NO. 21-1455

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Eighth Circuit held that the government may burden and penalize the formation of valid and enforceable arbitration agreements to its heart's content, and the Federal Arbitration Act (FAA) has nothing to say about it. In addition, the court held that federal agencies may take advantage of this apparently gaping hole in the FAA, which specifically addresses and protects arbitration agreements, so long as they have generic rulemaking authority (which they always do), and courts must defer to their anti-arbitration agenda under *Chevron*—all while skipping over the serious pre-deference statutory analysis that any proper understanding of *Chevron* demands. That decision plainly conflicts with this Court's cases and decisions from other circuits, and it threatens to render the FAA a dead-letter whenever a federal agency deems arbitration a hindrance to accomplishing its mission.

The Department of Health and Human Services (HHS) does nothing to disturb the conclusion that certiorari is warranted. HHS nowhere denies that the decision below empowers federal agencies to literally punish parties for forming or enforcing arbitration agreements. Instead, it presses the risible argument that its rule welcomes arbitration despite denouncing it as "abusive." And while HHS denies that the decision below conflicts with *Kindred Nursing Centers L.P. v. Clark*, 137 S.Ct. 1421 (2017), it ignores language in *Kindred* confirming otherwise, as well as other decisions contradicting its position—including decisions issued after the filing of the petition. HHS claims that the circuit split is illusory, but only on the

remarkable theory that federal agencies, unlike states, have free rein to frustrate the objectives of federal statutes they do not administer. And although the decision below hinges entirely on *Chevron* deference, HHS barely mentions *Chevron* and never denies that the court below failed to exhaust all tools of statutory interpretation before deferring.

HHS is thus left trying to downplay this case's importance to the long-term-care industry, but it apparently overlooked the amicus briefs belying that claim, and it never disputes that the decision below is a roadmap to undermine the FAA more generally. Virtually all federal agencies elevate their own specialized missions over the policies embodied in the FAA, and many believe that unbridled private litigation is complementary to their mission, while efficient and private resolution via arbitration is not. With other federal agencies already proposing their own anti-arbitration rules, now is the time, and this is the case, to decide whether the FAA is truly "helpless to prevent even the most blatant discrimination against arbitration." *Id.* at 1428-29.

I. The Decision Below Is Irreconcilable With The FAA And Decisions From This Court And Other Circuits.

1. HHS does not dispute that it promulgated its rule to "accomplish the same goals," 84 Fed. Reg. 34,718, 34,732 (July 18, 2019), as an earlier rule declaring pre-dispute arbitration agreements "unconscionable," 81 Fed. Reg. 68,688, 68,792 (Oct. 4, 2016). HHS concedes that its rule addresses the perceived "disadvantages" of arbitration, BIO.6, such as its purportedly "abusive" tendencies, BIO.22, 27.

HHS does not deny that, to accomplish that objective, it has imposed threshold restrictions that "apply only to arbitration." *Kindred*, 137 S.Ct. at 1425-26. And HHS acknowledges that long-term care facilities that form and enforce arbitration agreements that do not meet with its approval face draconian punishment, including "civil penalties" and "termination" from Medicare and Medicaid. BIO.3.

Remarkably, HHS nevertheless disclaims any "'hostility to arbitration,'" insisting that its rule is "measured" and simply ensures that residents form arbitration agreements on a "willing and informed" basis. BIO.16. That argument defies this Court's cases. The Montana legislature presumably thought it took an equally "measured approach," BIO.16, when it permitted parties to form a contract containing an arbitration clause so long as notice of it appeared in "underlined capital letters on the first page of the contract," yet this Court still held that "threshold limitations placed specifically and solely on arbitration provisions" are "antithetical" to the FAA, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 688 (1996). And the Kentucky Supreme Court presumably thought its unique-to-arbitration clear-statement rule still "allow[ed] nursing homes to continue to make and enforce pre- and post-dispute arbitration agreements with residents," BIO.27, yet this Court still detected the obvious "hostility to arbitration," *Kindred*, 137 S.Ct. at 1427-28. Just so with HHS' rule, which imposes a host of burdensome requirements that do not apply to contracts generally. Indeed, it is hard to understand how HHS can deny hostility to arbitration with a straight face when it

equates an arbitration agreement to a license to provide "substandard care" with impunity. BIO.11.

