No. _____

In the Supreme Court of the United States

CHANCELLOR SENIOR MANAGEMENT, LTD.,
Petitioner,

v.

LOUISE MCGRAW, by and through her daughter, NANCY REUSCHEL, as power of attorney, and CHARLOTTE RODGERS, by and through her daughter, LORETTA HOLCOMB, as power of attorney, on their own behalf and all others similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the West Virginia Court's determination that the parties' arbitration agreement is invalid and unenforceable because "it fails to 'comply with its own stated standards,'" on the basis that it does not satisfy the peculiar requirements of AHLA Rule 2.1, conflicts with the command of § 2 of the FAA that agreements to arbitrate shall be "valid, irrevocable and enforceable"?

II.

Whether, under circumstances in which an arbitration forum suggested or selected in the parties' arbitration agreement becomes unavailable, § 5 of the FAA mandates that a court "shall designate and appoint an arbitrator" and, thus, preserve the validity and enforceability of the core agreement to arbitrate?

LIST OF PARTIES TO PROCEEDING

The parties to the proceeding are as named in the caption of this Petition.

CORPORATE DISCLOSURE STATEMENT

The corporate parent of the Petitioner is Chancellor Health Partners, Inc. No other entity owns ten percent (10%) or more of the stock of that corporation.

LIST OF RELATED PROCEEDINGS

This Petition flows from judgments rendered as set forth below:

In the Supreme Court of Appeals of West Virginia
Chancellor Senior Management, Ltd. v. Louise McGraw, et al.
Appeal No. 20-0794
Opinion filed: March 22, 2022
Mandate entered: April 22, 2022

In the Circuit Court of Raleigh County, West Virginia
Louise McGraw, et al. v. Chancellor Senior Management, Ltd.
Civil Action No. 16-C-698-D
Order re: Arbitration entered: October 2, 2020

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A copy of the Order re: Arbitration entered by the Circuit Court of Raleigh County, West Virginia is reprinted at [25a-33a]. The Order is unreported and unpublished.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the April 22, 2022 Mandate of the Supreme Court of Appeals of West Virginia, which rendered final its March 22, 2022 Opinion, by writ of certiorari under the provisions of 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to

> submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

9 U.S.C. § 2.

Section 5 of the FAA provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to available himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5.

PETITION FOR A WRIT OF CERTIORARI

Introduction

The Federal Arbitration Act ("FAA") was enacted nearly 100 years ago as Congress' response to a perceived, wide-spread, judicial hostility to the enforcement of arbitration agreements. *AT&T Mobility LLC, v. Concepcion*, 563 U.S. 333, 338 (2011); *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). Decades of jurisprudence have yet to fully eliminate that hostility. *See*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012). The decision in this case demonstrates that there remain issues warranting further guidance and clarification by this Court.

In the instant case the Supreme Court of Appeals of West Virginia ("West Virginia Court") held that a provision in the parties' arbitration agreement that "Any arbitration conducted pursuant to this Section X shall be conducted…in accordance with the American Health Lawyers Association ('AHLA') Alternative Dispute Resolution Service Rules of Procedure for Arbitration" constituted an internal standard of enforceability. The West Virginia Court reached this conclusion because *after* the execution of the parties' agreement, the AHLA adopted administrative Rule 2.1, which contains peculiar requirements that must be met by an arbitration agreement in order for AHLA to administer an arbitration. Because the parties' agreement does not satisfy these requirements, the West Virginia Court held that the agreement "fails to 'comply with its own stated standards' set forth in the

AHLA Rules; indeed, the arbitration provision is internally inconsistent with the requirements of [AHLA] Rule 2.1." 22a. On that basis and contrary to § 2 of the FAA's command that arbitration agreements are generally "valid, irrevocable, and enforceable," the West Virginia Court held that "the arbitration agreement was not valid." *Id*.

Section 5 of the FAA was designed by Congress to facilitate the enforcement of agreements to arbitrate, despite a "lapse" in the appointment of an arbiter; even though the federal circuit courts of appeals are strongly divided on when, how, and under what circumstances § 5 applies to the unavailability of a designated forum, and the district courts' and state courts' decisions are flatly irreconcilable. The West Virginia Court took the view that the parties' arbitration agreement makes the AHLA the exclusive forum for any arbitration, even though the language of the parties' agreement clearly does not say so, and then gave no shrift at all to the mandate of § 5 of the FAA, tersely holding that the unavailability of the AHLA rendered the parties' arbitration agreement invalid and unenforceable. Whatever may be the correct construction of § 5, the West Virginia Court's handling of the issue cannot reconcile with Congress' intent.

The West Virginia Court's decision manifests exactly the sort of hostility toward the enforcement of private arbitration agreements that the FAA was designed to remedy. Petitioner respectfully requests that this Court issue a writ of certiorari to resolve the split of authority and provide guidance on the proper

standards for application of § 5 of the FAA, and to correct a decision of the West Virginia Court that is inconsistent with federal law as embodied by § 2 and § 5 of the FAA.

