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 Writ of Certiorari to the Arkansas Court of Appeals, Divisions IV & I

Brief of Amici Curiae the American Health Care Association and the Alabama Nursing Home Association in Support of Petitioners

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INTEREST OF *AMICI CURIAE*

Amici Curiae the American Health Care Association and the Alabama Nursing Home Association (collectively, Amici) have a strong interest in the issues the Petition presents.[1]

The American Health Care Association (AHCA) is the largest association in the United States representing long-term and post-acute care providers. Its more than 15,000 members include both non-profit and proprietary skilled nursing centers, assisted living communities, sub-acute centers, and homes for individuals with intellectual and developmental disabilities.

The Alabama Nursing Home Association (ANHA) is a nonprofit trade association that represents over 94% of the state of Alabama's licensed nursing homes. Established in 1951, and with more than 217 nursing facility members, ANHA is the voice of nursing homes, which care for more than 22,000 Alabama citizens.

Many of AHCA's and ANHA's members use arbitration agreements to reduce litigation costs, shorten the time to resolve disputes, and make the

[1] Under this Court's Rule 37.2, Amici provided 10-day notice to the parties of their intent to file this brief. Under this Court's Rule 37.6, the undersigned counsel certifies that no counsel for any party authored this brief in whole or in part. No counsel for a party made a monetary contribution to fund the preparation or submission of this brief. And no one other than the Amici and their counsel made any such monetary contribution.

process by which they provide quality care more efficient. Doing so benefits both their members and the patients or residents for which their members provide care.

AHCA and ANHA file this brief urging the Court to grant the Petition for a Writ of Certiorari and to review the Arkansas Court of Appeals' decision left unreviewed by the Arkansas Supreme Court.

The Petition explains why this case affords an excellent vehicle for the Court to squarely decide the sharp split between the United States Court of Appeals for the Eighth Circuit in *Northport Health Services of Arkansas, LLC v. United States Department of Health & Human Services*, 14 F.4th 856 (8th Cir. 2021), *cert. denied*, 143 S. Ct. 294 (2022) (Mem.), and the Arkansas Court of Appeals in *Hickory Heights Health & Rehab, LLC v. Watson,* 2025 Ark. App. 133, 707 S.W.3d 499, *review denied*, 2025 Ark. 111, 711 S.W.3d 793. This split pertains to whether or not a federal agency can void and make unenforceable an arbitration agreement that is otherwise valid in all respects under the Federal Arbitration Act, 9 U.S.C. § 2.[2] Rather than burden the Court by repeating the Petitioners' arguments, Amici will instead emphasize additional reasons for granting the Petition by highlighting the practical implications of the Arkansas

[2] The Eighth Circuit in *Northport,* 14 F.4th at 868, found that CMS had no such power, and the Arkansas Court of Appeals in the instant case, *Hickory Heights*, 2025 Ark. App. 133, at 14, 707 S.W.3d at 508, found that CMS indeed has such power.

courts' interpretation on the thousands of nursing facilities across the country and on the residents of such facilities.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

In 2019, the Secretary of the Department of Health and Human Services promulgated a final rule[3] that singled out nursing home arbitration agreements for disfavorable treatment. *See* 84 Fed. Reg. 34718-01 (July 18, 2019) (codified at 42 C.F.R. § 483.70(m)) (the "Revised CMS Rule").[4] Two years later, the United States Court of Appeals for the Eighth Circuit upheld the Revised CMS Rule because it "does not invalidate or render unenforceable any arbitration agreement" but instead merely "establishes the conditions for receipt of federal funding through Medicare and Medicaid programs." *Northport*, 14 F.4th at 868. Despite warnings that the Eighth Circuit's decision posed substantial risks to the contractual rights of private parties, this Court denied certiorari and let the Eighth Circuit's decision stand. *See Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs.*, 143 S. Ct. 294 (2022). And the opponents of arbitration began sharpening their knives.

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[3] Petitioners outline the evolution of the rule from outright banning arbitration to the current version allowing pre-dispute arbitration but requiring nursing facility agreements to contain specific provisions and take additional steps to be in compliance.

[4] The Centers for Medicare and Medicaid Services (CMS), a division of the Department of Health and Human Services, is charged, *inter alia*, with enforcing the Revised CMS Rule.

Now, the Arkansas state courts have done precisely what the Eighth Circuit assured would not happen—use the Revised CMS Rule to invalidate an arbitration agreement. *See Hickory Heights,* 2025 Ark. App. 133, at 14, 707 S.W.3d at 508. In direct conflict with the Eighth Circuit's decision in *Northport*, which assured providers that the Revised CMS Rule only matters for participation in Medicare and Medicaid, the Arkansas decision in *Hickory Heights* held that the Revised CMS Rule can render contracts between nursing homes and private citizens unenforceable.

The Court should conclude that the resulting confusion and ambiguity is intolerable, and it should act to resolve it. The lack of clarity affects the admission of nursing home residents for 94% of all nursing facilities and skilled nursing facilities in the United States.[5] Amici represent the majority of those nursing facilities on either a nationwide or state-specific basis.

