No. 19-1154

In The
Supreme Court of the United States

ROBINSON NURSING AND REHABILITATION CENTER, LLC, D/B/A Robinson Nursing and Rehabilitation Center*;* CENTRAL ARKANSAS NURSING CENTERS, INC.*;* NURSING CONSULTANTS, INC.*; and* MICHAEL MORTON,
Petitioners,

vs.

ANDREW PHILLIPS, as Personal Representative of the Estate of Dorothy Phillips, and on Behalf of the Wrongful Death Beneficiaries of Dorothy Phillips, and on Behalf of Themselves and All Others Similarly Situated,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF IN OPPOSITION

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A. This Court Should Deny the Petition Because the Issues Presented Were Never Raised to Either of the Courts Below

The Supreme Court "is one of final review, not of first view." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009). In exercising its jurisdiction under 28 U.S.C. § 1257, this Court has repeatedly explained that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Supreme Court] ha[s] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). "When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in [the Supreme Court] can affirmatively show the contrary." *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). This "presentation requirement is jurisdictional." *Howell v. Mississippi*, 543 U.S. 440, 445 (2005). Failure to raise the issues presented to this Court in the proceedings below prevents this Court from reaching the questions presented in this petition, and any writ of certiorari granted to review those questions would have to be dismissed as improvidently granted. *Id*. at 441-443.

This petition asks the Court to review whether the Arkansas Supreme Court's application of basic rules of contract law is preempted by the Federal Arbitration Act. All three of the questions presented are phrased in terms of "whether the FAA preempts a

state-law contract rule…." However, the decision below does not address any argument concerning preemption at all. *See generally* Petitioners' Appendix A. Nor have the Petitioners specified where that issue was raised and ruled on below, as required by Supreme Court Rule 14.1.(g)(i). Unsurprisingly, preemption was not addressed because the Petitioners did not raise this issue to the trial court nor to the Arkansas appellate courts. It was only after the Arkansas Supreme Court ruled against them that Petitioners became interested in preemption arguments.

As this Court noted in *Adams*, "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." 520 U.S. at 90. Petitioners raised preemption for the first time in a Petition for Rehearing—18 days after the Arkansas Supreme Court announced its decision. Like many other courts around the country, Arkansas does not allow a party to raise new arguments on appeal that were not presented to the trial court. *McCourt Mfg. Corp. v. Rycroft*, 360 S.W.3d 138, 144 (Ark. 2010). The Arkansas Supreme Court has also made it clear that it will not consider arguments raised for the first time in a petition for rehearing. *Garrett v. Andrews*, 744 S.W.2d 386, 388 (Ark. 1988). Therefore, no Arkansas court has had an opportunity to address the arguments raised in this petition, and this Court "ha[s] generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. at 89, n.3.

The importance of presenting the issue and allowing the state court to pass on it before triggering this Court's appellate jurisdiction can be seen clearly here. When presented with the question and given an opportunity to address it, the Arkansas Supreme Court does not shy away from recognizing the supremacy of the FAA and this Court's arbitration-related precedents. Arkansas recently undertook a thorough analysis of a mutual obligation question similar to the one Petitioners have submitted here. In *Jorja Trading, Inc. v. Willis*, 2020 Ark. 133, ---S.W.3d --- (Ark. 2020), the Arkansas Supreme Court analyzed its mutual obligation requirement and reversed the denial of a motion to compel arbitration because the trial court had misapplied the rule to require identical bilateral obligations in every provision of a contract. The court explained:

> This court has not required that every provision within a contract be bilateral. We therefore cannot require that every provision in an arbitration agreement be bilateral without violating the FAA because doing so would hold arbitration agreements to a more stringent analysis than other contracts. Because the FAA preempts, we cannot single out a rule or application unique to arbitration agreements. That is precisely what the FAA prohibits.

Id., 2020 Ark. 133, at 5-6 (internal citations omitted). As will be discussed in Section C.3., *infra*, *Jorja* is substantively distinguishable as it relates to the enforceability of the arbitration agreement. The facts

of this case, as well as the way the Petitioners presented it, dictated its outcome. However, *Jorja* aptly illustrates that the Arkansas Supreme Court is not attempting to sidestep FAA requirements and will address perceived conflicts and preemption issues when they are actually raised by the parties.

Petitioners are asking this Court to rule on their arguments in the first instance rather than review a squarely teed-up question that was answered first in the state court system. The Petitioners' failure to raise their preemption arguments prior to a petition for rehearing prevents this Court from exercising jurisdiction to reach the questions presented in the petition for a writ of certiorari, and the petition should be denied. *Rotary Club of Duarte*, 481 U.S. at 550; *Adams*, 520 U.S. 83; *Howell*, 543 U.S. 440; *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3 (1983).

B. This Court Should Deny the Petition Because It Does Not Present a Clean Slate of Questions Supported by a Developed Record

This Court has recognized the role of the presentation requirement in refining the Court's deliberations "by promoting the creation of an adequate factual and legal record." *Adams*, 520 U.S. at 90-91. It "affords the parties the opportunity to develop the record necessary for adjudicating the issue[,]" and gives state courts an opportunity to exercise their authority so as to apply state law in ways that obviate and avoid federal problems. *Webb v. Webb*, 451 U.S. 493, 500 (1981). And as the Court has pointed out, "questions not raised below are those on which the record is very likely to be inadequate since

it certainly was not compiled with those questions in mind." *Illinois v. Gates*, 462 U.S. 213, 221 (1983).