STATEMENT OF THE CASE

A. The Nature Of The Claims

This a putative class action brought on behalf of elderly residents of four assisted living residences located in West Virginia. Petitioner, defendant below, is under contract to the owner-operator to provide certain management services for residencies. Respondents, the representative plaintiffs below, are the daughters of former residents who are now deceased. Respondents allege that the Petitioner, whom they mistakenly alleged to be licensed owner/operators of the residences deliberately provided insufficient staffing levels to deliver the levels of service promised in the written residency agreements entered into with all residents at all four residences over a 4-year period. Respondents allege that this constitutes multiple violations of the West Virginia Consumer Protection Act, West Virginia Code § 46A-1-101 *et seq*.

B. Facts Material To The Questions Presented

Respondents' mothers were both residents of the Villages at Greystone, an assisted living residence located near Beckley, West Virginia. As is statutorily required under West Virginia's Assisted Living Residence statute, West Virginia Code § 16D-5D-1 *et*

seq., Respondents' mothers, like every other resident in the putative class, were admitted to residency under written residency agreements. Their residency agreements were executed in April 2013 and July 2014, respectively, and are identical. Section X of the agreements contain arbitration provisions which require arbitration of any dispute, claim or demand arising under the residency agreements or otherwise relating to their residency at the Greystone. Subsection C, entitled "ALL OTHER DISPUTES," states in relevant part:

> Any legal controversy, dispute, disagreement or claim of any kind arising out of, or related to this Agreement, or the breach thereof (other than those actions addressed in Sections X.A. and X.B. of this Agreement), shall be settled exclusively by binding arbitration as set forth in Section X.D. below. This arbitration clause is meant to apply to all controversies, disputes, disagreements or claims.

Subsection D, entitled "CONDUCT OF BINDING ARBITRATION," states:

> You understand that by hereby agreeing to arbitrate legal disputes means that you are waiving your right to sue in a court of law and to a trial by jury. You agree to arbitrate disputes by signing this Agreement. The decision of the arbitrator(s) shall be final and binding and may not be appealed nor may it be stayed.

> The arbitration will be conducted as follows: Any arbitration conducted pursuant to this Section X shall be conducted in Cabell County, West Virginia *in accordance with* the American Health Lawyers Association ("AHLA") Alternative Dispute Resolution Service Rules of Procedure for Arbitration. The award rendered by the arbitrator(s) shall be final, and judgment on the award shall be entered in accordance with applicable law in any court having jurisdiction thereof. The parties understand that arbitration proceedings are not free and that any person requesting arbitration will be required to pay a filing fee to AHLA and other expenses; however, the parties agree to divide the arbitration expenses equally. If you would like information regarding AHLA's Alternative Dispute Resolution Service, you may contact AHLA at (202) 833-1100 or Suite 600, 1025 Connecticut Avenue NW, Washington, DC 20036-5405. (Emphasis added).

The American Health Lawyer's Association ("AHLA") is an educational organization devoted to legal issues in the health care field. The AHLA offers dispute resolution services, including the administration of consumer arbitrations, and periodically publishes "Rules of Procedure for Consumer Arbitration." Sometime after the execution of the above-referenced residency agreements in

2013-14, the AHLA adopted administrative rules which included requirements that must be met in order for the AHLA to administer an arbitration.

AHLA Rule 2.1 states as follows:

> To file a claim, a party must complete and submit the claim form on the AHLA web-site, pay the applicable fees listed in **Exhibit 3** and on the form, provide a statement describing the issue(s) to be arbitrated, and either provide a copy of an agreement to arbitrate or a court order requiring arbitration of the claim under the Rules or cite a statute or regulation authorizing or requiring arbitration under the Rules. If the agreement to arbitrate was signed before the events giving rise to the claim occurred, the agreement must:
>
> (1) be a separate document conspicuously identified as an agreement to arbitrate;
>
> (2) include the following notice, or substantially similar language, in a conspicuous location:
>
> **Voluntary Agreement to Arbitrate**
> **THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ IT CAREFULLY BEFORE SIGNING.**
> **This is a voluntary agreement to resolve any dispute that may arise in the future between the parties under the American Health Lawyers**

> **Association's Rules of Procedure for Arbitration. In arbitration, a neutral third party chosen by the parties issues a final, binding decision. When parties agree to arbitrate, they waive their right to a trial by jury and the possibility of an appeal.**
>
> (3) state conspicuously that the health care entity will provide the same care or treatment, without delay, if the agreement is not signed; and
>
> (4) explicitly grant the resident or his or her representative the right to rescind the agreement within 30 calendar days of signing it (unless a state law applicable to contracts generally grants a longer period for revocation).

