and well-being of residents … as [HHS] may find necessary," *id.* §§1395i-3(d)(4)(B), 1396r(d)(4)(B); and (3) subsections titled "Other rights," which give HHS the duty to "protect and promote … [a]ny other right established by [HHS]," *id.* §§1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi).

Nowhere in those provisions (or anywhere else in the Acts) has Congress expressly empowered HHS to restrict the use of arbitration agreements in long-term care facilities. To the contrary, both Acts expressly require facilities to "protect and promote" a resident's "right[]" to the "prompt" resolution of grievances, *id.* §§1395i-3(c)(1)(A), 1396r(c)(1)(A)—language historically associated with arbitration, *see, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 438 (1953); *Epic*, 138 S.Ct. at 1621. And while Congress has occasionally (and recently) considered proposals that would override the FAA in the long-term-care context, each has failed. *See* H.R. 1626, 110th Cong. (2008); S. 2838, 110th Cong. (2008); H.R. 1237, 111th Cong. (2009); S. 512, 111th Cong. (2009); H.R. 6351, 112th Cong. (2012); H.R. 5326, 116th Cong. (2019).

B. Regulatory Background

1. Unsurprisingly given the absence of any grant of authority to override the FAA and restrict the use of arbitration agreements, HHS' rules for long-term care facilities "were silent on any arbitration

requirements" for decades. 82 Fed. Reg. 26,649, 26,650 (June 8, 2017). In fact, the agency "issue[d] sub-regulatory guidance that supported arbitration between residents and their facilities." *Id.* In 2008, for instance, HHS explained to Congress that "[p]re-dispute arbitration agreements are an excellent way for patients and providers to control costs, resolve disputes, and speed resolution of conflicts," as arbitration is "more prompt and less expensive than litigation." CA8.Add.52-53.[1] Accordingly, HHS "encourage[d] potential residents and nursing homes to consider adopting such agreements," emphasizing that they "do not hinder [its] ability to take enforcement action against nursing homes providing poor quality care." CA8.Add.52. HHS also recognized that its position aligned with Congress' "clear preference for arbitration" in the FAA. CA8.Add.52; *see* CA8.Add.50 (similar 2003 memorandum).

2. In 2016, HHS abruptly changed course. In direct contradiction to its earlier views (not to mention the FAA), the agency now posited not only that there are "disadvantages associated with both pre-dispute arbitration agreements and arbitration itself," but that "predispute arbitration clauses are, by their very nature, unconscionable." 81 Fed. Reg. at 68,792. Citing the Ninth Circuit's decision in *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016)—which this Court later reversed in *Epic*—HHS further posited that the FAA "does not impinge on federal agencies' rights to issue regulations regulating the

[1] "CA8.Add." refers to the addendum to petitioners' Eighth Circuit opening brief. "CA8.App." refers to petitioners' appendix in the Eighth Circuit.

conditions of adoption of [arbitration] agreements." *Id.* at 68,791. The agency then promulgated a rule that "prohibited pre-dispute binding arbitration agreements between facilities and residents as a condition of participation in Medicare and Medicaid." *Id.* at 68,792. As authority for that rule, HHS invoked the aforementioned Medicare and Medicaid Act provisions related to the "health," "safety," "welfare," "well-being," and "rights" of residents. *See id.* at 68,791-92. According to HHS, because any theoretical facility that flouted its prohibition could still enforce a noncompliant arbitration agreement in court (after facing HHS-imposed punishment), "the terms of the FAA are not implicated." *Id.* at 68,791.

Before the 2016 rule took effect, the American Health Care Association and various long-term care facilities sued to invalidate it. The district court granted a preliminary injunction. *See Am. Health Care Ass'n v. Burwell* (*AHCA*), 217 F.Supp.3d 921 (N.D. Miss. 2016). The court explained, among other things, that this Court's FAA precedents, along with "powerful persuasive authority" from the First and Fourth Circuits, "present[ed] significant legal hurdles" for HHS. *Id.* at 930-31 (citing *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990); *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989)). The court also rejected HHS' argument that its rule did not implicate the FAA because it established conditions of participation in Medicare and Medicaid, explaining that "nursing homes are so dependent upon Medicare and Medicaid funding" that the rule "effectively amounts to a ban on pre-dispute nursing home arbitration contracts." *Id.* at 929. But even accepting HHS' theory that the rule is "a mere

'incentive' against arbitration," the court continued, "this does not necessarily mean that singling out a form of arbitration for such disincentives allows it to survive FAA scrutiny." *Id.* at 929-30.

Turning to HHS' authority under the Medicare and Medicaid Acts, the court found the statutory provisions that HHS invoked too "vague" and "generalized" to justify its rule. *Id.* at 934. If such "generalized language … were deemed sufficient to authorize a ban on arbitration agreements in nursing home cases," the court warned, "many other agencies would choose to broadly exert power in a variety of contexts." *Id.* at 934-35. The court thus rejected HHS' "unprecedented" and "breathtakingly broad assertion of authority." *Id.* at 939.