ARGUMENT

I. The implications of *Hickory Heights* extend far beyond this case and the State of Arkansas.

In the underlying case, the arbitration agreement was a condition of admission, which violated the Revised CMS Rule. *See Hickory Heights*, 2025 Ark. App. 133, at 3, 8, 707 S.W.3d 499, 502, 504-05. Thus,

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[5] *See* Asst. Sec'y for Planning & Evaluation, Office of Health Planning, Data Point (Dec. 15, 2022) (available at https://aspe.hhs.gov/sites/default/files/documents/fd593ae970848e30aa5496c00ba43d5c/aspe-data-brief-ownership-snfs.pdf (last visited Dec. 1, 2025).

at first blush, perhaps, the case would seemingly have limited impact, insofar as most agreements for skilled nursing facilities participating in Medicare and Medicaid have been updated to meet the Revised CMS Rule's regulatory requirements. However, among other things, the Revised CMS Rule includes a requirement that facilities must verbally explain the arbitration provision in a language, manner, and form that the resident and their representative understand. The *Hickory Heights* decision, in turn, morphs the Revised CMS Rule's requirement here beyond the bounds CMS told the Eighth Circuit it envisioned (more on this below) and instead paves the way for challenges to the enforceability of any arbitration agreement signed upon admission to a nursing facility. Such a challenge to enforceability can be raised simply by alleging either that the facility did not explain the agreement verbally or that the facility's verbal explanation was lacking sufficient detail, such that the resident's or resident representative's failed to form an understanding of the agreement. *See Hickory Heights*, 2025 Ark. App. 133, at 14, 707 S.W.3d at 508.

Hickory Heights allows the Revised CMS Rule to be used to support a defense of illegality under state law. The contractual defense of illegality is not unique to the State of Arkansas. The concept of voiding an illegal contract is a prevalent common-law principle based, in part, on public policy. Therefore, the type of argument used in *Hickory Heights* could be used to defeat arbitration in the context of nursing home agreements in every state in the Union. *See Stone v. Freeman,* 298 N.Y. 268, 82 N.E.2d 571, 572 (1948) ("It is the settled law of this State (and probably of every

other State) that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object, nor can such a person plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose.").

Amici agree with Petitioners that the Eighth Circuit got it right when it ruled that a violation of the Revised CMS Rule "does not invalidate or render unenforceable any arbitration agreement" but "[i]nstead" merely "establishes the conditions for receipt of federal funding through Medicare and Medicaid programs." *Northport*, 14 F.4th at 868.[6] In other words, the Eighth Circuit in *Northport*—unlike the Arkansas Court of Appeals in *Hickory Heights*—has held an arbitration agreement cannot be deemed invalid or unenforceable solely for want of following the procedures outlined in the Revised CMS Rule.

By way of example, in a recent case in Alabama, counsel for the residents and/or their estates, relying on *Hickory Heights*, have suggested that an Alabama court should deny a motion to compel arbitration seeking enforcement of an agreement that would otherwise be enforceable in the absence of *Hickory Heights*' interpretation of the Revised CMS Rule. *See* Surreply Opposing Mot. to Compel Arbitration at 6a, *Wilson v. DHS of Ala., LLC*, No. 08-CV-2022-900036.00 (Ala. Cir. Ct. (Blount Cty.) Sept. 11, 2025) (citing *Hickory*

[6] Although Amici agree with the Eighth Circuit that an arbitration agreement should not be deemed invalid or unenforceable for not following the Revised CMS Rule, Amici do not agree with other aspects of the Eighth Circuit's decision.

Heights and arguing, "Because Diversicare's arbitration agreement was in violation of federal law [the Revised CMS Rule], it must be set aside and deemed unenforceable ….").[7] An Alabama trial judge has even issued an order citing the lack of a showing that the Revised CMS Rule was complied with as an element the court looked at when denying a motion to compel arbitration. *See Wilson v. DHS of Ala., LLC*, op. at 23a, No. 08-CV-2022-900036.00 (Ala. Cir. Ct. (Blount Cty.) Nov. 25, 2025) ("To the Court it becomes a question of fact did the Agent of the Defendant's [*sic*] clearly, specifically and intentionally explain the agreement and its federal requirements to the signing party.").[8]

Notably, in the *Wilson* case from Alabama and in other similar cases, the agreement on its face met all regulatory requirements; however, attorneys for the resident or the family alleged that the facility failed to meet its regulatory obligation to verbally explain the arbitration agreement in a language, manner, and form that the resident or the representative understood. According to the attorneys for the residents or their estates (and at least one Alabama trial judge), any failure to abide by the Revised CMS Rule's

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[7] Amici are including a copy of this Alabama trial court briefing in "Appendix A," and the page citation given above is to the Appendix page. The Alabama proceeding referenced is separate from the Arkansas proceeding placed at issue in the present Petition but illustrates what will happen in other states (not just Arkansas) if the *Hickory Heights* decision is left unreviewed.

[8] Amici are including a copy of this Alabama trial court order in "Appendix B," and the page citation given above is to the Appendix page.

requirement—that the arbitration provision be verbally explained—renders the arbitration agreement illegal, under state law, because the agreement violates a federal regulation.

II. *Hickory Heights* conflicts with the FAA.

This Court maintains a "liberal federal policy favoring arbitration" under 9 U.S.C. § 2 of the Federal Arbitration Act. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Because of the "'fundamental principle that arbitration is a matter of contract,'" "'courts must place arbitration agreements on equal footing with other contracts, and enforce them according to their terms.'" *Concepcion,* 563 U.S. at 339 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

Before CMS promulgated its Revised CMS Rule, it had been a well-settled principle of contract law that a party who signs a contract is deemed to have read and understood what they are signing. Without this principle, the "sanctity of contract" is lost, and parties could avoid their obligations merely by claiming that they did not read a contract. *Locklear Dodge City, Inc. v. Kimbrell*, 703 So. 2d 303, 306 (Ala. 1997). That would lead to the anomalous result that those responsible enough to read their contracts would be bound to the contracts' terms, while those reckless enough not to read their contracts could avoid the contracts' terms. *See id.*