Where a consumer claims that an arbitration agreement fails to comply with the requirements of Rule 2.1, AHLA Rule 2.4 provides for a hearing on whether the AHLA will administer the arbitration. Rule 2.4(b) states:

> DETERMINATION. Within ten (10) days after the preliminary hearing is closed, the arbitrator will issue an award determining whether the agreement to arbitrate satisfies the requirements set forth in Rule 2.1. If the arbitrator determines that the agreement does not satisfy the requirements, the arbitrator will issue a Final Award terminating the arbitration

> *without prejudice* to any claims or defenses. The Final Award may order the Health Care Entity to pay all the costs and fees of arbitration, including the filing fee. If the arbitrator determines the agreement satisfies the requirements, the arbitrator will issue an interim award to that effect. *Any determination under this section not to administer the arbitration shall not be considered a determination on the validity of the arbitration agreement, and the parties may arbitrate in another forum if their agreement so provides or if they otherwise agree.* (Emphasis added).

Notably, in addition to giving the parties' discretion to use non-AHLA forums if the AHLA declines to conduct the arbitration, the AHLA Rules contain no express prohibition that would prevent a court from appointing an arbitrator unaffiliated with the AHLA.

C. Proceedings On Petitioners' Motion To Compel Arbitration

Given that both relevant residency agreements clearly contained valid, written, arbitration agreements which embraced Respondents' claims filed in the Circuit Court of Raleigh County, West Virginia, Petitioner moved to compel arbitration pursuant to § 2 of the FAA. Respondents argued that the arbitration agreements were unenforceable because the AHLA was the designated arbitral forum and would not administer the arbitration due to the

non-compliance with AHLA Rule 2.1; most specifically, the "separate document" requirement. In response, Petitioner argued that § 5 of the FAA authorized a court to appoint a different arbitrator; therefore, the AHLA's unavailability was not a valid basis to invalidate the clear agreement to arbitrate. [36a-49a]; [50a-51a]; [52a-56a].

The Circuit Court denied the motion to compel arbitration. The Circuit Court did not view the AHLA's availability to administer the arbitration as the issue, noting that the wording of the parties' agreement did not actually require that the arbitration be administered by the AHLA. Rather, the Circuit Court viewed the issue as a failure of the agreement to meet internal standards of enforceability, mainly because the arbitration provisions are embedded in the residency agreement rather than contained in "a separate document" as required under AHLA Rule 2.1(1). On that basis, the Circuit Court concluded that the arbitration provisions failed to comport with their "own stated standards." According to the Circuit Court, that failure rendered them unenforceable.[1]

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[1] The Circuit Court arrived at that conclusion even though at the time the residency agreements containing the arbitration provisions were drafted and agreed to, the AHLA's "separate document" rule had not yet come into existence. It would have been nonsensical for the draftsman of the residency agreements to have incorporated embedded, detailed and specific arbitration provisions if, in fact, those provisions would be deemed unenforceable in the future unless set forth in a separate document. Further, the Circuit Court's reasoning treats the AHLA's "separate document" rule as a standard of enforceability, even though AHLA Rule 2.4(b) indicates that the

On appeal to the Supreme Court of Appeals of West Virginia, Petitioner argued that the very notion that the parties' unequivocal agreement to arbitrate became unenforceable because the AHLA subsequently adopted a rule specifying that peculiar criteria must be met in order for that entity to administer an arbitration squarely conflicts with the mandate of § 2 of the FAA. [34a-35a]. However, the West Virginia Court affirmed, largely endorsing the Circuit Court's "own stated standards" analysis, on the basis that "the arbitration provision is internally inconsistent with the requirements of [AHLA] Rule 2.1" [22a], The West Virginia Court, too, observed that "the arbitration provision is not contained in a separate agreement as required by [AHLA] Rule 2.1, but rather is buried in the Residency Agreements."[2]

"separate document" rule has absolutely no bearing on the enforceability of an agreement to arbitrate, and represents nothing more than an internal, operating, administrative requirement. Finally, the Circuit Court's "stated standards" interpretation is not supported by any relevant legal authority, and is flatly in derogation of the mandate of the FAA.

[2] The characterization of the arbitration provisions as "buried" betrays the sort of hostile attitude toward enforcing private arbitration agreements that engendered the enactment of the FAA. As is clear from a cursory examination of the residency agreements, the arbitration provisions are hardly "buried"; rather, they are remarkably conspicuous. They are contained in Section X of the residency agreements, which is distinctly titled "RESOLUTION OF LEGAL DISPUTES." As shown *supra*, Subsection C thereunder, entitled "ALL OTHER DISPUTES," contains the basic agreement to arbitrate. Subsection D, entitled "CONDUCT OF BINDING ARBITRATION," contains an extensive explanation, which makes clear that "agreeing to arbitrate legal disputes means that you are waiving your right to sue in a court of law and to a

Although not argued by Respondents or addressed by the Circuit Court, the West Virginia Court added, *sua sponte,* that the arbitration agreement "fails to contain any language specifying that it is a 'voluntary agreement,' which is also required by [AHLA] Rule 2.1." *Id*. The West Virginia Court further observed that contrary to the provisions of AHLA Rule 2.1(3) and (4) above-quoted, "the arbitration provision further fails to advise residents that the provision of healthcare is not contingent on their signing the agreement to arbitrate," and did not "provide a thirty-day period to rescind the agreement after it has been signed." *Id*. Finally, the West Virginia Court held that because of the non-compliance with the requirements adopted by the AHLA in its Rule 2.1, "the arbitration agreement was not valid."[3] *Id*. Despite Petitioner's arguments based on FAA § 2, the West Virginia Court did not address whether any contract provision other than an arbitration agreement could be invalidated on those same grounds.