As mentioned above, the record in this case is bereft of any discussion concerning the issues sought to be reviewed in the pending petition. Not only has the record been stunted by Petitioners' failure to present their issues below, but the record is also sorely underdeveloped because Respondents were never even allowed to make a record attacking the validity of the arbitration agreements at issue.

This case entails the examination of 544 separate arbitration agreements. App. 3a. Each agreement raised questions concerning who signed the agreement, if it was signed at all, in what capacity was the person who signed the agreement signing it, when was the agreement signed, did the person signing the agreement have the authority to sign the agreement at that time, and was any record evidence submitted in support of the propositions necessary to establish the validity of each of these agreements. Each of the 544 agreements was supposed to be accompanied by supporting documentation in the form of power of attorney documents, guardianship documents, and ancillary admission agreements. App. 3a.

These 544 agreements were submitted to the trial court through four different motions to compel arbitration filed on September 1 and September 5, 2017. App. 3a. Given the vast undertaking of examining the factual scenario represented in each of these 544 agreements, counsel for the Respondents sought, and was granted, an extension of time until October 17 to respond to the various motions to compel

arbitration. App. 4a. Twenty-one days after the first motion to compel was filed, and during an unrelated hearing concerning sending notice to the class members, the trial court took up the motions *sua sponte* and summarily denied them without any argument from either side and without even allowing the Respondents to respond to any of the motions. App. 33a-37a.

The first time that Respondents had an opportunity to make any sort of argument concerning these agreements was in response to the Petitioners' appeal to the Arkansas Supreme Court. And there, Respondents were severely curtailed in developing the record as well. The trial court's on-record reasoning strongly suggested that Petitioners had waived their right to enforce these agreements or were estopped from doing so by not litigating the arbitration agreements' effect on the class definition that had been certified previously. *See* App. 35a-36a. However, when Respondents raised those issues with the Arkansas Supreme Court, that court refused to entertain the argument, explaining that it would only rule on the arguments raised to the trial court and penalizing the Respondents for failing to obtain a ruling on these arguments—a feat not possible because (1) Respondents had not been allowed to argue at all; (2) Respondents had won the motions, and "a party cannot appeal from a favorable ruling," *Ball v. Foehner*, 931 S.W.2d 142, 145 (Ark. 1996); and (3) the trial court refused to make any specific findings of fact or conclusions of law, *see* App. 4a, 6a. Ironically, in a portion of the hearing transcript omitted from Petitioners' Appendix C, the trial court expressed unwillingness to articulate factual findings and legal

conclusions because it "hampers appellate counsel when they are preparing arguments" and it "would be overstepping into appellate advocacy." Record 6596.

It should also be noted that in their reply brief to the Arkansas Supreme Court, the Petitioners objected to *any* arguments challenging the validity of these arbitration agreements as not preserved for appeal because they had not been first presented to the trial court. Reply Brief, p. 2. The Petitioners also specifically objected to any arguments concerning mutual obligation (question presented herein # 2), *id.* at p. 13, and mutual assent (question presented herein # 3), *id.* at p. 18, because they had not been raised below.

As already mentioned, Petitioners failed to allow the Arkansas Supreme Court to pass on the preemption questions that comprise their request for the current writ. And as the Arkansas court noted in its opinion, it was considering "only the issues *raised by Robinson* in its motions to compel." App. 6a (emphasis added). Although describing the purpose of the concept of standing, the Court has expressed the importance of "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 755 (1976). This case offers no such illumination. If the petition is granted, the Court will inherit a one-sided and quite underdeveloped record concerning these 544 agreements, devoid of any opportunity for the Respondents to develop the facts or press the full range of available legal arguments. The lack of a record below denied the Arkansas

Supreme Court the opportunity to address the relevant issues in a way that avoids the alleged federal problem, even though the court is quite capable of doing so. *See Jorja*, *supra*. This Court would be placed in the position of having to stretch to reach the questions presented and would be answering them in the first instance. And Respondents' first opportunity to even address the preemption issue would be in the briefing to this Court.

This case would be a stark departure from arbitration cases this Court has reviewed which contain well-developed and fully-considered federal arguments. *See e.g. Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015) (*reversed sub nom* by *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017)). In *Extendicare*, the parties thoroughly briefed whether Kentucky's rule requiring power-of-attorney documents to explicitly grant authority to waive access to the courts conflicted with this Court's arbitration holdings. The Kentucky Supreme Court analyzed the issue and dedicated several pages of its decision to the perceived federal conflict. *Id.* at 330-331. The Kentucky Supreme Court had been presented with opposing arguments from the litigants and given ample opportunity to consider that rule's validity in comparison to the clear pronouncements from this Court. When this Court then took up the issue, it had not only the rule squarely presented for review, but a pronouncement from the highest court of Kentucky analyzing that rule's interplay with the FAA and Supreme Court precedent. Any conflict with federal law and precedent was clearly exposed and the underlying analysis was laid bare. On review, this Court proceeded to dissect the rule *and* break down

the Kentucky court's attempt to reconcile it with the FAA. *Kindred Nursing*, 137 S. Ct. at 1427-1428.