3. HHS appealed, but it later dismissed its appeal, *see Am. Health Care Ass'n v. Price*, No. 17-60005 (5th Cir. dismissed June 2, 2017), and published a new proposed rule to address the "disadvantages of pre-dispute arbitration" in a "better" way, 82 Fed. Reg. at 26,650. In July 2019, HHS finalized that rule—now codified at 42 C.F.R. §483.70(n)—which again relied on Medicare and Medicaid Act provisions related to the "health," "safety," "welfare," and "rights" of residents of long-term care facilities.[2] 84 Fed. Reg. at 34,718.

---

[2] The Eighth Circuit claimed that HHS promulgated the 2019 rule pursuant to 42 U.S.C. §1395i-3(c)(1)(A)(xi) and 42 U.S.C. §1396r(c)(1)(A)(xi), among two other sets of provisions. *See* App.16-17. That is not what HHS said at the time, *see* 84 Fed. Reg. at 34,718, but as the court recognized, those provisions are even more generic than the ones the agency did invoke, App.17-18.

HHS explained that it "designed" the 2019 rule "to accomplish the same goals as the 2016 rule," as the agency continued to maintain that arbitration "[o]f course" has "disadvantages." *Id.* at 34,725, 34,733. HHS conceded that it lacked evidence to support that claim. *See id.* at 34,722 ("lack of statistical data"); *id.* at 34,726 ("little solid social science research evidence"); *id.* at 34,729 ("lack of hard social science data"). Nevertheless, it proceeded to single out arbitration agreements for special disfavored treatment. For example, the new rule prohibits "requir[ing] any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to … the facility" and requires facilities to "explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it." *Id.* at 34,735-36. It requires facilities to "explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to … the facility" and to "ensure" that any arbitration agreement "is explained to the resident and his or her representative in a form and manner that he or she understands." *Id.* at 34,735. And it requires facilities to maintain "a copy of the signed agreement for binding arbitration and the arbitrator's final decision … for 5 years … for inspection upon request by [HHS]" so the agency can "learn how arbitration is being used by [facilities] and how this is affecting residents." *Id.* at 34,723, 34,736. These provisions apply even to agreements between long-term care facilities and residents not covered by Medicare or Medicaid.

In promulgating this rule, HHS "recognize[d]" the potential for conflict with the FAA, which it described

as "the overall federal statute addressing arbitration agreements." *Id.* at 34,725. But HHS maintained that its rule does not conflict with the FAA because it does "not purport to regulate the enforceability of any arbitration agreement," but rather only exposes facilities to "sanctions" for "[f]ailure to comply," *id.* at 34,718, 34,728—*e.g.*, installation of new management, denial of Medicare and Medicaid payments, civil monetary penalties, or termination from Medicare and Medicaid entirely, *see* p.6, *supra.*

C. Proceedings Below

1. Petitioners operate long-term care facilities that participate in Medicare and Medicaid. *See* App.3. As with many such facilities, Medicare and Medicaid fund the overwhelming majority of care petitioners provide. *See* CA8.App.312, 324. Petitioners have historically used arbitration agreements that do not comply with the special requirements imposed by HHS' 2019 rule, and they wish to continue to do so.[3] *See* CA8.App.55-56.

Before the rule took effect, petitioners filed suit alleging that it conflicts with the FAA and that HHS lacks authority under the Medicare and Medicaid Acts to impose it.[4] *See* App.8. Like the plaintiffs in the *AHCA* litigation, petitioners moved for a preliminary injunction. HHS did not oppose that motion, instead agreeing to stay enforcement of the rule against

---

[3] To avoid penalties, petitioners began complying with HHS' rule after the Eighth Circuit proceedings. But petitioners would revert to their prior practices but for the rule.

[4] Petitioners also alleged that the rule is arbitrary and capricious and violates the Regulatory Flexibility Act. *See* App.9.

petitioners while the district court resolved cross-motions for summary judgment. *See* App.9.

The district court granted summary judgment to HHS. As to the FAA claim, echoing HHS' theory, the court maintained that "failure to comply with the Rule's requirements does not prevent the enforcement of arbitration agreements between [a long-term care] facility and a resident." App.53. The court acknowledged that noncompliance with the rule would "expos[e]" the facility to serious "corrective action" by HHS—*e.g.*, "the provider can be denied reimbursement, subject to civil penalties, or even excluded from further participation in the Medicare and Medicaid programs." App.53. But, in the court's view, facilities "could rationally choose to accept" such "corrective action" as the cost of engaging in activity protected by the FAA. App.41,50. The court therefore found "no conflict with the FAA." App.50-53.

The district court next addressed HHS' authority under the Medicare and Medicaid Acts, positing that the language related to "health," "safety," and the like is "ambiguous" about whether it empowers the agency to restrict the use of arbitration agreements. App.65. Rather than treat the absence of any grant of power to restrict arbitration as the death knell for the rule, however, the court held that the agency's view that it may restrict arbitration in service of protecting patient "health" and "safety" "is entitled to deference [under] *Chevron*." App.65.[5]

[5] The court also rejected petitioners' other claims. *See* App.71-83.

