No. 21-1455

In the Supreme Court of the United States

NORTHPORT HEALTH SERVICES OF ARKANSAS, LLC, DBA SPRINGDALE HEALTH AND REHABILITATION CENTER, ET AL.,
Petitioners,

v.

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

Motion for Leave to File Brief of Amici Curiae and Brief of Amici Curiae Alabama Nursing Home Association and the Florida Health Care Association in Support of Petitioner

E. Travis Ramey
Counsel of Record
Angela Cameron Smith
Brenton L. Thompson
BURR & FORMAN LLP
420 North 20th Street
Suite 3400
Birmingham, AL 35203
(205) 251-3000
tramey@burr.com
Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* ALABAMA NURSING HOME ASSOCIATION AND THE FLORIDA HEALTH CARE ASSOCIATION

This case presents an important issue, and *amici curiae* Alabama Nursing Home Association (ANHA) and the Florida Health Care Association (FHCA) are well-suited to provide additional insight into the broad implications of the United States Court of Appeals for the Eighth Circuit's decision and the Department of Health and Human Services (HHS) Rule at issue.

ANHA and FHCA have received the Petitioners' consent to file their brief. Although ANHA and FHCA informed the Respondents (through the Office of the Solicitor General) on June 10, 2022 of the intent to file an *amici curiae* brief and sought consent to its filing, they have received no response. Therefore, under Supreme Court Rule 37.2(b), ANHA and FHCA respectfully move this Court for leave to file the accompanying brief of *amici curiae* in support of the Petitioners.

ANHA and FHCA's interests stem from their representation of the interests of long-term care providers subject to the HHS Rule at issue. Petitioners focus on HHS's authority to issue the Rule. The petition says little, however, about the practical effect the Rule will have on nursing homes that provide long-term care services to Medicare and Medicaid enrollees. The Rule, and the Eighth Circuit's decision upholding it, will subject nursing homes to unduly burdensome costs and administrative requirements, which will in turn lead to decreased medical care to Medicare and Medicaid enrollees.

Amici's experiences will help the Court understand the practical consequences the Eighth Circuit's decision will have on thousands of nursing homes and perhaps hundreds of thousands of nursing-home residents. Thus, *amici* seek leave to file the attached brief urging the Court to grant the petition for writ of certiorari.

Respectfully submitted,

E. Travis Ramey
Counsel of Record
Angela Cameron Smith
Brenton L. Thompson
BURR & FORMAN LLP
420 North 20th Street
Suite 3400
Birmingham, AL 35203
(205) 251-3000
tramey@burr.com
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

The Alabama Nursing Home Association (ANHA) is a nonprofit trade association that represents 98% of the state of Alabama's licensed nursing-home facilities. Established in 1951, and with more than 225 members, ANHA is the voice of nursing homes, which care for more than 21,000 Alabama citizens.

The Florida Health Care Association (FHCA) is a non-profit trade association representing over 82% of the 690 nursing centers in Florida. It has a strong history of leadership and advocacy dating back to 1954.

ANHA, FHCA, and their members have a strong interest in the issues the petition presents.[1] Relying on the Federal Arbitration Act, most of ANHA's and FHCA's members have implemented arbitration agreements to reduce litigation costs and make the process by which they provide quality care more efficient. Doing so benefits both their members and the patients or residents for which their members provide care.

ANHA and FHCA file this brief urging the Court to grant the petition for certiorari and to re-

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[1] *Amici* provided notice to the parties on June 10, 2022 of intent to file this brief. Petitioners consented to the filing. Respondents have withheld consent. No counsel for any party authored this brief in whole or in part. No counsel for any party made a monetary contribution to fund the preparation or submission of this brief. And no one other than the *amici curiae* and their counsel made any such monetary contribution.

view the United States Department of Health and Human Services' authority to issue rules restricting the use of arbitration.

SUMMARY OF ARGUMENT

The Rule HHS promulgated, which places burdensome requirements on nursing homes who seek to arbitrate with their residents, leaves nursing homes in a lose–lose situation. They can attempt to retain their arbitration agreements with any residents who will sign them, but they must bear all of the additional administrative burdens and financial risks associated with complying with the Rule. Their other choice is to jettison arbitration as a method of resolving disputes and bear all of the costs and inefficiencies of litigating their disputes in court—costs and inefficiencies that arbitration avoids. With either choice, nursing homes must take on additional costs and burdens, something they hardly need given their already strained budgets and staffs.

The probable effect of the Rule will be that nursing homes will choose not to arbitrate patient disputes. That is likely HHS's intent. Unable to ban arbitration outright, HHS has promulgated a Rule that places such heavy burdens on using arbitration that many (if not most) nursing homes will simply abandon arbitration altogether.

Further, the Rule will affect a large number of nursing homes nationwide. Most nursing homes are certified to receive reimbursements from Medicaid, Medicare, or both. And due to their reliance on those reimbursements, they will lack the option to "opt out"

of those programs to maintain their arbitration agreements.

The Rule, however, is likely invalid. Courts have generally held that agency rules and state statutes that disfavor arbitration violate the FAA, and the Rule does just that. Moreover, only a shockingly broad reading of the Medicare and Medicaid Act would vest HHS with the authority to regulate something as tangentially related to patient health and safety as the use of arbitration agreements.

