No. 25-535

IN THE
Supreme Court of the United States

HICKORY HEIGHTS HEALTH AND REHAB, LLC, ET AL.,
Petitioners,

v.

YASHIKA WATSON, AS GUARDIAN OF THE PERSON AND ESTATE OF ZEOLA ELLIS III, *Respondent*.

On Petition for a Writ of Certiorari to the Arkansas Court of Appeals, Divisions IV & I

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court relying on generally applicable state-law principles can decline to enforce an arbitration clause that separately violates a federal regulation.

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INTRODUCTION

This is a mine-run case about the enforceability of an arbitration clause under general state-law principles. In declining to enforce an arbitration clause between the parties, the Arkansas Court of Appeals relied on longstanding, generally applicable state law holding that any contractual clause—not just an arbitration clause—is invalid if it violates a separate law or regulation. The arbitration clause here violated a 2019 Centers for Medicare & Medicaid Services ("CMS") Rule prohibiting long-term care ("LTC") facilities like Petitioners from imposing certain arbitration clauses. *Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements*, 84 Fed. Reg. 34,718 (July 18, 2019) ("2019 CMS Rule"). Accordingly, under state law principles, the arbitration clause was unenforceable. The court alternatively held that the clause was unconscionable based on the particular "facts pertaining to [Respondent]." Pet.App.13a.

The Petition, however, raises several grandiose legal claims about Congress's spending powers (QP1) and whether the 2019 CMS Rule violates the Federal Arbitration Act ("FAA") (QP2). This Court should deny review.

First, the Questions Presented were not ruled upon below. There is only one passing reference in the record to Congress's spending power, and Petitioners forfeited any challenge to the validity of the 2019 CMS Rule itself. Moreover, lead Petitioner Hickory Heights was a named party in a prior Eighth Circuit case challenging the 2019 CMS Rule's validity. *See*

Northport Health Servs. of Ark., LLC v. HHS, 14 F.4th 856 (8th Cir. 2021). Hickory Heights lost *Northport*, and this Court denied review years ago. This second bite at the apple is precluded.

Second, there is no square split, let alone one ready for this Court's review. The Eighth Circuit's *Northport* decision involved an Administrative Procedure Act ("APA") challenge to the 2019 CMS Rule, whereas this case is a state-law tort claim between private parties. The causes of action are dramatically different, making this case a poor excuse for a direct split. Moreover, the decision below by the Arkansas Court of Appeals expressly stated it was following *Northport*, not splitting from it. Petitioners do not cite any case where a court has rejected the decision below or enforced an arbitration agreement covered by the 2019 CMS Rule. Unless and until that happens, there is no split, let alone a ripe one.

Third, the enforceability of clauses covered by the 2019 CMS Rule is of dwindling importance. When it sought certiorari years ago in *Northport*, Hickory Heights and dozens of other similar LTC facilities told this Court that they had already stopped using arbitration clauses like the one at issue here.

Fourth, the decision below rests on an alternative holding that the arbitration clause is unconscionable under the specific facts of this case.

Fifth, Petitioners' arguments on the merits are wrong, leading to an overblown portrayal of the consequences of the decision below. The state courts below did nothing more than apply general state-law principles to an area of traditional state regulation,

entirely in accord with precedent and the FAA. Given that they seek to overturn a state court's use of state law, Petitioners' invocations of federalism ring hollow.

In effect, Petitioners ask this Court to sanction their explicit breach of a funding condition they voluntarily accepted. The operative regulation in effect when the arbitration agreement was executed states that a facility "must not require" arbitration agreements as a condition of admission. 42 C.F.R. § 483.70(n)(1) (2021). Yet, Petitioners' own contract stipulated that "[s]igning this arbitration agreement … is a condition of admission." Pet.App.3a. This Court should not grant certiorari to assist a party in profiting from its own admitted regulatory noncompliance.

Any of these reasons is a sufficient basis for denying further review. Together, they make clear this case is not a suitable vehicle for certiorari.