Petitioners asked the district court to stay its judgment pending appeal. HHS opposed, arguing that petitioners could easily "come into compliance" with its rule "simply by abandoning the use of arbitration agreements with new residents." CA8.App.633. The court ultimately stayed its judgment for 60 days. *See* Dist.Ct.Dkt.57.

2. The Eighth Circuit stayed enforcement of HHS' rule against petitioners for the duration of the appeal. *See* App.9. Nonetheless, in an opinion authored by Judge Kelly, a panel of the court affirmed.

According to the panel, this Court "has construed the FAA simply to limit the circumstances in which arbitration agreements, once entered into, can be rendered invalid or unenforceable." App.12. Employing that narrow reading of this Court's cases, the panel held that HHS' rule "does not come up against the FAA" because, in the highly unlikely event that a long-term care facility "entered into an arbitration agreement with a resident without complying with the [rule] …, the arbitration agreement would nonetheless be enforceable," and HHS "would simply enforce the regulation through … administrative remedies, including denial of payment and civil monetary penalties." App.11, 13-14. In the panel's view, penalizing parties for entering into arbitration agreements "does not conflict with the FAA" or its liberal federal policy favoring arbitration agreements because "'courts do not apply federal policies.'" App.14-15 (quoting *Cal. Ass'n of Priv. Postsecondary Schs. v. DeVos* (*CAPPS*), 436 F.Supp.3d 333, 344 (D.D.C. 2020), *vacated, appeal dismissed*, 2020 WL 9171125 (D.C. Cir. Oct. 14, 2020)).

The panel next held that HHS has statutory authority to impose the rule under the Medicare and Medicaid Act provisions relating to the "health," "safety," "welfare," "well-being," and "rights" of residents. *See* App.16. The court acknowledged that those provisions are (at best) "ambiguous as to whether HHS has the authority to regulate the use of arbitration agreements." App.18. But, like the district court, rather than treat that as fatal, the court viewed it as a license to deploy *Chevron* deference, and proceeded to declare it "reasonable … to conclude that regulating the use of arbitration agreements in [long-term care] facilities furthers the health, safety, and well-being of residents." App.22. In reaching that conclusion, the panel recognized that, for decades, HHS had never hinted that it had authority to restrict arbitration agreements. But in the panel's view, "whether or not an agency has previously attempted to exercise statutory authority it may or may not have" is irrelevant. App.20.[6]

3. Petitioners sought panel rehearing or rehearing en banc, emphasizing that the panel's FAA and *Chevron* analysis conflicts with this Court's precedents and decisions from several circuits—including the First and Fourth Circuit decisions referenced in the *AHCA* decision, 217 F.Supp.3d at 930, and a Ninth Circuit decision issued just two weeks before the panel's decision, *see Chamber of*

[6] The panel also rejected petitioners' arbitrary-or-capricious arguments, and although it concluded that HHS violated the Regulatory Flexibility Act, it declared that violation harmless. *See* App.23-37.

Com. of U.S. v. Bonta, 13 F.4th 766 (9th Cir. 2021). The court denied the petition.

REASONS FOR GRANTING THE PETITION

According to the decision below, states and federal agencies may enact rules that impose crippling penalties on parties for entering into arbitration agreements, and the FAA has nothing to say about it. Moreover, according to the decision below, when a federal agency that is openly hostile to arbitration wants to coerce parties into restricting or even abandoning the use of arbitration agreements, it need only identify some generic rulemaking language, and a court will then have to defer to its anti-arbitration views under *Chevron*. That decision violates this Court's precedents, creates a clear circuit split, and is antithetical to the policies underlying the FAA.

Just a few Terms ago, this Court squarely rejected the argument—in the nursing-home context, no less—that the FAA is concerned only with whether arbitration agreements are enforceable in court, not with efforts to restrict or deter their formation. Consistent with that understanding, three circuits have squarely rejected the argument that the FAA is agnostic toward efforts to penalize parties for using arbitration agreements. It could hardly be otherwise, as the FAA would be a dead letter if it left states or agencies—most of which consider their priorities of the day more pressing than promoting arbitration—free to obliterate arbitration agreements by penalizing parties for the bare act of entering into them. The Eighth Circuit's contrary conclusion not only creates a square circuit split, but renders the FAA "helpless to

prevent even the most blatant discrimination against arbitration." *Kindred*, 137 S.Ct. at 1428-29.

Making matters worse, the decision below defies this Court's command that federal statutes may be read to override the FAA's strong pro-arbitration policy only when Congress' intent to do so is "clear and manifest." Instead of abiding by that rule, the Eighth Circuit invoked purported "ambiguity" in rulemaking provisions dealing with resident "health," "safety," and "welfare" to defer to HHS' anti-arbitration views under *Chevron*. That is not even a permissible application of *Chevron* principles, let alone a permissible applicable of the clear-statement rule that governs when federal agencies claim the power to discriminate against arbitration. The FAA emphatically declares a policy in favor of arbitration, and Congress has demonstrated that it knows how to override that policy when it wishes to do so. It strains credulity to claim that Congress implicitly delegated to HHS the authority to treat arbitration as a threat to health, safety, and welfare through obtuse, generic rulemaking language buried in healthcare laws.