The Supreme Court will have no such record or analysis to consider here. Accordingly, Respondents respectfully submit that the petition should be denied.

C. This Court Should Deny the Petition Because the Rulings Below Were Fact-Bound and a Direct Result of the Way Petitioners Presented Their Case

Petitioners premise their entitlement to a writ of certiorari on a complete mischaracterization of how the Petitioners presented their case and how it was handled by the courts below.

1. Petitioners Presented the Arbitration Agreements as Separate from the Admission Agreements

According to Petitioners, the genesis of Arkansas's hostile treatment toward their arbitration agreements was when the court decided (1) "that the arbitration agreement was a separate contract from the admission agreement," and (2) "the court held the underlying admission agreement was fully enforceable." *See* Petition, pp. 9-10. Having successfully parsed the two agreements apart, the court then proceeded to employ its three, hostile arbitration-agreement-destroying devices. Both of these premises require clarification.

What the Petitioners have omitted is that the Petitioners, *themselves*, consistently referred to the

arbitration agreement as its own contract, enforceable in its own right. Starting with their very first motion to compel arbitration and repeated in each successive motion, the Petitioners asserted that the arbitration agreements—by themselves, and without reference to the admission agreements—"clearly demonstrate all 5 elements [of a valid contract.]" Memo. Mot. to Enforce Arb. Agmts., Record 005; 121; 1217; 3740. They repeatedly argued that "[t]he Arbitration Agreements executed by these [Guardians/residents/Powers of Attorney/Responsible Parties] are valid contracts to arbitrate disputes and should be enforced according to their terms." *Id*. at 003; 119; 1216; 3738. Even more explicitly, while analyzing the five elements of a valid contract under Arkansas law, the Petitioners claimed that "[t]he subject matter is to arbitrate disputes," and "the legal consideration is an exchange of promises to arbitrate." *Id*. at 006; 121; 1217; 3740. In their arguments to this Court, the Petitioners now blame the courts below for treating these agreements exactly how *Petitioners* told those courts to treat them, *i.e.*, independently. In light of the fact that Petitioners were trying to bulk enforce 544 separate agreements, with multiple variations in the agreements they submitted, they should not be heard to complain when the court accepts Petitioners' representations that the arbitration agreements could be analyzed separately for contractual validity.

The Petitioners also complain that the arbitration agreements had to be read into the admission agreements because they were incorporated into the admission agreements. This argument necessarily—but incorrectly—presumes the arbitration agreements to be valid. To bolster their newly-minted argument

that these separate documents are really one, Petitioners now suggest that the arbitration agreement was on a separate sheet of paper and required a separate signature merely "to assure it is properly highlighted and considered by the signee—not to be given different treatment from the admission agreement." Petition, p. 14. In short, if the admission agreement is valid then, *ipso facto*, the arbitration agreement is valid.

In context, the Petitioners' argument is not sustainable. The arbitration agreements they submitted were not arbitration *clauses* nestled into an otherwise valid contract. They were *separate* agreements, and, *in their own words*, "the subject matter [was] to arbitrate disputes," and "the legal consideration [was] an exchange of promises to arbitrate." If the Petitioners were sincere in their argument, then they would have compelled the entire class (consisting of over 1,000 members) to arbitration based upon nothing more than the existence of an admission agreement. Instead, they took only the 544 separate arbitration agreements that had signatures on them—regardless of whose signature it was—and submitted them with their demand for arbitration. As the Third Circuit has stated, "[t]he strong federal policy favoring arbitration, however, does not lead automatically to the submission of a dispute to arbitration upon the demand of a party to the dispute." *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 523 (3d Cir. 2009). The arbitration agreements must still be valid to justify compelling arbitration. Likewise, a *separate* arbitration agreement that does not exist or that is not valid cannot be incorporated into the admission

agreement and forced into existence by virtue of nothing more than the admission agreement, itself.

Petitioners further criticize the courts below for "h[olding] the underlying admission agreement was fully enforceable" but then treating the arbitration agreement differently. To be clear, no court has passed on the validity of the admission agreement. Neither the trial court nor the Arkansas Supreme Court has held that the admission agreements are valid. When Respondents sought class certification of their breach-of-contract claim, the validity of that claim was not before the court: "We have said that neither the circuit court nor the appellate court may delve into the merits of the underlying claim when deciding whether the requirements of Rule 23 have been met." *Robinson Nursing and Rehab. Ctr., LLC v. Phillips*, 519 S.W.3d 291, 300 (Ark. 2017). Likewise, in the opinion below, the Arkansas Supreme Court did not undertake an analysis of whether the admission agreements were valid, rather it was constrained to answering two threshold questions: "(1) Is there a valid agreement to arbitrate between the parties? and (2) If such an agreement exists, does the dispute fall within its scope?" App. 5a. Analyzing the validity of a separate arbitration agreement is not treating it differently than other agreements and does not display the hostility toward arbitration agreements by the Arkansas Supreme Court that the Petitioners have suggested.