This, however, is not the rule under state law. There is abundant case law on this exact issue across every jurisdiction. *See, e.g.*, *Dolores v. Gen. R.V. Ctr., Inc.*, 398 F. Supp. 3d 184, 191 (E.D. Mich. 2019) ("[U]nder Michigan law, a party who signs a contract ... ordinarily is presumed to have read, understood and assented to its terms."); *Fernandes v. Dillard's Inc.*, 997 F. Supp. 2d 607, 612 (S.D. Tex. 2014) ("Under Texas law, a party who signs a contract is presumed to have read and understood its contents."); *Schooley v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 867 F. Supp. 989, 992 (W.D. Okla. 1994), *aff'd*, 107 F.3d 21 (10th Cir. 1997) (unpublished table decision) ("One who signs a contract is presumed to have read and understood the terms."); *Roldan v. Callahan & Blaine*, 161 Cal. Rptr. 3d 493, 497-98 (Cal. App. 4th Dist. 2013), *as modified* (Sept. 18, 2013) ("[C]ourts must also presume parties understood the agreements they sign, and that the parties intended whatever the agreement objectively provides."); *York v. Dodgeland of Columbia, Inc.*, 749 S.E.2d 139, 146 (S.C. App. 2013) ("[A] party who signed a contract is deemed to have read and understood 'the effect' of the contract."); *Stelluti v. Casapenn Enters., LLC*, 1 A.3d 678, 690 (N.J. 2010) ("When a party enters into a signed, written contract, that party is presumed to understand and assent to its terms, unless fraudulent conduct is suspected."); *Dashiell v. Meeks*, 913 A.2d 10, 20 (Md. 2006) ("[I]t is the rule under Maryland contract law that, as between the parties to an agreement, a party who signs a contract is presumed to have read and understood its terms and that the party will be bound by them when that document is executed."); *Continental Stock Transfer & Tr. Co. v. Sher-Del Transfer & Relocation Servs., Inc.*, 750 N.Y.S.2d 8, 8 (N.Y. App. Div.

1st Dept. 2002) ("[P]arties are ordinarily bound by agreements they sign since they are presumed to have read them."); *Marley v. M. Bruenger & Co.*, 6 P.3d 421, 424 (Kan. App. 2000) ("We assume that any party who has signed an agreement has read it and understands it."); *Locklear*, 703 So. 2d at 306 ("[A] person who signs contract is on notice of terms therein and is bound thereby even if he or she fails to read document."); *Parker v. Fidelity Bank*, 261 S.E.2d 465, 466 (Ga. App. 1979) (a person who signs a contract is "presumed to have read the instruments in question and to have understood their contents").

Further, in determining whether an arbitration agreement is enforceable, state law is applied in analyzing the formation of contracts. *See Herrera Cendeno v. Morgan Stanley Smith Barney, LLC*, 154 F. Supp. 3d 1318, 1326 (S.D. Fla. 2016) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Bhim v. Rent-A-Center, Inc.*, 655 F. Supp. 2d 1307, 1311 (S.D. Fla. 2009)). Thus, under the FAA, courts routinely enforce arbitration agreements where both parties signed the agreement, presuming they have each read the agreement and thus understood it.

If the result from *Hickory Heights* is left standing, then by alleging any violation (however slight) of the Revised CMS Rule, the resident or resident's representative can invoke a new state-law contractual defense to an arbitration agreement in the long-term care setting, merely by asserting that the agreement was not adequately reviewed by them or was not verbally explained to them. This is in direct conflict with this Court's interpretation of the FAA as placing arbi-

tration agreements on equal footing with other contracts, and it is in direct conflict with state-law principles that a party is ordinarily deemed to have read the contracts they sign and to have agreed to be bound to the terms therein.

Additionally, *Hickory Heights* not only arguably creates a new contractual defense unique to arbitration agreements, but it does so only as to arbitration agreements in the long-term-care setting. This Court recently provided guidance to lower courts that they cannot create arbitration-specific procedural rules to tilt the playing field in favor of or against arbitration. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 418-19 (2022). If lower courts cannot create arbitration-specific procedural rules, certainly this Court should ensure that the Revised CMS Rule is not construed so as to create a new contractual defense specific to arbitration agreements used in the long-term-care setting, when those agreements otherwise comply with the provisions of the FAA. Allowing a party in the long-term-care setting to refute a contract containing an arbitration clause on the basis of an allegation that he or she did not understand the verbal explanation of the written contract he or she signed not only undoes *Concepcion*, but doing so directly conflicts with the equal-footing principles this Court has enunciated in interpreting the requirements of the FAA. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 254 (2017); *Concepcion*, 563 U.S. at 339.

In placing the Eighth Circuit's *Northport* ruling into context, the brief CMS itself filed with the Eighth Circuit is noteworthy. *See* Brief of Appellees, *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health*

& Hum. Servs., No. 20-1799 (8th Cir. June 30, 2020), 2020 WL 3884698. CMS defended its ability to promulgate the Revised CMS Rule while including the following caveat: "The 2019 Rule does not affect the enforceability of such agreements, or their validity or irrevocability, which remain issues governed under state contract law—not by this regulation. The regulation instead simply provides that facilities that fail to follow the requisite procedures may face consequences in their receipt of federal Medicare and Medicaid funds." *Id.*, 2020 WL 3884698 at *14-15.