In sum, the Eighth Circuit got two exceptionally important questions exceptionally wrong. This Court should grant review and reverse a decision that, if left standing, would provide a blueprint to "wholly defeat" the FAA. *Id.* at 1428.

I. The Decision Below Cannot Be Reconciled With Decisions From This Court Or Three Other Circuits.

A. HHS' Rule Unabashedly Singles Out Arbitration Agreements for Disfavored Treatment.

The FAA "establishes a sort of 'equal-treatment' rule for arbitration contracts." *Epic*, 138 S.Ct. at 1622. While arbitration agreements remain governed by rules that are "generally applicable" to *all* contracts, such agreements cannot be subjected to disfavored treatment using rules that "apply *only* to arbitration." *Concepcion*, 563 U.S. at 339 (emphasis added). Rules that are "tailor-made" to "specially impede[]" the use of arbitration agreements thus squarely conflict with the FAA. *Kindred*, 137 S.Ct. at 1427, 1429.

HHS' rule plainly flunks that test. Indeed, while the FAA precludes even rules that "discriminate[] … against arbitration … covertly," *id.* at 1423, HHS' hostility to arbitration is neither subtle nor concealed. HHS concededly promulgated the rule to "accomplish the same goals," App.17 n.6, as an earlier rule that declared pre-dispute arbitration agreements *per se* "unconscionable," 81 Fed. Reg. at 68,792. And the rule reiterates the agency's view that arbitration "[o]f course" has "disadvantages" in desperate need of HHS' correction. 84 Fed. Reg. at 34,732.

To address those purported disadvantages, HHS requires long-term care facilities to abide by a host of burdensome requirements that "apply only to arbitration." *Concepcion*, 563 U.S. at 339. The rule "singles out arbitration agreements for disfavored treatment," *Kindred*, 137 S.Ct. at 1425, as compared

to all other contractual agreements a new resident must sign as part of the intake process and dictates that making such an agreement a condition of admission is verboten. *See* 42 C.F.R. §483.70(n)(1). And the rule's hostility to arbitration does not end there. The rule directs facilities to "ensure" that any arbitration agreement is specially "explained to the resident and his or her representative …, including in a language the resident and his or her representative understands." *Id.* §483.70(n)(2)(i). The rule demands that facilities "explicitly" provide a "resident or his or her representative" the right to "rescind the agreement within 30 calendar days of signing it." *Id.* §483.70(n)(3). The rule imposes special record-keeping and document-retention procedures for facilities that arbitrate disputes. *See id.* §483.70(n)(6). And facilities that do not comply face severe HHS-imposed punishment, including denial of payment, civil monetary penalties, or "exclu[sion] from further participation in the Medicare and Medicaid programs," App.41—*i.e.*, "the economic equivalent of the death penalty," *Connolly*, 883 F.2d at 1124.

It thus cannot seriously be disputed that HHS' rule is "tailor-made" to "specially impede[]" the formation and use of arbitration agreements. *Kindred*, 137 S.Ct. at 1427, 1429. The rule puts the proverbial "gun to the head" of long-term care facilities and gives them "no real option" but to abandon activity protected by the FAA. *NFIB v. Sebelius*, 567 U.S. 519, 581-82 (2012) (opinion of Roberts, C.J.). HHS all but acknowledged as much when it argued below that the easiest way for facilities to "come into compliance" with its rule is "simply by abandoning the use of arbitration agreements with new residents."

CA8.App.633. It is hard to imagine a rule more antithetical to the "emphatic federal policy in favor of arbitral dispute resolution," *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per curiam), than one that the government explicitly encourages parties to satisfy by forgoing the use of arbitration agreements entirely.

B. The Eighth Circuit's Justifications for Upholding HHS' Rule Squarely Conflict With Decisions of This Court and Others.

Remarkably, the Eighth Circuit countenanced HHS' blatantly anti-arbitration rule, even as it openly acknowledged that no statute clearly empowers HHS to countermand the "liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. The court's justifications for doing so cannot be reconciled with decisions from this Court or others.

1. The Eighth Circuit's miserly view of the FAA conflicts with *Kindred* and decisions from three other circuits.

The Eighth Circuit first posited that HHS' rule does not implicate the FAA at all, on the theory that the FAA has nothing to say about laws that penalize parties for entering into arbitration agreements while leaving those (hypothetical) agreements enforceable in court. App.15 n.5. Indeed, according to the Eighth Circuit, the FAA's "liberal federal policy favoring arbitration agreements" has no role to play whatsoever here because "'courts do not apply federal policies.'" App.14. That extraordinary claim conflicts with decisions of both this Court and other courts of appeals.