Petitioner also advanced an extensive argument on appeal that even though the AHLA would not administer an arbitration of the instant dispute, because the arbitration agreement does satisfy AHLA Rule 2.1, the agreement must be enforceable

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trial by jury." Subsection D further specifies that "you agree to arbitrate disputes by signing this Agreement." In short, these provisions are no more "buried" than any other clearly captioned, but embedded, Section or Subsection of the agreement.

[3] In doing so, the West Virginia Court failed to recognize that AHLA Rule 2.4 explicitly makes clear that AHLA's refusal to administer an arbitration due to non-compliance with Rule 2.1 "shall not be considered a determination on the validity of the arbitration agreement…."

nonetheless, because under § 5 of the FAA a court on application "shall designate and appoint an arbitrator." [44a]; [57a-61a]. Notwithstanding this argument and the clear implications of § 5 of the FAA, the West Virginia Court's Opinion makes no analysis of § 5. Instead, the West Virginia Court merely cited a syllabus point from *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013), an earlier case in which the West Virginia Court did analyze § 5, and held that because the parties' arbitration agreement provided for the arbitration to be "conducted…in accordance with" AHLA rules, that necessarily meant not only that the AHLA was the designated arbitral forum, but that the designation must have been "an integral part of the agreement." [5a.] On that basis, the West Virginia Court presumably decided, *sub silentio,* that § 5 of the FAA, providing for the appointment of a different arbitrator, does not apply.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Decision Of The West Virginia Court Is Irreconcilable With This Court's Decisions Effectuating § 2 Of The FAA

Section 2 of the FAA, 9 U.S.C. § 2, commands that

> a written provision…to settle by arbitration a controversy thereafter arising out of such contract or transaction…or an agreement in writing to submit to arbitration an existing controversy arising out of such

> contract…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract….

Section 2 represents Congress' direction to "courts to abandon their hostility [to enforcement of private agreements to arbitrate] and instead treat arbitration agreements as valid, irrevocable, and enforceable." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). The West Virginia courts' notion that the parties made an agreement to arbitrate that by its "own stated standards" was unenforceable on its face is so preposterous that it betrays an impermissible hostility toward the enforcement of arbitration agreements in violation of the FAA. On deeper examination, the decision rendered below does not square with this Court's precedents.

The final phrase of § 2 has often been referred to as a "savings clause." It means that agreements to arbitrate may be "invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011), quoting in part from *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), and citing *Perry v. Thomas*, 482 U.S. 483, 492-493 n.9 (1987). Thus § 2 "…requires courts to place arbitration agreements 'on equal footing with all other contracts.'" *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1424 (2017), quoting *DIRECTV v. Imburgia*, 577 U.S. 47

(2015). "In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts." *Epic Systems Corp. v. Lewis*, 138 S. Ct. at 1622. Further,

> …the FAA thus preempts any state rule discriminating on its face against arbitration…And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.

Kindred Nursing, 137 S. Ct. at 1426.

The decision below conflicts sharply with these fundamental principles. Indisputably, the parties made a core agreement to arbitrate claims such as those brought by Respondents. But the West Virginia Court refused to enforce that agreement, in substance because (a) the agreement to arbitrate is embedded in a larger contract, rather than in a separate document, (b) it was not captioned as a "voluntary agreement" and (c) because it did not include a 30-day rescission period. Naturally, there is no rule of general applicability in West Virginia that contractual agreements must meet any of those peculiar requirements to be enforced. Quite to the contrary, West Virginia law routinely enforces embedded contractual agreements, no right of rescission is necessary, and contractual provisions are never required to be identified as "voluntary" to be enforced. By invalidating an arbitration agreement, ostensibly because it failed to meet those peculiar requirements,

the West Virginia Court elevated an AHLA administrative rule to the status of a doctrine of legal enforceability, quite obviously applicable "only to arbitration [agreements]." This offends the FAA's "equal-treatment principle," and stands in clear violation of § 2. In the words of *Kindred Nursing*, "the [West Virginia Court] thus flouted the FAA's command to place [arbitration] agreements on an equal footing with all other contracts."

B. The West Virginia Court Of Last Resort Failed To Effectuate The Mandate Of § 5 Of The FAA

As stated, the FAA is Congress' manifestation of a "liberal federal policy favoring arbitration agreements." *Epic Systems,* 138 S. Ct. at 1621, citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). *See also, Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). By enacting the FAA, Congress' aim was clearly to facilitate the enforcement of arbitration agreements, and to eliminate impediments to their enforceability as much as possible. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 55 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985). As the Court succinctly observed in *Dean Witter Reynolds, Inc. v. Byrd*, 407 U.S. 213 (1984), "[t]he legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made

agreements to arbitrate." *Dean Witter Reynolds,* 407 U.S. at 219. As the Court stated in *Mitsubishi Motors*, "…the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements; the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.'" *Mitsubishi Motors,* 473 U.S. at 625, quoting *Moses H. Cone Memorial Hospital*, 460 U.S. at 25 n.32. And, the Court has repeatedly held that, "…state law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), quoting *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011).