Hickory Heights has ignored CMS's own position in *Northport* and has thus created a split in authority. Where the Arkansas court said that the Revised CMS Rule could invalidate a private contract, the Eighth Circuit expressly stated that such an outcome was not intended, per CMS's own interpretation: "Simply put, the [Revised CMS Rule] does not come up against the FAA because it does not limit or frustrate the enforceability of valid arbitration agreements." *Northport*, 14 F.4th at 867. The justices who dissented from the Arkansas Supreme Court's denial of review in *Hickory Heights* noted as much. Justice Bronni explained: "The court of appeals' opinion is not just bad law; it also creates a clear split with the Eighth Circuit." *Hickory Heights Health & Rehab, LLC v. Watson*, 2025 Ark. 111, at 2, 711 S.W.3d 793, 793 (Bronni, J., dissenting).

It is this conflicting stance on arbitration that Amici seek clarity on from this Court. Granting Petitioners' Writ would finally resolve the issue and provide certainty to Amici's members who seek to uphold

the enforceability of arbitration clauses in their admission agreements. Amici urge this Court to grant the Petition to settle the issue of whether a violation of the Revised CMS Rule invalidates a private contract.

CONCLUSION

For the foregoing reasons, AHCA and ANHA request that the Court grant certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — PLAINTIFF'S SURREPLY IN THE CIRCUIT COURT OF BLOUNT COUNTY, ALABAMA, FILED SEPTEMBER 11, 2025

IN THE CIRCUIT COURT OF BLOUNT COUNTY, ALABAMA

No. 08-CV-2022-900036
Hon. Gregory Reid presiding

CYNTHIA WILSON SELF, AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MARGARET ANN WILSON, DECEASED,

Plaintiff,

v.

METHODIST HOME FOR THE AGING, *et al.*,

Defendants.

PLAINTIFF'S

(1) SURREPLY OPPOSING DIVERSICARE'S MOTION TO COMPEL ARBITRATION

(2) MOTION TO DEEM FACTS ADMITTED

Comes now the plaintiff, Cynthia Wilson Self, the personal representative of the estate of her deceased mother, Margaret Ann Wilson, who offers arguments in

surreply to those made by Diversicare[1] in its reply brief filed in support of its motion to compel arbitration. (D.283) Cindy also seeks an order deeming her August 3, 2025, requests (D.279) to be judicially admitted by Diversicare.

I. Diversicare's Motion to Compel Arbitration Should Be Denied.

Cindy will not repeat arguments made in her initial response to Diversicare's motion to compel arbitration (D.236), which adopted all her arguments and evidence she filed in opposition to co-defendant Fair Haven's motion to compel arbitration. (D.103-111) Cindy also incorporates the arguments she made in her February 17, 2024 filing. (D.244) Simply put, this surreply only addresses the new arguments made by Diversicare in its August 21, 2025, reply brief. (D.283)

A. Marvin Lacked Actual Authority to Make Litigation Decisions for Margaret.

Diversicare's contention that Margaret vesting Marvin with a healthcare power of attorney allegedly authorized him to agree to arbitration on her behalf is incorrect for the reasons set forth in previous briefs. (D.103/pp.10-19) Simply put, Marvin's healthcare power of attorney only gave him powers to make *healthcare decisions* and enter into contracts for *healthcare*, not to make litigation decisions. Diversicare's separate dispute resolution

1. "Diversicare" is Diversicare of Oneonta L.L.C., Diversicare Mgmt. Servs. Co. Inc., and Diversicare Mgmt. Servs. L.P.

agreement at issue in this case states that agreeing to arbitration is *not* a precondition to enter the facility for healthcare. Moreover, 42 C.F.R. § 483.70 *prohibited* Diversicare from making arbitration decisions a condition of admission. As stated in Cindy's previous briefs, numerous courts have sensibly held that a holder of a pure healthcare power of attorney (like the one Marvin had) does *not* have actual authority to bind his principal to a separate nursing home arbitration agreement. And, as shown in previous briefs, such a construction is supported by the Alabama Uniform Power of Attorney Act, Ala. Code §§ 26-1A-101, et seq. ("AUPAA"), not the other way around. Therefore, the fact that Marvin's healthcare power-of-attorney gives him authority to "make decisions ... regarding [Margaret's] health care," to "authorize [her] admission to ... any hospital, residential care or related facility," and to "contract for health care or related service" does not matter. These are *health care* decisions, *not* litigation decisions. And this is fair and right. Marvin told Diversicare before he signed anything that his brother, Boddy Wilson, had the general power of attorney for financial and other powers, and Marvin's power of attorney only applies to healthcare decisions (D.239), but Diversicare pushed the agreement in front of him anyway.

Diversicare's reliance on the lone sentence in Marvin's health care power of attorney that authorized Marvin to "sign any document relative to health care in any way whatsoever and pursuing legal action in my name" does not give Marvin power to enter into an arbitration agreement for Margaret. The entire provision from which this phrase is pulled states that Marvin was authorized

as follows; but the underlined part was not included in Diversicare's reply brief:

> To sign any document relative to health care in any way whatsoever and pursuing legal action in my name *at the expense of my estate, should that be necessary to enforce compliance with my wishes as determined by my agent pursuant to the authority given within.*

(D.107/p.3) By its plain terms, this provision only gave Marvin power to seek specific performance regarding Margaret's previously communicated medical directives. When a party pursues a personal injury or wrongful death litigation for a principal or decedent, they are not seeking specific performance to enforce their medical directives. They are seeking an action for compensatory damage for physical harm and/or for punitive damages to avenge a death. Under Alabama law, "contracts are construed so as to give effect to the intention of the parties, and, to determine this intent, a court must examine *more* than an *isolated* sentence or term; it must read each phrase in the *context* of *all other* provisions."[2] This construction of Marvin's healthcare power of attorney is supported by the provisions that surround this one, which address Marvin's authority to authorize healthcare and other end-of-life decisions, including to authorize an autopsy, direct disposition of her remains, and to make anatomical gifts. Indeed, the provision following the one selectively

2. *Jay v. United Servs.*, 343 So.3d 18, 21 (Ala. 2021) (cleaned up).

quoted by Diversicare states that Margaret expressed her preference that Marvin "will consult family and friends for their advice and support in arriving at what may be difficult decisions." So, tort actions and other litigation decisions were not contemplated by this phrase.