First and foremost, this Court squarely rejected just a few Terms ago—and in the specific context of nursing homes, no less—the notion that the FAA "has 'no application' to 'contract formation issues,'" explaining that the FAA "cares not only about the 'enforce[ment]' of arbitration agreements, but also … about what it takes to enter into them." *Kindred*, 137 S.Ct. at 1428. It could hardly be otherwise, for an FAA agnostic to efforts to literally *penalize* parties for entering into arbitration agreements would be "helpless to prevent even the most blatant discrimination against arbitration." *Id.* at 1428-29. This is a case in point. HHS has deployed the existential threat of kicking long-term care facilities out of Medicare and Medicaid (or paying millions of dollars in penalties each year, among other threats) to coerce them into abandoning their rights to make willingness to arbitrate disputes a condition of admission. The agency unabashedly did so because it believes that arbitration has "disadvantages" in need of its correction. 84 Fed. Reg. at 34,725. It simply cannot be the case that the FAA has nothing to say about such a brazenly anti-arbitration rule.

The Eighth Circuit's contrary conclusion conflicts not only with *Kindred*, but with decisions from three circuits that have emphatically rejected the notion that the FAA tolerates efforts to penalize parties for entering into arbitration agreements rather than declaring such (hypothetical) agreements unenforceable.[7] The First Circuit reached that

[7] It is also exceedingly difficult to reconcile with *Epic*. There, the Court affirmed the Fifth Circuit's decision in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), which had held

conclusion in *Securities Industry Association v. Connolly*, a case concerning a set of Massachusetts securities regulations aimed at broker-dealers. *See* 883 F.2d at 1116. Much like HHS' rule, those regulations prohibited broker-dealers from making pre-dispute arbitration agreements "a nonnegotiable condition precedent to account relationships," "order[ed] the prohibition brought 'conspicuously' to the attention of prospective customers," and "demand[ed] full written disclosure of 'the legal effect of the pre-dispute arbitration contract or clause.'" *Id.* at 1117. Broker-dealers who failed to comply could face "the economic equivalent of the death penalty": "denial, suspension or revocation" of their licenses. *Id.* at 1124-25.

The First Circuit concluded that the regulations clearly violated the FAA, as they required of arbitration agreements "what is not generally required to enter contracts in the Commonwealth." *Id.* at 1123. And the court rejected as "so seriously flawed that it cannot be countenanced" the state's dubious claim that the regulations did not conflict with the FAA because a theoretical broker-dealer willing to flout the rule at risk of losing its license could still enforce its noncompliant arbitration agreements in

---

that Murphy Oil did not commit an unfair labor practice by enforcing an arbitration agreement that prohibited employees from pursuing class or collective actions for employment-related claims. If the truly FAA cared only about bare enforceability, then the Fifth Circuit (and this Court) had it wrong: Murphy Oil could have enforced its arbitration agreement and "simply" accepted an unfair-labor-practice charge as the "penalty" for doing so. Tellingly, no one in *Epic* even suggested such an absurd theory.

court. *Id.* at 1122-24. As the court explained, "[a] policy designed to prevent one party from enforcing an arbitration contract or provision by visiting a penalty on that party is, without much question, contrary to the policies of the FAA." *Id.* at 1124. Indeed, the court observed, taking away a license from a business as a penalty for noncompliance with an anti-arbitration rule is an even "greater" threat to the FAA than declaring a particular arbitration agreement invalid or unenforceable "in a given dispute." *Id.* The court thus rejected Massachusetts' equally brazen attempt to evade the FAA's "national policy favoring arbitration." *Id.*

The Fourth Circuit subsequently found *Connolly* "persuasive" and adopted its reasoning in full in *Saturn Distribution Corp. v. Williams*. *See* 905 F.2d at 724. *Saturn* concerned Virginia legislation that prevented automobile manufacturers from including "nonnegotiable" arbitration provisions in their dealer agreements and required them to submit their standard dealer agreements to Virginia's Commissioner of the Department of Motor Vehicles for approval. *Id.* at 721. When Saturn submitted for the Commissioner's approval a dealer agreement containing a nonnegotiable arbitration provision, the Commissioner denied approval and informed Saturn that he would not approve the agreement "unless it contained an opt out provision to the binding arbitration provisions." *Id.* While the Commissioner tried to defend Virginia's regime by "argu[ing] that the scope of FAA preemption is limited to laws covering existing arbitration agreements, and does not extend to laws that prohibit or regulate the *formation* of arbitration agreements," *id.* at 723, the Fourth Circuit

disagreed. As it explained, "common sense dictates that a state should not be able to escape its enforcement duties under §2 by banning the formation of arbitration agreements." *Id.*

The Ninth Circuit reached the same conclusion just a few months ago in *Chamber of Commerce of United States v. Bonta*. There, the court addressed California legislation providing, among other things, that employers may not require employees to sign a standard employment contract that includes an arbitration provision. *See* 13 F.4th at 772; *id.* at 784 (Ikuta, J., dissenting). Employers who violate the rule face "civil and criminal sanctions." *Id.* at 771. But in a conceded effort to "sidestep" the FAA and "navigate[] around" this Court's precedent, *id.* at 784 (Ikuta, J., dissenting), the legislation provided that employers could still enforce any hypothetical noncompliant arbitration agreements in court, *see id.* at 772. The Ninth Circuit concluded that "[t]he imposition of civil and criminal sanctions for the act of executing an arbitration agreement directly conflicts with the FAA" and its "'liberal federal policy favoring arbitration agreements.'" *Id.* at 771, 780. Just as the government "may not prohibit outright the arbitration of a particular type of claim," the court explained, "it also may not impose civil or criminal sanctions on individuals or entities for the act of executing an arbitration agreement." *Id.* at 781 (alterations omitted).[8]