Section 5 contains one of the most important enforcement devices that Congress expressly included in the FAA. Anticipating that parties might either neglect to include specifics regarding means and methods for the arbitration in their agreement, or that the specified means and methods might fail for some reason, Congress sought to provide a vehicle by which courts might fill in or provide alternative details rather than scrap the agreement for arbitration altogether. The obvious goal was to allow a court to enforce a basic agreement to arbitrate even where the mechanism for conducting the arbitration was in doubt. In pertinent part, § 5 of the FAA states as follows:

> If in the agreement provision be made for a method of naming or appointing an arbitrator…or if a method be provided and

> any party thereto shall fail to avail himself of such method, or if for any other reason *there shall be a lapse* in the naming of an arbitrator…or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator…who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein….

(Emphasis supplied) 9 U.S.C. § 5.

Given its evident proclivity to use a nuanced analysis to avoid enforcement of private agreements to arbitrate, it is perhaps not surprising that the West Virginia Court barely mentioned § 5 of the FAA. The Opinion certainly lacks any meaningful analysis of its implications. The only reference to § 5 in the Opinion appears in a quote of Syllabus Point 3 from an earlier West Virginia case, *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013), as follows:

> Where an arbitration agreement names a forum for arbitration that is unavailable or has failed for some reason, a court may appoint a substitute forum pursuant to section 5 of the Federal Arbitration Act, 9 U.S.C. § 5 (1947) (2006 ed.), only if the choice of forum is an ancillary logistical concern. Where the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable.

[4a-5a]. In *Credit Acceptance Corp. v. Front,* the West Virginia Court adopted the integral/ancillary logistical dichotomy that has been embraced by some courts, *see, e.g. Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000); *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012), but not others.[4] *Cf., e.g., Green v. U.S. Cash Advance Illinois, LCC*, 724 F.3d 787 (7th Cir. 2013).

Even if a court is authorized to designate and appoint an arbitrator under § 5 *only* if the "choice of forum is an ancillary logistical concern," in the present case there is neither a textual basis in the parties' agreement, nor any other basis to conclude that the choice of forum was viewed by these contracting parties as an "integral part of the agreement." In fact, the wording of the agreement does not even require administration of the arbitration by the AHLA, as the Circuit Court below readily concluded. [32a].

The reasoning employed by the West Virginia Court is at best tautological, and at worst, utterly

[4] Much more will be said about the integral/ancillary logistical dichotomy in Sections C. and D., *infra*. This method of analysis unduly constricts, and impairs the efficacy of § 5, yet it is utterly unsupported by any of the text or history of the FAA. The integral/ancillary method of analysis itself reflects a misinterpretation of Congress' intent. Indeed, as stated in detail *infra*, it is much more reasonable and consistent with the broad congressional "policy guaranteeing the enforcement of private contractual agreements" to arbitrate to conclude that Congress intended § 5 to be available as a mechanism to save the parties' basic agreement to arbitrate even where the choice of forum *was integral* but, for whatever reason, the chosen forum failed.

circular. The West Virginia Court found it critical that if any non-AHLA arbitrator would attempt to conduct an arbitration in this dispute, such arbitrator would, nonetheless, be required to apply the AHLA administrative rules which preclude the AHLA from administering an arbitration where the arbitration agreement is not contained in a separate document. According to the West Virginia Court, therefore, application of the AHLA rules would necessarily "mandate a dismissal of the arbitration." [24a]. As a second rationale, the West Virginia Court thought that merely because the wording of the arbitration agreement suggested the parties' selection of the AHLA as the arbitral forum, that wording necessarily made the choice "integral" rather than ancillary and logistical. That reasoning, in addition to conflicting with virtually every other court that has analyzed the integral/ancillary dichotomy, directly neuters the "lapse" provisions of § 5. In other words, only if the parties' agreement contains no selection of an arbitrator, or mode or method of arbitration, or designated forum for arbitration, can § 5 be utilized.

The West Virginia Court's construction, of course, is utterly antithetical to the obvious goal of § 5, which is to salvage the enforceability of a core agreement to arbitrate despite the unavailability of a designated forum. This construction, of course, is virtually senseless. But, more to the point, this sort of illogic threatens to render the important saving mechanism that Congress fashioned in § 5 of the FAA essentially nugatory. If courts may capriciously declare, for no substantial reason, not only that the parties' agreement requires a designated arbitrator, but also

that the choice was integral, as the West Virginia Court did here, courts that are ambivalent about or hostile towards arbitration may seize the opportunity to scrap enforcement of the arbitration agreement altogether. Thus, the West Virginia Court's construction renders an important mandate of the FAA too vulnerable to judicial hostility toward the enforcement of private agreements to arbitrate.