Finally, the fact that Marvin executed numerous other documents to admit him to Diversicare is irrelevant. All those documents related to *health care*, which he had the actual authority to do. Marvin simply had no actual authority to make litigation decisions for Margaret. And Diversicare and its employees should have known it.

B. Diversicare's Violation of Federal Law Rendered the Separate Dispute Resolution Agreement Illegal and Unenforceable under Alabama Law.

Diversicare's contention that its arbitration agreement is not in violation of federal law merely because its *written* arbitration agreement contains the mandatory disclosures required by § 483.70(n) opposes an argument that Cindy does not make, and it ignores the argument that Cindy does make. As stated in Cindy's response to Fairhaven's motion to compel arbitration, by Cindy's counsel at the December 16, 2024 hearing, in Cindy's response to Diversicare's motion to compel arbitration, by Cindy's counsel at the August 4, 2025 hearing, and in nearly every filing made in this case, § 483.70(n) clearly and unambiguously required Diversicare and its employees to not only make required disclosures in its arbitration agreements § 483.70(n). It also required Diversicare to verbally explain – through

spoken speech – (1) that signing an arbitration agreement was not a precondition for admission into Diversicare, (2) that residents and their representatives have a choice, and (3) that even if they agreed they had 30 days to rescind the agreement. Because Diversicare and its employees made no verbal disclosures on these topics through spoken speech to Marvin, its arbitration agreement was in violation of federal law. A contract is illegal under the common law of contracts, which Alabama follows, when it violates federal law just as much as if it violated Alabama law.[3] Because Diversicare's arbitration agreement was in violation of federal law, it must be set-aside and be deemed unenforceable under Alabama's common law of contracts, which has long enforced and applied the illegality affirmative defense.

Directly on point and highly persuasive, but not binding, is the recent decision by the Arkansas Court of Appeals in *Hickory Heights v. Watson*, 707 S.W.3d 499, 502 (Ark. App. 2025), which affirmed a circuit court's denial of a nursing home's motion to compel arbitration because the arbitration agreement that the plaintiff signed was an illegal contract under Arkansas law because the circuit court determined that the nursing home defendant violated § 483.70(n). The plaintiff in

3. *BRCC Enters. LLC v. Skie*, 697 S.W.3d 417, 424 (Tex. App. 2024) ("an act that is authorized by state law is illegal in the place where it is to be performed if it is prohibited by federal law that preempts the state law"); *Kashani v. Tsann Kuen.*, 118 Cal. App. 4th 531, 543, 13 Cal. Rptr. 3d 174, 181 (2004) ("a violation of federal law is a violation of law for purposes of determining whether or not a contract is unenforceable as contrary to the public policy").

Hickory Heights made the *same* argument that Cindy has made here – "that although the regulatory violation may not provide a mechanism for *CMS* to invalidate an arbitration agreement, it is well established that a regulatory violation does provide a mechanism for a party to a contract to contest enforcement of that contract against them" and "[i]n no other context would a court turn a blind eye to the fact that a party made a contract that flagrantly violated the law." Even though the *Hickory Heights* court "recognize[d] that arbitration is strongly favored in Arkansas," it held that the Federal Arbitration Act ("FAA") requires and allows "a court [to] declare an arbitration agreement unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract'" under state law, which "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses" under state law.[4] Because "[i]llegality of a contract is an affirmative defense" under Arkansas contract law, the *Hickory Heights* court affirmed the circuit court's ruling that "arbitration agreements [in violation of § 483.70(n)] are unlawful" and that "because the arbitration agreement violates a federal regulation, it is illegal and unenforceable" under Arkansas law. *Id.* The Arkansas Supreme Court has denied certiorari review.[55]

Diversicare's contention that *Hickory Heights* is distinguishable because the nursing home in that case

4. *Quoting BDO v. SSW*, 386 S.W.3d 361, 370 (Ark. 2012) (quoting 9 U.S.C. § 2 and *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996)).

5. 711 S.W.3d 793 (Ark. 2025).

made signing the arbitration agreement a precondition of admission in its written arbitration agreement and Diversicare's written agreement in this case did not is a distinction without a difference. Both *Hickory Heights* and this case concern violations of § 483.70(n). It matters not which violations of § 483.70(n) occurred, but only that a violation occurred.

Diversicare's reliance on CMS's brief filed with the Eighth Circuit Court of Appeals in *Northport v. U.S. Dep't of Health & Human Servs.*, 14 F.4th 856 (8th Cir. 2021) for the proposition that Cindy's illegality defense is inapplicable to void its arbitration agreement is misplaced. In the *Northport* litigation, numerous nursing homes throughout the country joined forces and argued that § 483.70(n) should be struck down because it "restricts the use of arbitration agreements" and allegedly violated the FAA. In other words, the issue presented in *Northport* concerned CMS's authority to promulgate § 483.70(n) and its authority pursuant to that regulation to unilaterally cancel contracts made between two other parties, i.e., nursing homes and their residents. CMS merely stated in its brief that *federal* law did not allow CMA or anyone else to set aside or void any arbitration agreement in violation of § 483.70(n).