---

[8] Although every panel member in *Chamber* agreed that the FAA forbids a state from "impos[ing] liability for conduct resulting in an *executed* arbitration agreement," a two-judge majority reached the "novel holding" that California can

The Eighth Circuit's decision is impossible to square with these decisions. Indeed, the court embraced the exact same exact (il)logic that the First Circuit denounced as "so seriously flawed that it cannot be countenanced." *Connolly*, 883 F.2d at 1123-24. The court did so, moreover, in the face of a recent decision from this Court admonishing that reading the FAA to have nothing to say about the formation of arbitration agreements would leave the Act "helpless to prevent even the most blatant discrimination against arbitration." *Kindred*, 137 S.Ct. at 1428-29. That square conflict with decisions of this Court and others readily warrants this Court's review.

2. The Eighth Circuit's reflexive resort to *Chevron* deference was doubly inappropriate.

The Eighth Circuit's conclusion that HHS has the statutory power to impose its anti-arbitration rule is every bit as flawed. As this Court recently reiterated, given the strong federal policy in favor of arbitration that the FAA establishes, an agency may single out arbitration agreements for disfavored treatment only if Congress "clearly and manifestly" empowers it to do so. *Epic*, 138 S.Ct. at 1624. That principle alone should have sufficed to resolve this case, as there is no dispute that nothing in the Medicare or Medicaid Acts

---

"prosecute" someone for "*attempting* to enter into" a valid arbitration agreement but failing to succeed. 13 F.4th at 790-91 (Ikuta, J., dissenting) (emphasis added). As Judge Ikuta recognized in her dissent, that holding conflicts with the First and Fourth Circuits' decisions in *Connolly* and *Saturn*, thus "requir[ing] en banc review or Supreme Court intervention." *Id.* at 787.

expressly empowers HHS to restrict the use of arbitration agreements in long-term care facilities. HHS has never suggested otherwise, and even the Eighth Circuit "conclude[d] that the Medicare and Medicaid statutes are ambiguous as to whether HHS has the authority to regulate the use of arbitration agreements." App.18. Yet rather than treat the absence of any "clear and manifest" authority as fatal to HHS' claim to such authority, the Eighth Circuit viewed that purported "ambiguity" as an excuse to defer to the agency's anti-arbitration views under *Chevron*. That was doubly wrong.

First, even assuming the Medicare and Medicaid Acts are ambiguous as to whether HHS may restrict the use of arbitration agreements, this is not a context in which ambiguity inures to the agency's benefit. If a statute is ambiguous about whether it empowers an agency to adopt anti-arbitration rules, then it does not, as ambiguity is the polar opposite of "a clear and manifest congressional command." *Epic*, 138 S.Ct. at 1624. Just like the statute in *Epic*, the Medicare and Medicaid Acts "do[] not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly." *Id.* That should have been the end of the matter. And it certainly should have foreclosed HHS' resort to *Chevron* deference, as "[o]ne of *Chevron*'s essential premises is simply missing" when, as here, an agency seeks "to interpret a 'statute which it administers' … in a way that limits the work of" the FAA. *Id.* at 1629.

The Eighth Circuit seemed to think it could avoid the clear-statement rule reiterated in *Epic* by narrowly construing the FAA as agnostic to rules that

penalize the use of arbitration agreements rather than restricting their enforcement. That construction is wrong for all the reasons just discussed. *See* Part I.AB.1, *supra*. But even accepting the Eighth Circuit's premise that HHS' rule "does not conflict with the FAA" as a technical matter, App.14-15, that is hardly an excuse to ignore the FAA entirely. After all, deference to an agency's interpretation of a statute is permissible (if at all) only if a court finds "genuine ambiguity" after "exhaust[ing] all the 'traditional tools' of construction" available in the "legal toolkit." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). That toolkit includes statutory "text, structure, history, and so forth," *id.* at 2416, as well as a statute's "relationship to other federal statutes," *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004).

Here, not only does the FAA embody "a liberal federal policy favoring arbitration agreements" that must inform the interpretation of other federal statutes, *Moses H. Cone*, 460 U.S. at 24; other statutes confirm that when Congress wants to break with that policy and empower an agency to impede arbitration, it does so expressly—and with express conditions on the invocation of that power. For instance, Congress has explicitly provided that, "by regulation," the CFPB "may prohibit or impose conditions or limitations on the use of an agreement … for arbitration" in certain contexts "if [it] finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers." 12 U.S.C. §5518(b). And Congress has empowered the SEC to enact rules that "prohibit, or impose conditions

or limitations on the use of, agreements that require customers … to arbitrate" certain disputes "if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors." 15 U.S.C. §78*o*(o).