2. Petitioners Presented No Evidence That "Responsible Parties" Were Signing in an Individual Capacity, and the Language of the Agreements Contradict a Third-Party Beneficiary Argument

Petitioners' entire argument regarding third-party beneficiaries stems from the mischaracterization described above. Petitioners necessarily rely on the separate *admission* agreement for their argument. *See e.g.* Petition, p. 13 ("the residents have gained the benefits of these contracts by receiving care and are bringing claims based on these contracts"). But, as already discussed, the admission agreement cannot validate an otherwise invalid arbitration agreement. Nor can a person be a third-party beneficiary in the absence of any valid contract at all.

Even accepting Petitioners' argument that the admission agreement could somehow validate the separate arbitration agreement, the argument would still fail because it rests on factual premises that the Petitioners failed to establish. When a third-party agent signs an arbitration agreement on behalf of someone else, they must have authority from the principal to do so. App. 8a. The Petitioners argue that "Responsible Parties" entered into admission agreements on behalf of nursing home residents, thereby binding the residents to arbitration as third-party beneficiaries of those agreements. However, the Petitioners failed to present any evidence that these individuals had any authority whatsoever to contract on behalf of the residents. In fact, Petitioners failed to present any evidence about who these people were at all. They just submitted the agreements—signed by

someone other than the resident allegedly bound by that agreement—and assumed the agreements were enforceable. Petitioners conceded below that these individuals lacked authority to contract on behalf of the residents. App. 8a.

Even though Petitioners admitted the signatories had no authority to contract for residents, Petitioners continue to argue that the residents should be bound to arbitration by the signatories' actions. To paper over their failure to present proof of authority, the Petitioners have argued that the signatories were not signing on behalf of the residents at all. According to Petitioners, the "Responsible Parties" were signing in their individual capacities and creating their own contract with the nursing facility to benefit the resident—whose consent and authority was not needed and who, for all intents and purposes, could be completely unaware this was happening. The Petitioners are urging the use of the third-party beneficiary doctrine to replace the resident's consent to arbitrate. As the Court is well aware, "[t]he first principle that underscores all of [this Court's] arbitration decisions is that arbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019). But even putting that principle aside, Petitioners failed to establish as a factual matter that the signatories were contracting in their individual capacities.

Petitioners argue that the language of the agreement itself dictates the capacity in which the "Responsible Parties" signed. It should not be overlooked, that there were three variants of the arbitration agreements, only one of which used the

term "Responsible Party." The other two variants clearly referred to the "Resident and/or Legal Representative," or "Resident Representative," completely undermining Petitioners' argument that the agreement was meant to be signed by a person in anything other than a representative, agent capacity for the resident. *See* App. 9a. The Arkansas Supreme Court correctly acknowledged that "[b]y its argument, Robinson essentially concede[d] that the third-party beneficiary doctrine does not apply to two of the three versions of its arbitration agreements, both of which utilize the terms 'Resident Representative' or 'Legal Representative.'" App. 13a.

Even in that third version of the agreement, the term "Responsible Party" points to a resident representative. First, the definition of the term is comprised of a list of descriptors: (1) "your legal guardian, if one has been appointed," (2) "your attorney-in-fact, if you have executed a power of attorney," or (3) "some other individual or family member who agrees to assist the Facility in providing for your health, care and maintenance." App. 10a; Record 3746. The first two specific items in this list unquestionably refer to a "Responsible Party" as someone with authority to represent and make decisions for the resident. The Arkansas Supreme Court follows the rule of *ejusdem generis* in construing contracts:

> In the construction of laws, wills, and other instruments, the 'esjusdem generis rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific

> meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

Union Bankers Ins. Co. v. Nat'l Bank of Commerce of Pine Bluff, 408 S.W.2d 898, 900 (Ark. 1966). As such, the broader third term of "other individual or family member who agrees to assist the Facility…" would be interpreted in light of the first two preceding terms which refer to classes of people with representative authority to speak for the resident.

In addition, the other language in the Petitioners' agreements makes clear that a "Responsible Party" is one *with authority* to act for the resident. The last part of the definition of the term in the admission agreement refers to one who "manages, uses, controls or otherwise has legal access to the Resident's income or resources." Record 3749, fn. 2. The "Responsible Party" is supposed to have the authority to "release[ ] the Facility, its owners, directors, agents, and employees from all liabilities arising from the care given to the Resident by the private nurse, attendant, or sitter." Record 3750, § 2.4(c). The "Responsible Party" also should have the authority to make the resident's decisions regarding "advance directives, code status, consent for photographs, and use of [the resident's] name" as well as to "unconditionally submit[ ] to the jurisdiction of the courts located in the State in which the Facility is located" on behalf of the resident. Record 3750, § 2.4(e); Record 3755, § 6.3. The agreement, itself, even contemplates that the "Responsible Party" is one who has been "appoint[ed]"

to make decisions concerning the resident. Record 3750, § 2.4(b). The payment provisions of the admission agreement most clearly illustrate that the "Responsible Party" is not taking on any *individual* obligations. Throughout Section 4, it is reiterated that the "Responsible Party" is not individually liable, but is only obligated if, and only to the extent, that the Responsible Party has legal access to the resident's income and resources from which to pay *the resident's* obligations. Record 3751-3752, §§ 4.1(a), 4.6, 4.8.