But no *federal remedy* is at issue in this case. Moreover, Cindy has *conceded* in this litigation that § 483.70(n) does not create a remedy that would allow a plaintiff, CMS, or anyone else to invalidate a contract in violation of § 483.70(n). What Diversicare (and Fair Haven) forget is that it is *irrelevant* under *Alabama* law whether

the statute or regulation that made a contract illegal provided an explicit remedy to set aside the agreement. As stated in Cindy's first brief, under *Alabama* law, "[i]t is *not necessary* that a statute should impose a penalty for doing or omitting to do something in order to make a contract void."[6] Instead, "[i]t is sufficient if the law prohibits the doing of *the act*, and when it does, the court, being organized under the law, and required to administer it, *cannot enforce* any supposed rights predicated upon a prohibited *act* or *omission* to perform an act that is *prohibited*." *Id.* Therefore, "[c]ontracts specially prohibited by law, or the enforcement of which violated a law, or the making of which violated the law which was enacted for regulation and protection, as distinguished from a law created solely for revenue purposes, [are] void and nonenforceable."[7]

Here, § 483.70(n) was clearly enacted for protection of the public, and not revenue. CMS was clear the 2019 amendments to § 483.70(n) were made "to protect the health, safety, welfare, and rights of residents." (D.109/pp.34721-34722) It explained:

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6. *Kilgore Dev. v. Woodland*, 47 So.3d 267, 270 (Ala. Civ. App. 2009) (quoting *Western Union v. Young*, 36 So. 374, 375 (Ala. 1903)).

7. *Kilgore Dev.*, 47 So.3d at 270 (quoting *Gill Printing v. Goodman*, 139 So. 250, 254 (Ala. 1932)); see also *Margaretson Mobile v. Hathcock*, 855 So.2d 1064, 1069 (Ala. 2003) (quoting *Marx v. Lining*, 165 So. 207, 209-210 (Ala. 1935) ("[i]t is established by a long line of decisions of this court that contracts specifically prohibited by law, or the enforcement of which violates the law, or the making of which violates the laws which were enacted for regulation and protection, as distinguished from a law created solely for revenue purposes, are void and unenforceable").

> [M]any LTC residents are not aware they have signed an arbitration agreement until after a dispute arises. We have concluded, therefore, that transparency is essential, and that CMS may properly exercise its statutory authority to ensure transparency under its statutory authority to promote the *health and safety* of LTC residents. ... We believe the finalized requirements will provide sufficient transparency to protect residents' *health and safety*, including supporting their right to make informed decisions about their health care.

(D.109/p.34735)

Thus, to paraphrase the statements of Alabama law above, "[i]t is *not necessary* that [§ 483.70(n) by its terms] should impose a [remedy of recission] for [Diversicare] omitting to do something [required by § 483.70(n)] in order to make [the arbitration agreement] void."[8] Instead, "[i]t is sufficient if [§ 483.70(n)] prohibits the doing of the *act*, and when it does, the court, being organized under the law, and required to administer it, *cannot* enforce any supposed rights predicated upon a prohibited act or omission to perform an act that is prohibited" under Alabama's common law of contracts. *Id.*

Diversicare's reliance on block-quotes from the brief CMS filed in the *Northport* litigation that stated that

8. Paraphrasing *Kilgore Dev.*, 47 So.3d at 270 (quoting *Western Union*, 36 So. at 375).

"the 2019 Rule [(i.e. § 483.70(n))] has nothing to do with how nursing homes 'enforce the agreement in court'" and that "[t]he validity, irrevocability, and enforceability of arbitration agreements does not depend on the 2019 Rule" is also misplaced. At that point in the brief, CMS was addressing the district court's ruling that § 483.70(n) did not conflict with the FAA. But the CMS *did not deny* the fact that the FAA allows arbitration agreements to be *set aside* under *State* laws that apply to all other contracts such as the illegality affirmative defense that applies across the board to all Alabama contracts. Indeed, in the section that Diversicare has block-quoted, CMS *agreed* with this core tenet of the FAA, which Cindy also relies upon in this case.

> The validity, irrevocability, and enforceability of arbitration agreements does not depend on the 2019 Rule. The Secretary explained that even if a nursing home fails to follow the rule's provisions, it can still enforce the arbitration agreement, *provided that* the agreement (the same as any other contract) "complies with any protections afforded residents *under state law*." Any "arbitration agreements that are valid *under the applicable state ... laws* are still valid." Nor does the regulation itself "annul" or revoke contractual arrangements between nursing homes and residents. The 2019 Rule therefore neither changes the *substantive* rules that govern the validity or enforceability of arbitration agreements nor on its own terms revokes those agreements.

(D.283-D/pp.33-34) (citations omitted) To paraphrase CMS's brief, because Diversicare's arbitration agreement does not "compl[y] with a[ll] protections afforded [Alabama] residents under state law" and is not "valid under the applicable state ... laws," it is not "still valid."