The Medicare and Medicaid Acts contain nothing remotely like that. The provisions HHS invoked instead relate to the "health," "safety," "well-being," "welfare," and "rights" of residents of long-term care facilities. App.16. Those terms may be broad enough to allow HHS to impose rules related to the "provision of healthcare," *Missouri*, 142 S.Ct. at 652—although even that can present close questions, *see id.* at 655-58 (Thomas, J., dissenting). But a rule restricting the use of arbitration agreements self-evidently does not "fit[] neatly within th[at] language." *Id.* at 652. Indeed, "[i]t's more than a little doubtful that Congress would have tucked into the mousehole of [a] catchall term an elephant that tramples the work done by [the FAA.]" *Epic*, 138 S.Ct. at 1627.

That is particularly true considering that the only language in the Medicare and Medicaid Acts regarding dispute resolution requires facilities to "protect and promote" a resident's "right to prompt efforts by the facility to resolve grievances," 42 U.S.C. §§1395i-3(c)(1)(A)(iv), 1396r(c)(1)(A)(vi)—language that both this Court and HHS have used to describe arbitration, *see, e.g.*, CA8.Add.52-53. Accordingly, while the Medicare and Medicaid Acts might authorize HHS to *require* facilities to offer residents the option to arbitrate, they certainly do not authorize HHS to *restrict* the availability of arbitration. "In fact, the most noteworthy action" by Congress when it

comes to restricting arbitration in the long-term-care context are the various legislative proposals to that effect that have failed. *NFIB v. OSHA*, 142 S.Ct. 661, 666 (2022) (per curiam); *see* p.7, *supra*.

That HHS "decided to do what Congress had not" should have been revealing in and of itself. *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2486 (2021) (per curiam). So, too, should the fact that, in all its decades of "existence," HHS "ha[d] never before adopted a … regulation of this kind" until it promulgated its first iteration of the rule in 2016. *NFIB*, 142 S.Ct. at 666. The Eighth Circuit tried to brush that aside, making the puzzling claim that there is "no authority suggesting that an agency's inaction defines the boundaries of that agency's statutory authority." App.20. In fact, this Court has said time and again that a "lack of historical precedent … is a telling indication that [a rule] extends beyond the agency's legitimate reach." *NFIB*, 142 S.Ct. at 666; *cf. Missouri*, 142 S.Ct. at 652 (relying on HHS' "longstanding practice … in implementing the relevant statutory authorities").

In sum, the Eighth Circuit did exactly what this Court has repeatedly told courts not to do: It "jumped the gun," *Kisor*, 139 S.Ct. at 2423, and "reflexive[ly] defer[red]" to HHS after "engag[ing] in cursory analysis," *Pereira v. Sessions*, 138 S.Ct. 2105, 2120 (2018) (Kennedy, J., concurring). The court simply "look[ed] to the above statutory provisions" and declared them "ambiguous" because they "are broadly worded to give HHS significant leeway in deciding how best to safeguard [long-term care facility] residents' health and safety and protect their dignity

and rights." App.18. That is not a serious effort to engage in the searching inquiry that *Chevron* step one requires. In reality, once the legal toolkit is opened even a crack, it is plain that there is no "genuine ambiguity" in the Medicare and Medicaid Acts when it comes to HHS' ability to restrict arbitration agreements. Simply put, it is exceedingly "unlikely" that "obtuse" language in those Acts was intended to empower HHS to treat arbitration as a dire threat to human health and safety. *CompuCredit*, 565 U.S. at 103-04. Even without *Epic* and its clear-statement rule, then, the decision below is profoundly wrong. With *Epic*, it is inexplicable.

II. The Questions Presented Are Exceptionally Important.

As the Court recognized in *Kindred*, the reasoning embraced by the decision below poses an existential threat to the FAA. Congress made a judgment long ago that the country should "abandon" its "hostility" to arbitration because it "offer[s]" substantial benefits, "not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic*, 138 S.Ct. at 1621. Yet according to the Eighth Circuit, federal agencies may literally *penalize* parties for entering into arbitration agreements, so long as they leave any hypothetical agreements that may slip through their coercive cracks technically enforceable.

If that were really the law, "[t]he FAA would then mean nothing at all." *Kindred*, 137 S.Ct. at 1428. After all, if the FAA were truly agnostic to unabashed efforts to coerce parties into abandoning arbitration agreements, then states would have free rein to deploy such anti-arbitration tactics too. Instead of

"condition[ing] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), a state could impose debilitating penalties on parties who propose agreements that lack them. Instead of declaring "unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes," *Marmet*, 565 U.S. at 531, a state could impose prison sentences on nursing-home owners who enter into them. Instead of "conditioning the enforceability of … arbitration agreements on the availability of classwide arbitration procedures," *Concepcion*, 563 U.S. at 336, a state could strip the operating license of any business that proposes one. These are no mere hypotheticals; California has already enacted a law that prohibits employers from requiring parties to sign an employment contract that includes an arbitration provision—a law that the Ninth Circuit largely sanctioned. *See Chamber*, 13 F.4th at 784 (Ikuta, J., dissenting).