STATEMENT OF THE CASE

A. Hickory Heights' Unsuccessful Challenge to the 2019 CMS Rule.

In 2019, CMS finalized a rule that conditioned Medicare and Medicaid funding for LTC facilities on those facilities agreeing they would "not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or … to continue to receive care at, the facility." 84 Fed. Reg. at 34,735 (codified at 42 C.F.R. § 483.70(n)(1)). The 2019 CMS Rule imposed several other requirements for such arbitration clauses. *Id.* at 34,735–36.

Hickory Heights Health and Rehab, LLC—which is lead Petitioner in this case—and numerous other LTC facilities filed a lawsuit challenging the 2019 CMS Rule before it took effect, arguing that it violated the FAA, the APA, and the Regulatory Flexibility Act. Although the rule was initially stayed, the court ultimately held in favor of the government. *Northport*, 14 F.4th at 863, 866, 879.

The challengers appealed but lost again. In 2021, the Eighth Circuit affirmed summary judgment for the government, holding that "[b]ecause the [2019 CMS] Rule does not … render arbitration agreements entered into in violation thereof invalid or unenforceable, it does not conflict with the FAA." *Id.* at 869. The Eighth Circuit did "not address" the challengers' argument "that Congress has not evinced a 'clear and manifest' intention to empower CMS to promulgate rules overriding the FAA." *Id.* at 869 n.5. Nor did the Eighth Circuit address any claims based on Congress's spending powers. *See id.*

Hickory Heights and the other challengers filed a petition for certiorari, in which they told this Court that they no longer require arbitration agreements as a condition of care. Pet.12 n.3, *Northport Health Servs. of Ark., LLC v. HHS*, No. 21-1455 (U.S. May 13, 2022). The Court denied the petition more than three years ago. *Northport*, 143 S. Ct. 294 (2022) (No. 21-1455).

B. Proceedings Below.

In 2022, Respondent Yashika Watson sued Petitioners, alleging that Hickory Heights failed to prevent abuse and mistreatment of her resident

father. Pet.App.26a. Hickory Heights moved to compel arbitration under an arbitration agreement it extracted as a condition of admitting her father to the facility. Pet.App.26a–27a. Watson, in opposition, argued that the arbitration agreement was unenforceable under Arkansas law because it violated the 2019 CMS Rule. Pet.App.27.

The county circuit court agreed with Ms. Watson, holding that the arbitration clause was unenforceable under "firmly established" Arkansas law because the clause "violates a federal regulation" and "is also unconscionable." Pet.App.40a.

Petitioners took an interlocutory appeal, but the Arkansas Court of Appeals affirmed. That court "agree[d] that the findings and holding by the Eighth Circuit in *Northport* are relevant and persuasive." Pet.App.11a. In particular, the Arkansas Court of Appeals agreed that "CMS could not cancel a contract between an LTC facility and a resident by regulatory fiat, but such a contract would remain subject to generally applicable contract defenses." Pet.App.10a. The court also stated that "[w]hile we recognize that *Northport* does not hold that a mandatory arbitration agreement is unenforceable between the parties," Pet.App.11a, the arbitration agreement was nonetheless unenforceable under *state law* for two reasons.

First, under generally applicable Arkansas contract law, "a contract which violates or contravenes a … *regulation* may be illegal, invalid, unenforceable, or void." Pet.App.3a–4a (quoting 17A Am. Jur. 2d *Contracts* § 223 (updated Jan. 2025)). *Second*, based

on "the totality of the circumstances" and "the facts pertaining to Ms. Watson," the arbitration agreement was unconscionable under Arkansas law. Pet.App.13a–14a.

Over a dissent, the Arkansas Supreme Court denied review, *see* Pet.App.34a–38a, and Petitioners now seek a writ of certiorari.

REASONS TO DENY THE PETITION

This case satisfies none of this Court's criteria for a grant. There are nearly half a dozen separate bases for denial, any one of which is sufficient.

I. The Questions Presented Were Not Squarely Decided Below, and QP2 Is an Improper Collateral Attack on Hickory Heights' Loss in *Northport*.

The Petition makes a mountain of a molehill. It claims this case raises monumental questions about Congress's spending powers and whether the 2019 CMS Rule is valid under the Federal Arbitration Act. But this Court should deny review because neither Question Presented was squarely decided below.