The types of decisions and obligations attributed to the "Responsible Party" are not those that can be made by simply any "other individual or family member who agrees." Other individuals and family members cannot consent to jurisdiction on behalf of another, nor can they release the potential claims of another—unless they have authority from the person to do so. Petitioners' own language in their admission agreements and arbitration agreements forecloses their argument that the "Responsible Party" was signing in an individual capacity. *See* App. 13a-14a. Absent any authority from the resident—which Petitioners conceded below—the admission agreement "do[es] not place any specific obligations or personal liability upon the 'Responsible Party.'" *Id.*

Petitioners did not put on any other evidence in support of their claim that the "Responsible Parties" were acting in their individual capacity. With no facts to support their contention, and with their own words clearly undermining their argument, Petitioners failed to establish the first element necessary to apply the third-party beneficiary doctrine, *i.e.* a valid contract.

3. Petitioners Failed to Establish That They Were Obligated to Do Anything Under the Terms of Their Arbitration Agreements

Petitioners also mischaracterize Arkansas's contract law by suggesting that Arkansas requires co-extensive promises to arbitrate. Petitioners work very hard to distort and muddy the element of mutual obligation beyond recognition, even using the Eighth Circuit's opinion in *Plummer v. McSweeney*, 941 F.3d 341 (2019), to suggest that if Arkansas's mutual obligation requirement was applied to other contracts the same way it was applied to arbitration, that you could not have a contract to build a house unless both parties were mutually obligated to build a house. *See* Petition, p. 17. This is not an accurate representation of the mutual obligation requirement, and, again, Petitioners' presentation of the case and its factual underpinnings—not some deep seeded hostility toward arbitration—is to blame for Petitioners' loss at the Arkansas Supreme Court.

Arkansas's mutual obligation requirement does not require each party to be mutually obligated to do the exact same thing, *e.g.* to arbitrate. It *does*, however, require each party to be obligated to do, or not do, *something*. Otherwise you would have no contract; you would have only a gratuitous promise.

Arkansas's mutual obligation requirement is nothing more than an offshoot of well-known and universally accepted consideration principles. The Restatement explains that "[i]f the requirement of consideration is met, there is no additional

requirement of . . . mutuality of obligation." Restatement (Second) of Contracts § 79 (1981). Consideration, however, is a bargained for performance or return promise given in exchange for another performance or promise. *Id*. at § 71(2). As the Restatement further explains, "sham or 'nominal' consideration does not satisfy the [consideration] requirement of § 71." *Id*. at § 79 cmt. d. "Words of promise do not constitute a promise if they make performance entirely optional with the purported promisor." *Id*. at § 76 cmt. d. "Such words, often referred to as forming an illusory promise, do not constitute consideration for a return promise." *Id*.

The Arkansas Supreme Court has been explaining this exact point for decades. In *Lindner v. Mid-Continent Petroleum Corp.*, the court explained that "Williston has pointed out that the use of the term 'mutuality' in this connection 'is likely to cause confusion and however limited is at best an unnecessary way of stating that there must be a valid consideration.'" 252 S.W.2d 631, 632 (Ark. 1952) (quoting Williston on Contracts § 141). The court further explained that "the requirement of mutuality does not mean that the promisor's obligation must be exactly coextensive with that of the promisee." *Id*. It simply means there must be consideration for the promise, and "[o]f course a promise which is merely illusory . . . falls short of being a consideration for the promisee's undertaking, and neither is bound." *Id*. Even reaching as far back as 1934, the court explained as follows:

> The doctrine of mutuality of obligation appears therefore to be merely one

> aspect of the rule that mutual promises constitute considerations for each other. Where there is no other consideration for a contract, the mutual promises must be binding on both parties. But where there is any other consideration for the contract, mutuality of obligation is not essential.

Johnson v. Johnson, 68 S.W.2d 465, 466 (Ark. 1934). Or, as the court has expressed it more recently: "The element of mutuality of contract means that an obligation must rest on each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." App. 16a.

Applying these principles to the current case demonstrates why the Petitioners failed below. As already discussed in Section C.1., Petitioners consistently argued that the arbitration agreements they sought to enforce were valid contracts in their own right, each satisfying all necessary contractual elements. They explicitly contended that "[t]he subject matter is to arbitrate disputes," and "*the legal consideration is an exchange of promises to arbitrate*." Memo. Mot. to Enforce Arb. Agmts., Record 006; 121; 1217; 3740 (emphasis added). Thus, if the arbitration agreements are to stand on their own feet, Petitioners had to promise to do *something* in these agreements in consideration for the residents' promises to arbitrate disputes. Taking them at their word, the Petitioners allegedly also provided a promise to arbitrate in consideration for the residents' promises.

But, as a factual matter, the court found that Petitioners had made no such promise. By promising to arbitrate only their claims against residents that exceeded $30,000, the court recognized that Petitioners had not actually promised to arbitrate anything at all. To borrow language from the Restatement, their promise was "sham consideration," "an illusory promise," or words of promise that "make performance entirely optional with the purported promisor." The court examined Petitioners' agreements and even entertained their hypothetical scenarios in which Petitioners claimed they might be bound to arbitrate, but found that the Petitioners had structured their relationship with residents in such a way that Petitioners could never have a claim that would be subject to arbitration according to the terms of their agreement. App. 17a-18a, and n.4.