Thus, the CMS agrees with what Cindy has been arguing all along. Although the *federal* substantive law set forth in § 483.70(n) (the 2019 Rule) does not provide recission as a remedy, because the FAA preserves all contract defenses provided by State (Alabama) law, and because Alabama law allows Cindy to set aside any contract in violation of law under the Alabama defense of illegality, the arbitration agreement must be set aside under the FAA. Simply put, and as explained by the *Hickory Heights* court, the *Northport* court ruled that although "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."[9]

Diversicare's contention that Cindy cannot rely on Marvin's affidavit (D.239) on grounds that Marvin allegedly restates inadmissible hearsay should be rejected for the reasons stated in Cindy's response to Diversicare's motion to strike the affidavit. (D.277)

Diversicare's *new* grounds for exclusion of Marvin's affidavit that it asserts for the first time in its reply, i.e., that the affidavit allegedly violates the parol evidence rule, should be rejected for two reasons. First, the parol

9. 707 S.W.3d at 506.

evidence rule does *not* apply when the evidence is offered in support of the defense of illegality.[10] As stated by the Supreme Court:

> On the issues of whether a contract is void, voidable or reformable because of *illegality*, fraud, mistake or any other reason and whether the parties assented to a particular writing as the complete and accurate integration of their contract, *there is no* parol evidence rule to be applied. On these issues *no relevant evidence*, parol or otherwise, *is excluded*. No written document is sufficient, standing alone, to determine *any* one of them, however long and detailed it may be. *No[t] one* of the issues can be determined by mere inspection of the written document.[11]

Second, even if the parol evidence rule applied to questions of illegality (it does not), it still does not apply here because Cindy is *not* trying to alter the terms of the written arbitration agreement. "Under the parol-evidence rule, ... a party to an unambiguous written contract cannot offer parol, or extrinsic, evidence of prior or contemporaneous

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10. *Motley v. Express Servs.*, 386 So.3d 766, 771 (Ala. 2023) ("[u]nder the parol-evidence rule, '*absent* some evidence of fraud, mistake, or *illegality*, a party to an unambiguous written contract cannot offer parol or extrinsic evidence").

11. *Harris v. M&S Toyota*, 575 So.2d 74, 77 (Ala. 1991) (quoting *Richard Kelley Chevrolet v. Seibold*, 363 So.2d 989, 993 (Ala. Civ. App. 1978) and citing numerous other authorities).

oral agreements to change, alter, or contradict the terms of the contract."[12] Cindy's illegality argument is *not* based on the terms of the written arbitration agreement. Nor does Marvin's affidavit seek to change the terms of the writing. Instead, Marvin's affidavit is probative of another issue. It proves that Diversicare and its employees illegally failed to *verbally explain* things to Marvin, which proves that the contract is in violation of federal law and should not be enforced under Alabama law.

Diversicare's contention that Cindy's illegality argument fails because Marvin did not read the arbitration agreement overlooks the following argument that Cindy made long ago:

> Alabama's "duty-to-read rule places a duty on the signee to read a contract before signing it, rather than creating some duty on the defendant."[13] [But] "the duty-to-read rule may be avoided when there are special circumstances or a special relationship between the parties or the plaintiff suffers from a disability rendering him or her unable to discern the contents of the document," *id.*, here, § 483.70(n) provides the special circumstances and the special relationship.

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12. *Motley*, 386 So.3d at 771-772 (Ala. 2023).

13. *Brickhouse Cap. v. Coastal Cryo*, 393 So.3d 467, 476 (Ala. 2023) (cleaned up) (citing *Alfa v. Reese*, 185 So.3d 1091, 1104 (Ala. 2015); *Alfa Life Ins. Co. v. Colza*, 159 So.3d 1240, 1255 (Ala. 2014); *Potter v. First Real Estate*, 844 So.2d 540 (Ala. 2002)).

(D.103/p.33) Indeed, the *whole point* of § 483.70(n) is there is a special circumstance and special relationship between nursing homes and the patients who are seeking entry for treatment and care and a place to live. Diversicare cannot credibly argue that its conduct was not illegal because Alabama law required Marvin to read the agreement when federal law explicitly states that he is entitled to a verbal explanation. When federal law and Alabama law clash, federal law wins. Article VI clause 2 of the U.S. Constitution "provides Congress with the power to preempt state law, and that preemption may be express or implied."[14] Implied conflict preemption "arise[s] ... when the state law stands as an obstacle to the objective of the federal law." *Id.* Here, Alabama's duty-to read rule "stands as an obstacle to the objective of [§ 483.70(n)]."

C. The Affidavit of Hannah Alldredge Is Inadmissible.

Diversicare's contention that there is allegedly a dispute of fact regarding what its employee, Hannah Alldredge, told Marvin fails as a matter of law. Diversicare attached an affidavit from Alldredge to its reply. But Alldredge *admits* in her affidavit that she does not have any memory of her interactions with Marvin. (D.283-E) Nor does she testify that what Marvin testified about in his affidavit was untrue. Instead, Alldredge claimed it was allegedly her "habit" to discuss and explain all of the things § 483.70(n) requires her to verbally explain. However, Alldredge's affidavit should be stricken because her testimony does not comply with Rule 406.

14. *State v. Volkswagen*, 279 So.3d 1109, 1116 (Ala. 2018).

Under the rule, "[a] habit ... is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic."[15] In other words, "habit refers to the type of *nonvolitional* activity that occurs with *invariable regularity*. It is the nonvolitional character of habit evidence that makes it probative."[16] "Habits have a reflexive, almost *instinctive* quality." *Id.*

In *DeLeon v. Kmart Corp.*, 735 So.2d 1214, 1218 (Ala. Civ. App. 1998), a false imprisonment, assault and battery, and outrage case where the plaintiffs alleged they were accosted and held by general store personnel. The circuit judge allowed the defense to introduce 36 incident reports to prove that the plaintiffs regularly contacted police to complain about trivial matters. The defense argued that because the plaintiffs complained to the police about this situation, this evidence was allegedly probative to prove the plaintiffs had proclivity to phone the police for trivial reasons, and that the plaintiffs were exaggerating or false about of their encounter with personnel from the store. The *DeLeon* court held that admission of the reports was error because "[t]he [plaintiffs] telephoning the police is necessarily *volitional* and *purposeful*, rather

15. *DeLeon v. Kmart Corp.*, 735 So.2d 1214, 1218 (Ala. Civ. App. 1998) (quoting A.R.E. 406, Advisory Committee Notes).