QP1: Spending Powers. The first Question Presented raises grandiose arguments about the nature of Congress's spending powers. Petitioners even go so far as to say this question was "clearly decided and dispositive below." Pet.28. But this Court will search in vain for where any lower-court opinion supposedly issued a "resolution" on this question. Pet.13. In the entire record below, there is one *passing* reference to Congress's spending power, and it appears only in a dissent from denial. Pet.App.36a.

Petitioners' own briefing did not raise this question below, either. At the Arkansas Supreme Court, for example, Petitioners sought review on (1) the 2019 CMS Rule's supposedly "retroactive[]" application to an arbitration clause executed during a period when that Rule was stayed, (2) whether the 2019 CMS Rule indirectly would render the

arbitration clause unlawful under state law, and (3) whether a sufficient showing had been made regarding unconscionability. *See* Pet. for Rev., *Hickory Heights Health & Rehab, LLC v. Watson*, No. CV-23-404 (Ark. Apr. 3, 2025). There was nothing even obliquely referencing spending powers.

Because this Court is "a court of final review and not first view," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), it should decline to wade into the difficult legal issues surrounding Congress's spending powers when the lower courts never had a chance to pass on those matters in the first instance. This Court DIG'ed a case just last year that allegedly "raised a difficult and consequential argument" about the preemptive force of Spending Clause legislation, precisely because the courts "did not address this issue below." *Moyle v. United States*, 603 U.S. 324, 326 (2024) (Barrett, J., joined by Roberts, C.J., & Kavanaugh, J., concurring). Three Justices expressed their view that this Court "should not jump ahead of the lower courts, particularly on an issue of such importance." *Id.* at 326–27. There is no reason for history to repeat itself.

QP2: Federal Arbitration Act. If anything, the second Question Presented—i.e., whether the 2019 CMS Rule contradicts the Federal Arbitration Act—has even more vehicle flaws.

The Arkansas Court of Appeals expressly held that Petitioners forfeited the issue below: "Hickory Heights, [in] its motion for rehearing, made an additional argument that the CMS regulation … violated the FAA. However, Hickory Heights failed to

argue this point in its original briefs," so the court deemed it forfeited. Pet.App.12a n.2. This procedural default alone prevents this Court from reaching the merits of Petitioners' second Question Presented.

Even if the argument were preserved, this Court should still deny review because lead Petitioner Hickory Heights is likely precluded from raising it. Recall that years ago, Hickory Heights, along with dozens of other LTC facilities, brought the pre-enforcement APA challenge to the 2019 CMS Rule that resulted in the *Northport* decision. Hickory Heights argued (among other things) that the 2019 CMS Rule violated the FAA. *Northport*, 14 F.4th at 863. But the Eighth Circuit rejected that argument, *id.* at 869, and this Court subsequently denied Hickory Heights' petition for a writ of certiorari, 143 S. Ct. 294.

Hickory Heights is therefore likely precluded from launching a new challenge to the same CMS rule on the same basis, especially given that Hickory Heights had no reason to pull its punches in the *Northport* case—it had every incentive to win that case at all costs, even hiring a seasoned Supreme Court advocate to file the petition for a writ of certiorari. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329–32 (1979) (outlining relevant preclusion principles).

It seems Hickory Heights is trying to use this private tort suit to get a second bite at the apple and thereby invalidate the 2019 CMS Rule. That is more than a vehicle issue—it is a potential preclusive bar on this Court's ability to decide the second Question Presented.

Given these serious questions about preservation and preclusion, this is a seriously flawed vehicle for resolving Petitioners' Questions Presented.

II. There Is No Split, and Even If There Were, Percolation Is Warranted.

Denial is independently warranted because this case involves no split, let alone one sufficiently developed for this Court's review. Petitioners claim the decision below "expressly split" from the Eighth Circuit's decision in *Northport*, Pet.28, which rejected an APA challenge to the 2019 CMS Rule, Pet.18. That is wrong for several reasons.