The West Virginia Court's interpretation, therefore, constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA." *Lamps Plus, Inc., supra*. As such, it is not only a misconstruction – it is preempted.

C. There Is A Multi-Faceted Split Among The Federal Courts And The Courts Of The States On The Proper Standards For Applying § 5 Of The FAA Where An Arbitral Forum Is Unavailable

The West Virginia courts' "own stated standards" analysis notwithstanding, the only problem presented by this case was the unavailability of the AHLA as an arbitral forum. To the extent the West Virginia Court addressed that subject at all, it utilized the so-called integral versus ancillary logistical approach, and thereby circumvented § 5 of the FAA. To that extent, the decision in this case indicates a deep and unresolved split of authority, not only between and among the federal circuits, but an utter lack of uniformity in the decisions of the district courts and state courts on the proper jurisprudential standards

for applying § 5 in the case of the unavailability of a designated arbitral forum.

To begin with, the origins of the integral/ancillary dichotomy are obscure. There is no textual basis for it at all in § 5. The statute simply states in relevant part that "…if for any…reason there shall be a lapse in the naming of an arbitrator…the court shall designate and appoint an arbitrator…." Congress did not ordain in the text of § 5 that a court's power to appoint an arbitrator arises only when the "lapse" involves an arbitrator or arbitral forum whose selection was ancillary, nor did Congress except from the operation of § 5 a "lapse" involving an arbitrator or arbitral forum whose selection was deemed by the parties to be integral. Moreover, the text of § 5 does not vest the court with discretion to weigh such considerations. In short, the integral/ancillary dichotomy finds absolutely no textual basis in the statute. The statute instead mandates that in the case of a lapse, "…the court *shall* designate and appoint an arbitrator…" (emphasis supplied). Plainly, had Congress wished to make the power to appoint a substitute arbitrator in the event of a lapse optional or equivocal, it undoubtedly would have used considerably different wording in the statute.

The first federal appellate court to mention concepts like "integral" and "ancillary" in relation to a court's power to appoint an arbitrator in the case of a lapse was the Eleventh Circuit, in *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000). *Brown* involved an arbitration provision contained in an employment agreement that called for "binding

arbitration under the Code of Procedure of the National Arbitration Forum ('NAF')…." *Brown*, 211 F.3d at 1220. By the time the employment claim arose, the NAF had been dissolved. The employee argued that the NAF's unavailability rendered the arbitration agreement void. The Eleventh Circuit rejected that argument, holding that "Section 5 of the FAA provides a mechanism for appointment of an arbitrator where 'for any…reason there shall be a lapse in the naming of an arbitrator….'" *Brown,* 211 F.3d at 1222. Without any analysis, however, the court stated "only if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern' will the failure of the chosen forum preclude arbitration." *Id*. Also without analysis, the court concluded that "…there is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate." *Id*. Because the provision did not explicitly require administration by the NAF, but only required the use of its rules, the court found the choice of forum to be ancillary, rather than integral. Nonetheless, the Eleventh Circuit conceived of an "integral" selection of a specified arbitral forum as an exception to § 5's otherwise ubiquitous mandate that in the case of a lapse in the appointment of an arbitrator a court "shall designate and appoint an arbitrator."

The Eleventh Circuit, of course, did not and could not ground that exception on any wording in the statute, because, as stated, there is none. Nor, did the Eleventh Circuit find much jurisprudential support for that proposition. The court cited *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742

F.Supp. 1359 (N.D. Ill. 1990) as the sole decisional support for the creation of the statutory exception. The reliance upon *Zechman* for what clearly seems to have been an important doctrine is ironic for multiple reasons. First, the court in *Zechman* readily concluded that the parties' arbitration agreement did not designate an arbitral forum at all. Rather, the parties' agreement merely required that arbitration be conducted pursuant to the regulations of the Chicago Board of Trade. Therefore, the fact that the Chicago Board of Trade declined to administer the arbitration was of no moment under the contract. Consequently, the very mention in *Zechman* of an integral/ancillary dichotomy as a doctrinal consideration in reference to § 5 of the FAA was entirely *obiter dicta.*

But perhaps more importantly, the Seventh Circuit later disavowed that analytical approach entirely in *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013). In *Green,* the Seventh Circuit elaborated at length upon the mistaken notion that it is "an established rule of law that § 5 cannot be used to appoint a substitute arbitrator when the contractual designation was an 'integral part' of the bargain…." *Green,* 724 F.3d at 792. Further, the Seventh Circuit observed that "no court has ever explained what part of the text or background of the Federal Arbitration Act requires, or even authorizes, such an approach." *Id*. At bottom, the Seventh Circuit made clear that in a case of unavailability of a designated arbitrator or arbitral forum, a court under § 5 *must* designate and appoint a substitute arbitrator, whether or not the parties' choice was

integral or ancillary. Thus, the *Zechman* decision upon which the Eleventh Circuit relied in *Brown* has been flatly rejected in the Circuit in which it was rendered.