And the problems will not end with "new devices and formulas" from HHS and the states. *Epic*, 138 S.Ct. at 1623. The U.S. Code is replete with generic rulemaking authority for all manner of federal agencies—authority that would easily support anti-arbitration measures under the Eighth Circuit's reflexive deference. For example, by the Eighth Circuit's logic, nothing would prevent the Department of Education from imposing a rule restricting arbitration agreements as reasonably "necessary to protect the interests of the United States." 20 U.S.C. §1087d(a)(6). In fact, the court openly embraced a

(now-vacated) decision that approved just such a rule. *See CAPPS*, 436 F.Supp.3d 333. Nor would anything prevent the Department of Labor from concluding that a rule restricting arbitration agreements is "reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. §§652(8), 655(b). Or the Department of Transportation from concluding that a rule restricting arbitration agreements is reasonably necessary to "meet the need for motor vehicle safety." 49 U.S.C. §30111(a). And so on and so on, as most agencies view their own regulatory priorities as more pressing than promoting arbitration.

The notion that arbitration agreements would continue to be used and enforced in the face of such coercive tactics is pure fiction. One need look no further than this case to see that. While the Eighth Circuit deemed it good enough for FAA purposes that any arbitration agreement entered into in violation of HHS' rule would be enforceable in court, that is not something that will ever happen in the real world. As HHS well knows, long-term care facilities cannot risk the severe sanctions that could follow for entering into a pre-dispute arbitration agreement that fails to comply with its new rule. Given the nature of the populations they serve, most facilities are largely funded by Medicare and Medicaid. Springdale, for example, receives 76.7% of its funding from Medicare and Medicaid, and The Maples receives 72.1%. *See* CA8.App.312, 324. The notion that such a facility "could rationally choose to accept" the risk of millions of dollars in civil penalties, denial of Medicare and Medicaid payments for care already provided, and even total exclusion from both programs as a cost of

exercising the contractual rights protected by the FAA blinks reality. App.50-53.

Indeed, if HHS really thought that a meaningful number of facilities would actually choose to opt out of Medicare and Medicaid rather than comply with its commands, then it undoubtedly would not have promulgated the rule. After all, it truly would be irrational for an agency charged with adopting rules that protect the health, safety, and welfare of people served those programs to prioritize restricting the use of arbitration agreements over ensuring that willing and able facilities are available to provide much-needed care. In reality, the agency knows that it has put proverbial "gun to the head" of long-term care facilities, giving them "no real option" but to abide by its commands. *Sebelius*, 567 U.S. at 581-82. Even if a facility were to inadvertently fail to comply with HHS' rule, moreover, the result would not be, as the Eighth Circuit seemed to think, enforcement of the agreement in court. The "corrective action" HHS would demand is that the facility abandon the agreement if it wants to continue participating in and receiving payments from Medicare and Medicaid. As a practical matter, then, there will never be any non-compliant agreement for a facility to try to enforce in court.

Making matters worse, some of HHS' commands may make it difficult for facilities to continue using pre-dispute arbitration agreements *at all*. It may be easy enough for HHS to verify whether an agreement "explicitly grant[s] 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)(3). But how can a facility be sure, *e.g.*, that

HHS will conclude that it "explained" an arbitration agreement "to the resident and his or her representative in a form and manner that he or she understands," *id.* §483.70(n)(2)(i), if a dispute about compliance with that new requirement arises when the time comes to invoke the agreement? The rule thus creates a very real risk that some facilities will abandon pre-dispute arbitration agreements entirely, rather than risk crippling sanctions for inadvertent noncompliance.

That result would be bad not just for facilities, but for residents too. As HHS itself previously recognized, "[p]re-dispute arbitration agreements are an excellent way for patients and providers to control costs, resolve disputes, and speed resolution of conflicts," as arbitration is "more prompt and less expensive than litigation." CA8.Add.52-53. Indeed, arbitration has particular utility as a cost-control measure in this context *precisely because* most long-term care facilities serve populations predominantly covered by Medicare and Medicaid. Since what facilities can charge residents is largely dictated by what those programs are willing to pay, a facility does not have the ability to increase its rates to offset increased litigation (or attendant insurance) costs. And whether a facility will be able to find some other way to offset those costs is anyone's guess. On top of everything else, then, HHS' anti-arbitration rule effectively imposes an unfunded mandate that could drive some long-term care facilities out of business entirely.

None of that makes any sense. It is plainly contrary to the FAA, and it is just as plainly contrary to this Court's cases. That the Eighth Circuit

embraced its crabbed view of the FAA and sweeping view of *Chevron* deference at the insistence of the federal executive branch leaves no doubt about the appropriate next step: The Court should grant review and reaffirm that the FAA is not, in fact, "helpless to prevent even the most blatant discrimination against arbitration." *Kindred*, 137 S.Ct. at 1428-29.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

KIRKMAN T. DOUGHERTY
HARDIN, JESSON
& TERRY, PLC
500 Rogers Ave.
Suite 500
Fort Smith, AR 72903

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
KASDIN M. MITCHELL
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
erin.murphy@kirkland.com

Counsel for Petitioners

May 13, 2022