2. Because its rule unabashedly "singles out arbitration agreements for disfavored treatment," *Kindred*, 137 S.Ct. at 1425, HHS shifts to arguing that the FAA is indifferent to its particular brand of anti-arbitration hostility. Like the Eighth Circuit, HHS contends that the FAA ensures only that arbitration agreements are valid, irrevocable, and enforceable, and it is "beyond the scope of the FAA" if states and federal agencies impose "penalties" on parties who form or enforce those agreements without complying with special arbitration-specific rules burdening their formation. BIO.15, 17. That too-clever-by-half argument is irreconcilable with this Court's cases and decisions from other circuits.

Indeed, HHS' theory is just a twist on the argument in *Kindred* that "the FAA has 'no application' to 'contract formation issues.'" 137 S.Ct. at 1428. This Court disagreed, holding that rules "tailor-made" to "specially impede[]" the formation of arbitration agreements "flout[]" the FAA. *Id.* at 1427, 1429. HHS declares its rule consistent with *Kindred* because the rule there rendered the formation of arbitration agreements "invalid," whereas its rule "substantial[ly]" discourages the formation of valid arbitration agreements. BIO.15, 18. But a rule can "impede" the formation of arbitration agreements without precluding it outright. And HHS never disputes that "[a]dopting [its] view would make it trivially easy" to "wholly defeat" the FAA. 137 S.Ct. at 1428.

Kindred is hardly the only case with which HHS' position conflicts. In *Preston v. Ferrer*, 552 U.S. 346, 356 (2008), the Court examined whether a law that "merely postpones arbitration" violates the FAA. Like HHS, the respondent argued that there was no FAA conflict because postponing arbitration "does not preclude or invalidate an otherwise enforceable arbitration agreement." Br. for Respondent 14, *Preston*, No. 06-1463 (U.S. filed Dec. 3, 2007). This Court disagreed. 552 U.S. at 358; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011). And just months ago, this Court reiterated that rules that "coerce parties into withholding … claims from arbitration" are "incompatible with the FAA." *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906, 1917 n.3, 1924 (2022). That perfectly describes HHS' rule.

With the cases stacked against it, HHS criticizes petitioners for insufficient reliance on statutory text. BIO.16-17. That is perplexing. As HHS agrees, §2 of the FAA speaks to the validity, irrevocability, and enforceability of arbitration agreements, and the entire point of HHS' rule is to burden and penalize the formation and enforcement of valid, irrevocable, and enforceable arbitration agreements. The textual basis of petitioners' claims is thus self-evident, and the cases confirm that the government need not outright prohibit forming or enforcing arbitration agreements to trigger §2. Nor is HHS correct to claim that the FAA's pro-arbitration policy is irrelevant. HHS cites *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1714 (2022), but *Morgan*'s "sole holding" is that courts "may not make up a new procedural rule" to "favor arbitration" "based on the FAA's 'policy favoring arbitration'" alone. The whole thrust of the FAA remains pro-

arbitration, and this case, of course, concerns a rule avowedly *disfavoring* arbitration. And *Southwest Airlines Co. v. Saxon*, 142 S.Ct. 1783, 1792 (2022), reaffirmed that courts *can* "rel[y] on statutory purpose" when, as here, "that 'purpose is readily apparent from the FAA's text.'"

3. HHS' effort to deny the circuit split is equally unavailing. HHS does not dispute that the First Circuit has held that penalizing parties for forming arbitration agreements is "patently inhospitable to arbitration," "too clever by half," and—"without much question"—"contrary to the policies of the FAA." *Secs. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1117, 1122-24 (1989). Nor does HHS dispute that *Connolly* rejected—as "so seriously flawed that it cannot be countenanced"—the argument that such restrictions are permissible because they are "not addressed to … validity and enforceability." *Id.* at 1123-24. And HHS does not dispute that the Fourth Circuit adopted *Connolly*'s reasoning and held that "special rules" that "discourage" or "unreasonably burden the ability to form arbitration agreements" conflict with the FAA. *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 723-24 (1990).

Instead, HHS tries to dismiss *Connolly* and *Saturn* as involving state laws implicating "obstacle preemption," which purportedly has "no direct analogue" in the context of federal agencies. BIO.24. That argument was weak before *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). All preemption stems from the dictates of federal law. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 79 (1987). And a federal agency, no less than a state, may not actively

"frustrate the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). But after *Epic* and its demand that more general federal law not undermine arbitration unless Congress "clearly and manifestly" authorizes that result, 138 S.Ct. at 1624, that argument is a non-starter.