Finally, a careful examination of the *Zechman* decision itself reveals very little jurisprudential support. The district court appears to have considered the question of whether the designation of a particular arbitral forum was "as important a consideration as the agreement to arbitrate itself," and only considered that issue as it relates to a fundamental contract principle that a court may sever and disregard a failed contract term, but nonetheless enforce the remainder of the agreement. *See*, *Zechman*, 742 F.Supp. 1364. In that context, the court in *Zechman* distinguished a decision of the Fifth Circuit in *National Iranian Oil Co. v. Ashland Oil Co.*, 817 F.2d 326 (5th Cir.) *cert. denied*, 484 U.S. 943 (1987), in which the court held an arbitration provision to be unenforceable because the parties' agreement specified arbitration in the country of Iran and, by virtue of the political climate in Iran, arbitration in the *situs* was unavailable. The Fifth Circuit held that courts were not at liberty to disregard the choice of *situs* agreed upon by the parties.

The decision in *National Iranian Oil* is not sound authority for an interpretation of § 5 of the FAA. Neither § 5 nor any other provision of the FAA purports to allow a court to designate a different *situs* for arbitration than the one agreed upon by the parties. Indeed, the text of the FAA implies the

contrary, and would appear to require a court to adhere to the parties' choice of a *situs*. Importantly, where the parties have selected a forum for their arbitration, a proceeding under § 4 to compel arbitration may only be brought in the judicial district in which the parties contractually agreed to arbitrate. *See, Merrill Lynch, Pierce, Fenner & Smith v. Lauer*, 49 F.3d 323, 328 (7th Cir. 1995), citing *Snyder v. Smith*, 736 F.2d 409, 419-420 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984). And, § 4 only permits a court to compel arbitration "within the district in which the petition for an order directing such arbitration is filed." To that extent, the FAA expressly disallows a court to order arbitration in a different *situs* than the one chosen by the parties, whether or not there has been an obstacle to proceeding in the agreed upon *situs*. That is the situation addressed in *National Iranian Oil*, and it is plainly inapposite to the question of whether, and under what circumstances, § 5 may properly be used to appoint a substitute arbitrator where there is a lapse in the naming of an arbitrator.

In fact, a careful examination of *Zechman* shows that the district court only considered the decision in *National Iranian Oil* because it was urged by the plaintiff as a basis to invalidate the arbitration agreement altogether, and the district court essentially rejected the case as distinguishable. Consequently, *Zechman* provides no decisional support for the integral/ancillary dichotomy seemingly invented by Eleventh Circuit in *Brown*.

Although some courts have characterized the integral/ancillary test as the "majority rule," *see, e.g., Credit Acceptance v. Front*, 231 W.Va. at 529, finding a majority rule on the issue is challenging. In fact, the federal circuits and other courts that have considered the implications of § 5 in relation to the unavailability of a chosen forum are entirely segmented on the issue. As stated, the Seventh Circuit rejected the integral/ancillary approach in *Green* and takes the position that § 5 mandates the appointment of a different arbitrator whenever the parties' designation fails "for any other reason." *Green,* 724 F.3d at 791. The Second Circuit takes an entirely different view. In *In re: Salomon, Inc. Shareholders Derivative Lit.*, 68 F.3d 554 (2d Cir. 1995), the Second Circuit held that a refusal of a designated forum to administer an arbitration is not even a "lapse" within the meaning of § 5. *See also, Moss v. First Premier Bank*, 835 F.3d 260, 264-266 (2d Cir. 2016). Some federal courts of appeals have seemingly followed *Brown* and embraced the integral/ancillary method of analysis, but have applied a very stringent standard under which even a clear selection of a specific forum is not enough to render the parties' choice integral. *See, e.g., Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012); *Ranzy v. Tijerina*, 393 Fed.Appx. 174 (5th Cir. 2010) (unpublished); *Reddam v. KPMG, LLP*, 457 F.3d 1054 (9th Cir. 2006). Those courts have held that § 5 mandates the appointment of an arbitrator different than the one clearly designated in the parties' agreement. The Eighth Circuit recognized the split in the federal circuits, but declined to resolve the issue, concluding that the selection of an arbitral forum in

that case was not integral in any event. *See, Robinson v. EOR-ARK, LLC*, 841 F.3d 781 (8th Cir. 2016).

In some instances, different panels within the same circuit have dealt quite differently with issues involving the unavailability of a forum designated in the parties' contract. *McDonald v. Cashcall, Inc.*, 883 F.3d 220, 232 n.13 (3d Cir. 2018) and *Khan v. Dell, Inc.*, *supra.* However, other than the Seventh Circuit in *Green*, no court has made any meaningful analysis of whether the integral/ancillary dichotomy can be reconciled with the text or history of the FAA. Nor have any of those courts offered any particular rationale as to why that method of analysis is appropriate under § 5.