Virtually this same scenario is presented as an example in the Restatement of an instance in which there is no valid consideration. "A conditional promise is not consideration if the promisor knows at the time of making the promise that the condition cannot occur." Restatement (Second) of Contracts § 76. Illustration 1 to comment b. presents this fact pattern: "A promises B to pay him $5,000 if B's ship now at sea has already been lost, knowing that the ship has not been lost. A's promise is illusory and is not consideration for a return promise." Changing only a few words creates the scenario in this case: "Petitioners promise residents to arbitrate if Petitioners have claims against residents that exceed $30,000, knowing that Petitioners will never have

claims that exceed $30,000. Petitioners' promise is illusory and is not consideration for a return promise."

In stark contrast is the Arkansas Supreme Court's treatment of the arbitration agreement in *Jorja Trading, Inc. v. Willis*, 2020 Ark. 133, ---S.W.3d--- (Ark. 2020). In *Jorja*, the agreement to arbitrate was a clause contained within an installment-sale contract for an automobile. And the court made sure to point out this important fact: "[H]ere we refer to the arbitration clause as an 'arbitration agreement.' However, the arbitration agreement is a paragraph contained in the installment-sale contract; *it is not a separate, independently executed contract*. *Id*. at 2, n. 1 (emphasis added). The trial court denied a motion to compel arbitration because it concluded that certain portions of the contract did not mutually obligate the parties. *Id*. Rather than use this mutual-obligation "device" of which Petitioners complain to demonstrate its hostility toward arbitration, the Arkansas Supreme Court reversed.

Unlike the case below, the court was directly presented with questions of preemption, and the court addressed those questions head-on. *Id*. at 5-7. The court summarized its mutual obligation requirement by explaining that "a contract that provides one party the option not to perform his promise would not be binding on the other." *Id*. at 5. However, unlike Petitioners' separate arbitration agreement in which they promised absolutely nothing, the court in *Jorja* recognized that consideration supported the installment-sale contract, of which the arbitration agreement was merely a part. The court explained that "Appellants delivered possession of and financed

a car in exchange for appellees' down payment and a promise to make future payments, satisfying mutuality of the installment-sales contract." *Id*.

The court continued that it "has not required every provision within a contract be bilateral" and that it "cannot require that every provision in an arbitration agreement be bilateral without violating the FAA because doing so would hold arbitration agreements to a more stringent analysis than other contracts." *Id*. Citing *Lindner* and *Johnson*, *supra*, the court explained that mutual obligation did not require each party to have identical rights and remedies, *i.e.* that each party had to be equally bound to arbitrate. But what it did require was "that the duty unconditionally undertaken by each party be regarded by the law as a sufficient consideration for the other's promise." *Id*. at 6.

When presented with a contract that was actually supported by consideration, the Arkansas Supreme Court had no hesitation in enforcing that contract, including the arbitration provision therein. The key point of departure from the decision below to *Jorja*, however, is that the Petitioners presented a *separate*, independent arbitration contract, which they argued was supported by the consideration of a promise to arbitrate—a promise that Petitioners didn't actually make. The federal and state policies favoring arbitration as a method of dispute resolution do not compel courts to overlook glaring deficiencies in arbitration agreements that would invalidate any other contract. 9 U.S.C. § 2.

4. Petitioners Failed to Put Any Evidence in the Record to Establish Mutual Assent

Petitioners also mischaracterize and distort the Arkansas Supreme Court's treatment of the concept of mutual assent. Arkansas's courts do not require arbitration agreements to be signed as the only mechanism sufficient to prove mutual assent, but they do require *some* record proof of assent. The Petitioners cite *Pine Hills Health & Rehab., LLC v. Matthews*, 431 S.W.3d 910 (Ark. 2014), for the proposition that the Arkansas Supreme Court has long held that a written contract can be valid as long as one of the parties signs and the other party acquiesces therein. Petition, p. 21.

Petitioners' reliance on *Matthews* is ironic. Much like it did in this case, in *Matthews* the Arkansas Supreme Court found an arbitration agreement to be invalid for lack of a signature by a facility representative. Even more ironic is the fact that Petitioners were aware of this six-year old case and yet still did the exact same thing that doomed the argument of the nursing facility in the *Matthews* case. While *Matthews* recognizes that an agreement need not be signed, it does not relieve the proponent of the contract of the burden of actually submitting some form of proof of assent, which is exactly what the facility in *Matthews* failed to do. And the Petitioners repeated the same mistake to the letter.