It also gets matters backward, as states enjoy nearly plenary power and have a broad range of policy objectives. Federal agencies, by contrast, tend to be focused on narrower objectives that have nothing to do with the FAA and its policies. Federal agencies are thus predisposed to view arbitration as a hindrance, especially if they view private litigation as complementary to their enforcement efforts. They have little fealty to the FAA and even less competence to administer it, let alone "harmonize" it with their own organic statutes. That is a job for the courts. *Id.* It thus would be a bizarre doctrine indeed that presumed that federal agencies have greater power than states to interfere with the FAA's objectives.

Turning to *Chamber of Commerce of the United States v. Bonta*, 13 F.4th 766, 781 (9th Cir. 2021), *reh'g granted, opinion withdrawn*, No. 20-15291, 2022 WL 3582697 (9th Cir. Aug. 22, 2022), HHS does not dispute that the Ninth Circuit unanimously held that "impos[ing] civil … sanctions on individuals or entities for the act of executing an arbitration agreement" "directly conflicts with … the FAA." Instead, HHS applauds the novel two-judge holding (over Judge Ikuta's strenuous objection) that penalizing the *attempted* formation of arbitration agreements is acceptable even if penalizing their *actual* formation is

not. BIO.25-27. That does not help HHS, as its rule punishes the latter, not the former. And in all events, the panel has now granted rehearing to reconsider that holding in light of this Court's instruction that efforts to "coerce parties into withholding … claims from arbitration" are "incompatible with the FAA." *Viking River*, 142 S.Ct. at 1924; *see Chamber*, 2022 WL 3582697, at *1. Thus, the "clearly wrong" holding, *Chamber*, 13 F.4th at 785 (Ikuta, J., dissenting), that HHS embraces appears doomed, while the clearly right holding that deepens the circuit split and would doom HHS' rule undoubtedly will survive.

Ultimately, then, *Connolly*, *Saturn*, *Chamber*, and this case all concern the same core question: whether the FAA is indifferent to rules that burden and penalize the formation of valid and enforceable arbitration agreements. The First, Fourth, and Ninth Circuits have said yes. The Eighth Circuit has said no. The Eighth Circuit is wrong.

4. HHS' defense of the Eighth Circuit's *Chevron* analysis suffers from the same defects as its FAA analysis—and then some. HHS does not deny that the Medicare and Medicaid Acts do not "clearly and manifestly" empower HHS to override the FAA. *Epic*, 138 S.Ct. at 1624. It just recycles its argument that there is no "conflict" because its rule punishes parties for forming arbitration agreements rather than invaliding the agreements they form. But even accepting HHS' miserly reading of the FAA, federal statutes do not have to be in strict and irreconcilable conflict to have bearing on each other's meaning. Courts thus have no license to ignore the FAA's manifestly pro-arbitration policy when asking

whether Congress has empowered an agency to disfavor arbitration agreements.

Even setting aside the FAA, HHS does not deny that the Eighth Circuit failed to "exhaust all the 'traditional tools' of construction," *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019), before reflexively resorting to *Chevron* deference. Instead, HHS ignores *Chevron* altogether, mentioning it only once while describing petitioners' arguments. BIO.21. Avoiding *Chevron* is understandable when courts can resolve cases without it, *see, e.g.*, *Am. Hosp. Ass'n v. Becerra*, 142 S.Ct. 1896 (2022), but it is inexplicable when defending a decision that relied entirely on *Chevron* deference—at HHS' invitation, no less.

Unwilling to bring itself to utter the word "deference," HHS is left arguing that generic provisions concerning health, safety, and the like are sufficiently "capacious" to *unambiguously* authorize anti-arbitration rules. BIO.21-22. That argument is dubious standing alone, but it is dead on arrival given Congress' use of express language when empowering other agencies to restrict arbitration. HHS tries to distinguish those statutes as purportedly authorizing limitations only on "enforceability." BIO.20 n.4. In fact, they make no mention of "enforceability," but rather authorize agencies to "prohibit or impose conditions or limitations" on the use of arbitration agreements, 12 U.S.C. §5518(b); 15 U.S.C. §78*o*(o). That is precisely what HHS' rule does.

HHS next emphasizes provisions regarding a resident's "right to voice grievances" and "prompt efforts" by long-term care facilities to resolve them. BIO.23 (citing 42 U.S.C. §§1395i-3(c)(1)(A)(iv),

1396r(c)(1)(A)(vi)). But the Eighth Circuit never examined these provisions, and HHS never explains why they allow it to disfavor arbitration. Nor could it: The FAA embodies Congress' view that parties not only *can* adequately air grievances in arbitration, but can do so even *more* expeditiously than in litigation—as HHS has previously recognized. CA8.Add.52-53.