First, there is no "express split." The Arkansas Court of Appeals actually said *Northport*'s "findings and holding" were "persuasive," Pet.App.11a, and that—if it were to reach the issue despite Petitioners' forfeiture—it would *agree* with *Northport* that the 2019 CMS Rule "does not violate the FAA," Pet.App.12a n.2. Nor did the Arkansas Court of Appeals dispute *Northport*'s view that the 2019 CMS Rule itself did not invalidate any arbitration clauses. Pet.App.9a–10a (quoting *Northport*, 14 F.4th at 868–69). Two courts agreeing with each other is certainly not the stuff of certiorari.

Second, there is no split in the outcome of the cases, either. Recall that *Northport* was an APA case involving a challenge to a federal rule, but the decision here involves a state court applying state law to decline to enforce an arbitration clause in a state-law tort claim. The postures are wildly different.

Put another way, Petitioners cite no case where a court has *enforced* an arbitration clause covered by the 2019 CMS Rule; nor do they cite any case where a court has *rejected* the validity of that Rule (again, the decision below indicated it agreed the Rule was valid). Unless and until there are such cases, there is no split, period—let alone one sufficiently developed for this Court's review.

As explained next, there is a good reason why Petitioners have been unable to cite any case directly disagreeing with the outcome below: the issue is of dwindling importance.

III. The Enforceability of Arbitration Clauses Covered by the 2019 CMS Rule Is of Dwindling Importance.

The enforceability of arbitration clauses covered by the 2019 CMS Rule is of quickly diminishing relevance and thus unworthy of review.

The Court need only take Hickory Heights' word for it. In its petition to this Court in *Northport*, Hickory Heights and dozens of other similar LTC facilities told this Court that they had stopped using such arbitration clauses in late 2021 after the Eighth Circuit ruled in *Northport*. *See* Pet.12 n.3, No. 21-1455.

That was a logical response to *Northport*, as continuing to use such clauses in violation of the 2019 CMS Rule only risks drawing scrutiny from CMS. But this also means the universe of cases involving this issue is swiftly dwindling. There is little point

granting review to resolve a scenario that will soon be extinct.

IV. The Decision Below Rests on an Alternative, Fact-Bound Holding.

Denial is also warranted because the decision below rests on an alternative holding that the arbitration clause here is unconscionable. Petitioners do not contend that the unconscionability ruling is separately cert-worthy.

As Petitioners themselves acknowledge, the unconscionability holding was premised on "Arkansas unconscionability law," Pet.11, and the Court below confirmed that its holding rested on the specific "facts pertaining to [Respondent]," Pet.App.13a, including that she "had no real choice but to sign the agreement," *id.* There is no point granting review of an opinion denying arbitration when the same outcome would obtain anyway on an alternative state-law ground.

Petitioners claim the unconscionability holding was not independent from the 2019 CMS Rule's effect on the arbitration clause, Pet.28, but the record proves otherwise. The trial court explicitly grounded its unconscionability holding in specific factual findings, determining that Respondent was presented with a take-it-or-leave-it contract during a moment of crisis and "had no real choice." Pet.App.40a. The Court of Appeals affirmed based on these "facts pertaining to Ms. Watson." Pet.App.13a. Because this factual determination of unconscionability is sufficient to sustain the judgment, any opinion by this Court on other issues would be advisory.

Further, even if the unconscionability holding did not qualify as a truly independent and adequate basis, it nonetheless remains a serious vehicle issue warranting a denial of review, especially given all the other vehicle problems with this case.

V. The Decision Below Is Correct, and Petitioners' Policy Arguments Are Illogical and Overblown.

In addressing Respondent's state-law tort claim, the state courts below applied general principles of state law to an arbitration clause. That is exactly the process the FAA requires: courts can refuse to enforce arbitration agreements on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 650 (2022) ("A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability."); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Petitioners never dispute that Arkansas law holds that all contractual clauses—not just arbitration clauses—are invalid when they are in violation of another law or regulation. *See, e.g.*, *Am. Fid. Fire Ins. Co. v. Builders United Constr., Inc.*, 613 S.W.2d 379, 380 (Ark. 1981); *Wilamouicz v. Adams*, 13 Ark. 12, 22 (1852); 17A Am. Jur. 2d *Contracts* § 223. Petitioners even agree that Arkansas "strongly favor[s] both arbitration as a whole and expeditiously moving parties from litigation to arbitration." Pet.27.