Not surprisingly given the lack of unanimity of the federal circuits, district court decisions considering the implications of § 5 of the FAA in relation to the unavailability of a contractually designated forum are impossible to reconcile. *See, e.g., Sunland Logistics Sols, Inc. v. Zhejiang Wanfeng Auto Wheel Co.*, 2021 U.S. Dist. Lexis 243585 (D. S.C. 2021); *Shandong Luxi Pharm. Co. v. Camphor Techs., Inc.*, 2021 U.S. LEXIS 244809 (M.D. Fla. 2021); *DePombo v. IRINOX N. Am., Inc.*, 2020 U.S. Dist. LEXIS 199455 (S.D. Fla. 2020); *Optical Mechanics, Inc. v. Cymbioms Corp.*, 2021 U.S. Dist. LEXIS 24786 (D. Md. 2021); *Frazier v. Western Union Co.*, 377 F.Supp.3d 1248 (D. Col. 2019); *Jose Evenor Taboada A. v. Amfirst Ins. Co.*, 2019 U.S. Dist. LEXIS 131384 (S.D. Ms. 2019); *Meskill v. GGNSC Stillwater Greeley, LLC*, 862 F.Supp.2d 966 (D. Mo. 2012); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. LEXIS

103638 (D. S.C. 2011). So, too, are the decisions of the various state courts. *See, e.g., Richardson v. Sky Zone, LLC*, 2021 WL 1308358 (N.J. 2021); *A 1 Premium Acceptance, Inc. v. Hunter*, 557 S.W.3d 923 (Mo. 2018); *In re: Good Tech. Corp. Stockholders Litig.*, 2017 Del.Ch. LEXIS 779, 2017 WL 5847341 (Del. Chancery 2017); *Wert v. Manorcare of Carlisle PA, LLC*, 633 Pa. 260, 124 A.3d 1248 (2015); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371 (2014); *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009). As the district court put it in *Meskill*, the proper standard for application of § 5 to the unavailability of an arbitral forum reference in an arbitration agreement is a "…question [that] has vexed courts across the country and resulted in a substantial split of authority. In this Court's view, the NAF's unavailability does not preclude arbitration." *Meskill,* 862 F.Supp.2d at 972.

Even among the federal and state courts that have firmly adopted the integral/ancillary logistical dichotomy, few have developed explicit standards, and there is plainly no unanimity in the standards for determining whether a contractual designation of an arbitral forum is integral to the parties' agreement or merely an ancillary logistical concern. Some courts perceive the issue as solely a matter of contract interpretation; others view the issue as susceptible to extrinsic evidence of the parties' intent. No courts have identified a specific foundation for applying the integral/ancillary logistical dichotomy in the text or history of § 5 of the FAA. The total lack of guidance provides a potential obstacle to the effectuation of Congress' purpose in enacting the FAA, to-wit, to

facilitate the enforcement of private agreements to arbitrate. *Dean Witter Reynolds, supra.*

Given the state of the law on this issue, there is a critical need for guidance from this Court on whether the integral/ancillary dichotomy is an appropriate aspect of the analysis under § 5 of the FAA.

D. The Integral/Ancillary Dichotomy Conflicts With This Court's Decision In *Hall Street Associates, LLC v. Mattel, Inc.*

The integral/ancillary logistical method of analysis begs the question of whether the parties can, by contract, constrain or tailor the statutory authority to appoint a substitute arbitrator that Congress vested in the courts under § 5. Stated differently, can the parties' contract thwart Congress' intent to facilitate the enforcement of a basic agreement to arbitrate through § 5?

Hall Street Associates v. Mattel, 552 U.S. 576 (2008) suggests that the parties cannot subvert Congress' objectives. In *Hall Street,* this Court held that the parties to an arbitration agreement cannot, by contract, alter the scope and standard for reviewing an arbitration award as delineated in §§ 9-11 of the FAA, even where the parties' agreement is exceedingly specific. The Court acknowledged that "the FAA lets the parties tailor some, even many, features of arbitration by contract…," *Hall Street*, 552 U.S. at 586, but, the Court held, there are limits to what the parties may alter. Specifically, the Court held that when "the FAA has textual features at odds

with" the terms of the parties' contract, the express provisions of the statute must prevail. *Id*. Conversely, the parties' agreement must yield. Among other grounds for its decision in *Hall Street*, the Court pointed out that where the statute contains "no textual hook for expansion" there is no basis to "authorize contracting parties to supplement" the scheme set out by Congress in the language of the statute. *Id*. At bottom, in the case of the standard for review under §§ 9-11 of the FAA, the Court concluded "…the statutory text gives us no business to expand the statutory grounds." *Hall Street,* 552 U.S. at 589.

Section 5's provisions vest authority in the courts to appoint a substitute arbitrator in any case where the parties' choice results in a "lapse"; indeed, the statutory language commands that the court "shall designate and appoint an arbitrator." The language of § 5 similarly gives no "textual hook" that would allow the parties to alter the authority expressly granted by the statute. Most assuredly, there is no basis in the language of § 5 that would allow for an exception, even when the parties perceive their choice of arbitrator to be integral rather than ancillary to the agreement. In substance, the courts that have adopted the integral/ancillary method of analysis had "no business" altering the planned text of § 5.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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June 9, 2022