Finally, HHS claims support from other purportedly "longstanding … regulations" regarding "potentially abusive contracts," like one pertaining to "liability waivers for property loss." BIO.22-23 (citing 42 C.F.R. §483.15(a)(2)(iii)). But that property-loss regulation is from 2016 (hardly "longstanding"), and Congress has never announced an emphatic pro-property-loss-waivers policy. It thus remains "more than a little doubtful" that, in 1987, "Congress would have tucked into the mousehole of" generic health-and-safety language "an elephant" that "trample[d] the work done by" the then-62-year-old FAA, which HHS "doesn't even administer." *Epic*, 138 S.Ct. at 1627.

HHS' argument is even weaker given that, for decades, HHS never invoked the health-and-safety language to burden or penalize the use of arbitration agreements.[1] As HHS does not dispute, "this 'lack of historical precedent' … is a 'telling indication'" that its

[1] HHS observes that it has "made clear that discharging or retaliating against residents for failing to sign or comply with binding arbitration agreements" would "violat[e] residents' rights." BIO.5. But the Medicare and Medicaid Acts *explicitly* prohibit the "transfer or discharge" of a "resident" except in enumerated circumstances that do not include those. 42 U.S.C. §§1395i-3(c)(2)(A), 1396r(c)(2)(A).

rule "extends beyond [its] legitimate reach.'" *NFIB v. OSHA*, 142 S.Ct. 661, 666 (2022) (per curiam). More telling still, although members of Congress have pressed proposals to alter this dynamic, none succeeded, Pet.7, confirming that HHS has (yet again) improperly "decided to do what Congress had not," *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2486 (2021) (per curiam).

II. The Questions Presented Are Exceptionally Important.

The decision below poses an existential threat to the FAA. HHS does not dispute that it makes it "trivially easy" for federal agencies to "undermine" the FAA. *Kindred*, 137 S.Ct. at 1428. Nor could it, as such efforts are already afoot. In July, for instance, the Department of Education invoked its generic authority to "protect the interest of the United States and to promote the purposes of the" Federal Direct Loan Program—the largest source of federal aid—to propose a rule "prohibit[ing] the use of mandatory arbitration" and expelling noncompliant institutions. 87 Fed. Reg. 41,878, 41,914 (July 13, 2022). Absent certiorari, FAA-defeating rules like HHS' will proliferate, as virtually every federal agency prioritizes its own pet policies over arbitration, and many view private litigation as a force multiplier for their limited enforcement resources.

Instead of addressing the broader threat to the FAA, HHS insists that long-term care facilities need not abandon FAA-protected activity because they can form and enforce arbitration agreements in defiance of its rule and incur penalties like termination from Medicare and Medicaid. BIO.27-28. HHS must not

live in the real world. In reality, facilities that overwhelmingly depend on Medicare and Medicaid funding will have no choice but to do exactly what HHS wants, rather than commit economic suicide. And although HHS speculates that "other participating facilities" may not share the views of the approximately 100 petitioners that its rule is "unduly 'burdensome,'" BIO.27-28, it apparently neglected to read petitioners' amicus briefs, *see* Ark. Health Care Ass'n Amicus Br.; Ala. Nursing Home Ass'n and Fla. Health Care Ass'n Amicus Br.

If anything, those burdens are clearer now than ever. In June, HHS issued implementing guidance weighing in at 17 pages. That guidance contemplates extensive in-person interviews and record reviews to ensure that arbitration agreements are compliant, and it promises to bring any noncompliant facilities into line through "plans of correction" that require replacing any non-compliant agreements with an offer of a compliant one. CMS, *Appendix PP—Guidance to Surveyors for Long Term Care Facilities* 680-96 (June 29, 2022), https://go.cms.gov/3PIbdC4. HHS' agreements-remain-enforceable argument thus is smoke and mirrors, as HHS undoubtedly will wield its enforcement power to ensure that no enforcement ever happens. Indeed, its rule makes formation of arbitration agreements so onerous that many facilities will likely forgo them altogether—just as HHS encouraged petitioners to do. CA8.App.633. Nothing in the Medicare or Medicaid Acts begins to justify such a blatant end-run around the FAA. Review of the Eighth Circuit's (and HHS') extraordinary conclusion to the contrary is amply warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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