Given the significant effects the Rule will have on nursing home operations, providers need certainty on the validity of the Rule and the scope of HHS authority.

ARGUMENT

I. HHS's Rule will unduly burden and ultimately inhibit dispute resolution between nursing homes and Medicare and Medicaid enrollees.

In 2019, HHS promulgated a Rule that discriminates against the formation of arbitration agreements in long-term care facilities. *See* 84 Fed. Reg. 34718-01 (July 18, 2019) (codified at 42 C.F.R. § 483.70(n)) [the Rule]. The Rule singles out nursing homes and arbitration agreements for disfavored treatment in several ways.

- It dictates that arbitration agreements cannot be a condition for admission to a nursing home. 42 C.F.R. § 483.70(n)(1).

- It requires nursing homes to include a provision giving residents or their representatives thirty days to rescind the arbitration agreement. *See id.* § 483.70(n)(3).

- It requires nursing homes to inform residents that they do not have to sign the arbitration agreement as a condition of admission or as a condition of continuing to receive care at the facility. *See id.* § 483.70(n)4).

- It requires nursing homes to explain the agreement "to the resident or . . . her representative in a form and manner that . . . she understands." *Id.* § 483.70(n)(2)(i).

- It requires nursing homes to obtain the resident's or representative's "acknowledg[ment] that he or she understands the agreement." *Id.* § 483.70(n)(2)(ii).

- It imposes record-keeping and document-retention procedures for nursing homes that choose to arbitrate resident disputes. *See id.* § 483.70(n)(6).

Thus, the Rule imposes significant administrative burdens and costs on nursing homes that choose to arbitrate resident disputes. Further, failure to comply with those requirements can result in penalties, fines, and other enforcement action by the Centers for Medicare and Medicaid Services. *See id.* § 488.406.

The vague nature of many of the Rule's requirements compound those additional burdens and

costs. For example, the Rule provides for a resident's right to rescind within thirty days of signing any arbitration agreement. But the Rule itself gives no guidance on the form any rescission must take or the procedures required to effect a rescission, and at least as of today, neither has HHS. Similarly vague is the Rule's requirement that a nursing home explain the agreement to a resident or her representative "in a form and manner that he or she understands." The Rule and HHS again provide no guidance, leaving nursing homes to guess at how to comply with this requirement.

And it isn't as though nursing homes needed additional burdens. As it is, providing care to residents who pay through Medicare or Medicaid requires nursing homes to carry significant burdens—compliance with all the requirements of 42 C.F.R. Part 483, Subpart B. Those requirements are detailed and numerous. Compliance is costly and arduous. Untold numbers of traps and pitfalls await even the most diligent of providers, each of which carries with it the potential for significant civil and regulatory liability. *See* 42 C.F.R. § 488.406. Thus, ensuring that tens of thousands of Medicare and Medicaid enrollees have access to quality medical care involves great risks and costs.

At a time when facilities are facing significant staffing and budgeting concerns, adding another compliance burden shifts the focus away from the provision of care, potentially harming nursing-home patients. Even pre-COVID 19, many nursing homes faced significant budgetary and staffing challenges, and those challenges have become all the greater

post-COVID. The Rule HHS promulgated and the Eighth Circuit upheld robs both nursing homes and their residents of the potential cost and efficiency benefits of arbitration,[2] further straining already strained budgets and further burdening already overworked nursing-home staffs.

Great risks and costs, but not so much great rewards. In most nursing homes, Medicaid covers the majority of residents. For example, in Alabama almost 70% of nursing home residents are Medicaid beneficiaries. Meanwhile, Medicaid reimbursements cover only roughly 70 to 80 percent of the actual cost of care for nursing home residents. *See* Press Release, American Health Care Association/National Center for Assisted Living, *Financial Challenges Continue to Affect Nursing Homes, Emphasizing Need for Higher Medicaid Reimbursement Rates* (Oct. 14, 2020) (noting that more than half of nursing home nationwide were operating at a loss as of October 14, 2020), https://tinyurl.com/2p9ywup7.[3] In other words, participating nursing homes, in service of

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[2] *Cf.* Nam D. Pham & Mary Donovan, *NDP Analytics, Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* (2022) (finding, in a study commissioned by the United States Chamber of Commerce, that arbitration is more efficient than traditional litigation and that claimants in arbitration prevail on their claims at a higher rate and recover higher awards than do plaintiffs in traditional litigation), https://ssrn.com/abstract=4077421.

[3] *See also generally* Stephen Zuckerman, Laura Skopec & Joshua Aarons, *Medicaid Physician Fees Remained Substantially Below Fees Paid by Medicare in 2019*, 40 J. Health Aff. 343 (2021), https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00611.

critical federal and state health-care programs, already jump through more hoops and expose themselves to more liability, all to receive lower reimbursements than their commercial counterparts. Arbitration eases the burdens, both in time and expense, of Medicare and Medicaid compliance.