The court in *Matthews* explained that it "employs an objective test for determining mutual assent, . . . mean[ing] objective indicators of agreement and not subjective opinions." 431 S.W.3d at 915. The court acknowledged that the presence or absence of a

signature was not determinative and that other conduct may manifest assent. *Id*. The problem for the Petitioners, and the defendants in *Matthews,* is that they failed to present anything other than their unsigned arbitration agreement as proof of their assent to that agreement. They did not call any witnesses. They did not submit any affidavits. Instead, they filed a motion to compel arbitration accompanied by an unsigned arbitration agreement and let counsel argue that the facility clearly intended to assent to that blank agreement. By submitting only their unsigned arbitration agreement, the Petitioners relied solely on their counsel's subjective opinion that assent had occurred. But they failed to produce any objective, record evidence of assent. This deficiency was dispositive, as explained in *Matthews*:

> Though a hearing was held on the issue of whether Pine Hills had manifested its assent to the contract, *no testimony was presented at the hearing*. What we have before us then are the first two pages of the Arbitration Agreement, an exemplar of the missing third page, and the Admission Agreement. There is no signature on the Arbitration Agreement by a representative of Pine Hills to indicate mutual assent. Rather there is a document whose missing third page contained a signature block for a representative of Pine Hills . . . *Though appellants assert that their conduct indicated Pine Hills's manifestation of its assent to the Arbitration Agreement, there was no testimony presented*

> *concerning any conduct that would have manifested assent*.

Id. (emphasis added).

If the Petitioners wanted to rely on the rule that a contract need not be signed to be enforceable, then they necessarily bore the burden of putting on some evidence of assent *other than* the unsigned contract. As the *Matthews* court concluded, when a nursing facility's representative declines to sign an arbitration agreement *and the facility fails to put on other evidence*, the objective test of assent is not met. *Id*. at 915-916. Even now, Petitioners continue to rely on argument of counsel and the conclusory assertion that, "of course the facility assented to the agreement," as cover for their failure to create a record.

Factually, the court below had nothing in the record before it from which to determine objective assent other than the unsigned arbitration agreements. The court's decision was not driven by hostility toward arbitration; it was driven by Petitioners' failure to carry their burden of actually putting evidence in the record to establish assent.

D. This Court Should Deny the Petition Because the Circuit Split Suggested by Petitioners Does Not Actually Exist

Petitioners point to two alleged circuit splits in support of their request for this Court's review. Both instances, however, are actually examples of how the decision below is consistent with basic principles of

contract law. The Petitioners have merely stretched and distorted these principles to manufacture the appearance of a split that is not really there.

1. The Third-Party Beneficiary Doctrine

Petitioners first assert that the Fifth and Eighth Circuits have diverged on the question of whether nursing home residents can be bound as third-party beneficiaries to arbitration agreements signed by individuals on the residents' behalf. Petitioners' characterization of this "split" is specious for several reasons.

First, neither court actually had to reach the third-party beneficiary argument because the cases were resolved on the issue of authority. In *Northport Health Servs. of Ark., LLC v. Posey*, the Eighth Circuit acknowledged the basic principle that a person cannot sign a contract as the representative of another without that other person's authorization. 930 F.3d 1027, 1030-1031 (8th Cir. 2019). The court reached the exact same conclusion that the Arkansas Supreme Court reached below in determining that the resident's "Responsible Party" referred to a person with representative authority from the resident, rather than to a person acting on their own behalf and in their individual capacity. *Id.* at 1031. The court considered an agreement virtually identical to the one involved in this case and explained that "the definition of Responsible Party in the agreement equates a Responsible Party to a legal guardian, attorney-in-fact, or legal representative." *Id.* Because the signatory lacked authority to make the contract, no valid contract was ever formed, and, thus, the third-

party beneficiary doctrine could not apply. *Id*. *See also* App. 8a (explaining the first element needed to apply the third-party beneficiary doctrine is an underlying valid agreement between two parties).

In contrast, the signatory in *JP Morgan Chase & Co. v. Conegie* had the necessary authority to enter into the admission agreement on behalf of the resident pursuant to a Mississippi statute. 492 F.3d 596, 599-600 (5th Cir. 2007). The court concluded that the agreement was valid under state law because the signatory was authorized by the statute to contract for the resident. *Id*. at 599-600. The court then gave a perfunctory and unnecessary two-paragraph analysis addressing the third-party beneficiary issue *in the alternative* and based on an assumption that federal law might apply to the question. *Id*. at 600. Regardless, because of the court's conclusion that the signatory was authorized to make the contract, there was no barrier to applying the third-party beneficiary doctrine; there was a valid underlying contract.

These two cases do not demonstrate a split in the law concerning application of the third-party beneficiary doctrine. They *do* demonstrate a factual difference between the authority possessed by the signatories. In light of those factual differences, these cases actually demonstrate a uniform approach to the basic rule that a representative or agent must have authority to enter a contract on another's behalf.

In addition, both of these cases involved arbitration provisions that were part and parcel of the admission agreements signed by the parties. Whereas in the current case, the arbitration agreements were

presented by Petitioners as standalone contracts, separate from the admission agreements. This important factual distinction makes this case a poor candidate for certiorari to address any perceived split between *JP Morgan* and *Northport*.

2. Mutual Obligation

Petitioners also claim a circuit split on the issue of mutual obligation. As their flagship example, the Petitioners cite *Plummer v. McSweeney*, 941 F.3d 341 (8th Cir. 2019) for "the reasons Arkansas' entire mutuality of obligation doctrine for arbitration agreements violates the FAA." Petition, p. 17. Curiously, *Plummer* was decided according to the law of Washington, D.C. and under an unconscionability analysis, making *Plummer* a less than ideal candidate to provide a detailed commentary on Arkansas law. *See* 941 F.3d at 344 ("[the district court] declined to enforce [the contract] on the ground that the contract was unconscionable under Washington D.C. law, which the parties agree is appropriate under a choice-of-law provision in the agreement").