Petitioners suggest there is now "disuniformity" because an arbitration clause that violates the 2019

CMS Rule would be unenforceable if it had been signed by "a resident in Iowa." Pet.18. But that is wrong, as other states likewise decline to enforce contractual provisions that violate federal regulations. *See Bank of the West v. Kline*, 782 N.W.2d 453, 462 (Iowa 2010) (declining to enforce contracts that were in violation of federal regulations). If anything, Petitioners' hypotheticals about disagreements between courts just confirms the lack of a true split here.

Petitioners are also mistaken that "an Arkansas arbitration agreement" would be enforceable "in federal court" in Arkansas but "unenforceable in a state court across the street." Pet.18. Under 9 U.S.C. § 2, a federal court would apply state law to determine the validity of the arbitration clause. *See Concepcion*, 563 U.S. at 339–40. That means a federal court would likely decline to enforce the clause here, too, because Arkansas law recognizes a generally applicable defense against *any* contract obtained in violation of a federal regulation. But again, the fact that Petitioners are forced to speculate about how other courts would handle this situation just proves there is no split.

Because Petitioners inaccurately portray the decision below, they also misunderstand and exaggerate the effects of it. For example, Petitioners claim the holding below will usher in a new era of "preempt[ion of] State law in areas traditionally reserved to State authority." Pet.3; *see* Pet.25 (claiming the ruling below would "deprive a State of the ability to enforce its laws") (cleaned up). But that claim rings hollow. The Arkansas Court of Appeals applied state law to a state claim in an area of

traditional state regulation. It makes no sense to reverse that holding in the name of federalism and protecting states' prerogatives. Arkansas enforced its laws below. Petitioners just do not like the outcome.[1]

There is also little logic in Petitioners' argument that the decision below runs afoul of the rule that Congress's spending powers are in the nature of a contract and require "consent." Pet.5, 25. Petitioners *did* consent to get federal funding and, in exchange, they cannot use the specific kind of arbitration clause at issue in this case, pursuant to the 2019 CMS Rule upheld in *Northport*. Petitioners want federal money without any of the judicially-upheld strings attached, but that does not somehow convert this mine-run tort case into a case about Congress's spending powers.

Petitioners cannot have it both ways. *See Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 219–20 (2022). Petitioners explicitly conditioned admission of Respondent's father on signing an arbitration agreement, in direct defiance of the 2019 CMS Rule, which says facilities "must not require" such signatures. 84 Fed. Reg. at 34,735 (codified at 42 C.F.R. § 483.70(n)(1)). Having pocketed the federal funds, Petitioners ask this Court to let them ignore the conditions attached to those funds.

Petitioners also cite cases about the need to provide clear notice to recipients of federal money that

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[1] Petitioners also propose several future regulations they claim could present spending-power concerns. Pet.23–24. If such rules come to pass, they would be subject to pre-enforcement challenges under the APA, just like the challenge Hickory Heights lost against the 2019 CMS Rule.

they might face private suits asserting an individual right under the terms of the federal grant. Pet.5. But Petitioners face no such "private remedies" here. Pet.16. This is an ordinary tort suit arising under a state-law cause of action, not some kind of implied cause of action seeking to enforce the 2019 CMS Rule itself, let alone use it as the basis for "an individual right," *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357, 378 (2025), like a "§ 1983" claim, Pet.5. Respondent invoked the 2019 CMS Rule as a *defense* against Petitioners' attempts to compel this dispute to arbitration—nothing more.

* * *

In sum, this case does not implicate Petitioners' grandiose legal theories, which were not even presented below. The Arkansas courts did exactly what this Court's precedent requires: they applied generally applicable state law to an arbitration clause. And there is no split here, but there is an alternative, fact-bound holding.

Given that Ms. Watson has now waited years to have her case move forward in state trial court, this Court should swiftly deny the Petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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