If upheld, the Rule and the Eighth Circuit's decision will have a chilling effect on nursing homes and their residents using arbitration to resolve disputes. With the significant burdens providers face to continue to use arbitration, the disfavorable treatment arbitration receives under the Rule will likely result in nursing homes choosing not to avail themselves of arbitration at all. Deprived of a dispute resolution method that decreased the time and expense of litigation, providers and their patients will face increased financial burdens.

From HHS's perspective, this chilling effect is likely a feature, not a bug. That is, HHS intends for the Rule to dissuade nursing homes from using arbitration agreements. Having already been told that it could not ban arbitration in nursing home admission agreements, HHS designed the Rule to achieve indirectly what it cannot do directly. It cannot ban arbitration agreements, so it seeks to make their use so burdensome that nursing homes will have no choice but to stop using them.

But regardless of HHS's intent, the Rule places nursing homes in a lose–lose situation. They can choose to forgo arbitration and bear the additional costs of litigation. Or they can continue to use arbitration and bear the costs and risks of attempting to comply with the Rule, including the risks of fines or

exclusion from Medicare and Medicaid for noncompliance.

The resulting problems are not hypothetical ones. For example, almost every single nursing home in Alabama is either Medicare or Medicaid certified. Most are dually certified. Therefore, almost every member of ANHA is subject to the Rule. Those facilities rely heavily on federal reimbursement—on average, more than 70% of a nursing home's revenue comes from Medicare and Medicaid. Whatever the Eighth Circuit may believe, opting out of Medicare or Medicaid to avoid the Rule is not feasible given that Medicare and Medicaid cover the majority of the residents cared for in these facilities, and no other payor source is available. Likewise, it is irrational to assume nursing homes will choose to violate the Rule and suffer fines and possible exclusion from the Medicare and Medicaid program, as the Eighth Circuit suggests.

Further, the issue before the Court is not limited to providers in the Eighth Circuit. Instead, it affects nursing homes throughout the country, many of whom will struggle with the HHS Rule and its effect on their operations. ANHA and FHCA members have seen the benefits of arbitration. They want to continue to arbitrate and to decide how best to implement arbitration in their facilities without interference from HHS or other federal agencies.

Nor is there anything questionable or nefarious about nursing homes choosing arbitration to resolve disputes. Studies have shown that that arbitra-

tion is less costly and shorter than civil litigation.[4] Additionally, there is nothing indicating that the outcomes of arbitrations between nursing homes and their residents are less fair than arbitration in other contexts or biased in favor of the nursing home.

Most of all, however, to make key business decisions, ANHA and FHCA members—other nursing home providers, too—need certainty on the validity of the Rule and the scope of HHS's authority. Those decisions include allocating resources for administrative functions and budgeting for the costs of expensive and lengthy litigation.

II. The HHS Rule conflicts with the FAA.

Other circuits have held that agency rules and state legislation that restrict arbitration violate the FAA. Here, the Eighth Circuit held that such anti-arbitration rules are acceptable in the context of nursing home admission agreements. (App.11, 13–14.) ANHA and FHCA support the Petitioners' position that the Eighth Circuit's holding is error and that the Rule contradicts the FAA.

This Court has stated over and over that the FAA prohibits rules disfavoring arbitration. The Rule the Eighth Circuit upheld is an example of just such disfavored treatment. And it will result in nursing homes not choosing a valuable and efficient form of dispute resolution.

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[4] *See generally* Pham & Donovan, *supra* note 2.

III. The Eighth Circuit's decision creates uncertainty and concern about the breadth of HHS's authority.

The Eighth Circuit's decision also sows seeds of uncertainty about limitations on HHS's authority. No statute expressly vests authority in HHS to restrict the use of arbitration; but the Eighth Circuit empowers HHS to do so by giving an overly broad interpretation of the Medicare and Medicaid Act. *See* 42 U.S.C. §§ 1395i-3(c)(1)(A)(xi), 1396r(c)(1))A)(xi).

According to the Eighth Circuit, HHS has authority to promulgate rules that protect the health and safety of residents in skilled nursing facilities, so it has authority to issue the Rule. (*See* App.16.) But neither HHS nor the Eighth Circuit has adequately explained how including arbitration agreements in admission agreements affects the health and safety of Medicare or Medicaid patients. There is also no evidence of a correlation between quality of care and the use of arbitration agreements.

Further, if HHS has authority to regulate something as tangential to patient care as the use of arbitration agreements, its regulatory authority must be shockingly broad. Indeed, under the Eighth Circuit's decision, it is unclear what, if anything, falls outside the category of "health" and "safety" such that HHS could not use its rulemaking authority to regulate it.

Because the scope of HHS's regulatory authority has a significant effect on nursing home operations, nursing homes and their patients would benefit from a definitive assurance that HHS does not

have unfettered discretion to implement arbitrary rules that have significant impact on their operations.

CONCLUSION

For these reasons, ANHA and FHCA request that the Court grant certiorari.

Respectfully submitted,

E. Travis Ramey
Counsel of Record
Angela Cameron Smith
Brenton L. Thompson
BURR & FORMAN LLP
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Suite 3400
Birmingham, AL 35203
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Counsel for Amici Curiae