Plummer is also the source of Petitioners' strained analysis that if Arkansas applied its mutual obligation rules to other contracts the way they have been applied to arbitration agreements, then a contract to build a house would fail for lack of mutual promises on both sides to build a house. *See id*. at 347, n.1. But as already discussed in Section C.3., *supra*, this is a mischaracterization of what are otherwise universally accepted rules regarding the necessity of consideration in a contract.

Propped up against this strawman, the Petitioners point to case after case as standing for the proposition that mutual obligation is not required. However, none of these cases are actually out of step with Arkansas law in any meaningful fashion, and each of them is factually distinct from the case presented by the Petitioners below. For example, in *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451-453 (2d Cir. 1995), an arbitration clause contained within a contract was valid even though both sides were not obligated to arbitrate all their disputes because there was consideration for the contract as a whole. *See also Soto v. State Indus. Prods., Inc.*, 642 F.3d 67 (1st Cir. 2011) (same). This is the same rule the Arkansas Supreme Court applied in *Jorja*, 2020 Ark. 133, at 5-8, --- S.W.3d---. But it could not be applied in this case because there was no consideration supporting Petitioners' separate arbitration agreements. Petitioners' other examples are similar. *See Kelly v. UHC Mgmt. Co., Inc.* 967 F. Supp. 1240, 1258-1260 (N.D. Ala. 1997) (mutual obligation not required so long as there is consideration exchanged); *Higgins v. Ally Fin. Inc.*, No. 4:18-CV-0417, 2018 WL 5726213, at *3-4 (W.D. Mo. Nov. 1, 2018) (arbitration clause part of an otherwise valid contract can be supported by the consideration underlying the whole contract). As *Jorja* demonstrates, the Arkansas Supreme Court adheres to all of these principles and applies them uniformly to *valid* contracts, even contracts that include arbitration provisions.

Petitioners also cite to *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985) and *Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4th Cir. 2013) as further evidence of a split and argue that these circuits have concluded

that state rules requiring mutual obligation in arbitration agreements are not preempted by the FAA. This is misleading in a few respects. First, it conflates the phrase "mutual obligation" with a requirement of co-extensive and perfectly identical promises to perform some act, *e.g.* to arbitrate. As discussed above, that is not how the Arkansas Supreme Court applies the principle of mutual obligation. It has required only that a contract impose some real obligation on the contracting party, not "a precisely even exchange of identical rights and obligations between the contracting parties." *Jorja*, 2020 Ark. 133, at 6, ---S.W.3d---. To the extent that "mutual obligation" simply means that there must be consideration to support a contract, that would certainly not be preempted by the FAA.

Furthermore, *Hull* is no longer a viable case for Petitioners' proposition. In *Hull*, an arbitration clause was included within an employment agreement. 750 F.2d at 1549. The court applied New York law and concluded that the consideration underlying the larger employment contract was not sufficient to support the arbitration clause. *Id*. at 1550. The Court of Appeals of New York soon thereafter clarified that an arbitration provision need not consist of co-extensive promises to arbitrate and that "[i]f there is consideration for the entire agreement that is sufficient." *See Sablosky v. Edward S. Gordon Co., Inc.*, 535 N.E.2d 643, 646 (N.Y. 1989).

Lastly, *Noohi v. Toll Bros., Inc.* is not so much evidence of a split as it is evidence of a singular outlier. *Noohi* is predicated on the Maryland case of *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835

A.2d 656 (Md. 2003), which held that consideration for an underlying contract was not sufficient consideration for an arbitration clause included in that contract, and that the arbitration clause had to be supported by independent consideration. *See Noohi*, 708 F.3d at 607. As explained in *Noohi*, the rationale for the *Cheek* rule is that any examination of the validity of the contract as a whole would impermissibly infringe on the role of the arbitrator to assess the merits of any arbitrable dispute. *Id*.

Regardless of the validity of the *Cheek* rule under the FAA, *Noohi* does not support the conclusion that this petition should be granted. The *Cheek* rule is confined to Maryland, and the Fourth Circuit does not apply such a rule on a circuit-wide basis. *See Noohi*, 708 F.3d at 608 and n. 4 (discussing certifying a similar question to the West Virginia Supreme Court and getting a different result). In addition, even if the Court wanted to address the *Cheek* rule, this case does not present the record on which to do it. As already discussed herein and explained in *Jorja*, Arkansas does not follow a similar rule. This case is also not a good candidate to address *Cheek* because the *Cheek* rule is predicated on an arbitration provision being included within some otherwise valid contract. In contrast, the outcome here was dictated by Petitioners' insistence that the arbitration agreement, itself, was a separate contract supported by its own consideration.

This case falls in line with the overwhelming weight of authority. It is also faithful to this Court's FAA decisions and does not provide a record on which to examine the outcomes of factually distinct cases

from other courts. Accordingly, Respondents contend that the petition should not be granted.

CONCLUSION

For the reasons discussed herein, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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