16. *DeLeon*, 735 So.2d at 1218 (quoting *Weil v. Seltzer*, 873 F.2d 1453, 1460 (D.C. Cir. 1989)).

than *semi-automatic* and *instinctive*." The DeLeon court held that "[i]f conduct 'entails some amount of *judgment* and *decision making*, [it] is too *complex* and is susceptible to *too much variation* to qualify as habit evidence.'"[17]

Here, having a conversation is even more volitional and purposeful than having the tendency to call the police. Furthermore, determining whether patients and their family members have understood the things that § 483.70(n) mandated they understand "entails some amount of judgment and decision making" and is "susceptible to too much variation" to be a habit. Therefore, Alldredge's affidavit does not constitute valid habit evidence.

In addition, and in the alternative, even if Alldredge's affidavit constituted valid habit evidence and even if this Court found itself in the role of fact-finder in a battle between Marvin's specific memory and what Alldredge claims is her habit, Alldredge's alleged habit evidence is very weak evidence of what happened. Marvin found himself in yet another stressful meeting to try to get his mother admitted to yet another facility. His memory of what happened is a very strong memory for him and very compelling evidence. Diversicare's contention that Marvin "does not even explain what was said to him" in his affidavit is absolutely incorrect. Marvin testified:

> It was a scramble to get [my mother, Margaret,] into Diversicare after she had

17. Quoting *Brett v. Berkowitz*, 706 A.2d 509, 516 (Del. 1998).

been discharged from the hospital. And we knew we couldn't take her back to TLC or Fair Haven because of how she was treated at those places. I was stressed out because this was the third facility we had to get my mother in. I was emotionally stressed out.

When I arrived at Diversicare on April 1, 2022, I gave [Alldredge] my health care power of attorney. I told her that that my brother, Bobby, had the general power of attorney for financial and other powers, and that this power of attorney only applies to healthcare decisions. She copied it and returned it to me. She never asked to see Bobby's power of attorney or asked for him to come in and sign documents.

Our experience at Diversicare was similar to our experience at Fair Haven, which I described in my first affidavit. I went into the Diversicare office to sign the paperwork. [Alldredge] laid down a stack of documents before me that needed signatures. She knew that we had been at Fair Haven, and I explained a little about what we had been through, and that I was stressed out. She seemed rushed/ stressed-out too.

[Alldredge] said, "I guess you are familiar with the process by now," or something similar to that and we got into the documents. Like the process at Fair Haven, we went through

> the paperwork fast. [Alldredge] laid a stack of papers out and shuffled through them. She would say, "[t]his is ___, this is ___, this is ___," and would point where for me to sign. When she got to the arbitration agreement, which was deep in the stack, she said, "this is for arbitration," and then she went to the next one, stating, "[t]his is ____, this is _____, this is _____."
>
> Neither [Alldredge] nor any other employee of Diversicare ever told me that signing the arbitration agreement was optional. Neither [Alldredge] nor any other employee of Diversicare ever told me that my mother could be admitted to the facility even if I did not sign the arbitration agreement. Neither [Alldredge] nor any other employee of Diversicare ever explained the arbitration provisions. Neither [Alldredge] nor any other employee of Diversicare ever told me that I had a 30-day right of recission.

(D.239) Marvin's testimony is clear and specific and believable. Alldredge's is not.

II. The Medical Records Should Be Deemed Authenticated.

Finally, out of an abundance of caution, this Court should deem facts admitted under Rule 36. Specifically, Cindy served Rule 36(a) requests for admissions on Diversicare on August 3, 2025. (D.279) These requests

asked the defendants to admit to the genuineness (authenticity) of St. Vincent medical records and Diversicare's own medical records. (*Id.*) Rule 36(a) states "[t]he matter is admitted unless, within thirty (30) days after service of the request ... [Diversicare] serves upon [Cindy] a written answer or objection addressed to the matter, signed by the party or by the party's attorney." Here, more than thirty (30) days have passed, and Diversicare has neither admitted, nor denied, nor objected to the requests for admission. Therefore, Cindy moves the Court under Rule 36(a) "to determine the sufficiency of the answers or objections" and enter an order that the requests are admitted.

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APPENDIX B — ORDER OF THE CIRCUIT COURT OF BLOUNT COUNTY, ALABAMA, FILED NOVEMBER 25, 2025

IN THE CIRCUIT COURT OF BLOUNT COUNTY, ALABAMA

Case No.: CV-2022-900036.00

WILSON MARGARET ANN,
SELF CYNTHIA WILSON,

Plaintiffs,

v.

DHS OF BLOUNT COUNTY, LLC, TRINITY MANAGEMENT, INC., METHODIST HOME FOR THE AGING, FAIR HAVEN RETIREMENT COMMUNITY, INC. *et al*,

Defendants.

ORDER

This matter came before the Court on the Defendants Methodist Home for the Aging, Fair Haven Retirement Community, and Diversicare Management SE, Motion to Compel Arbitration. On October the 1st 2025 the Court heard arguments from both the Defendant/movants and the Plaintiff/respondents.

Upon review of the pleadings and arguments of Counsel the Court makes the following findings:

First, it is undisputed that the respective contracts contain an arbitration clause or section. The Decedent Margaret Ann Wilson was not capable of entering into a contract at the time of these two agreements and care was arranged through an authorized representative who held a health care power of attorney. The Decedent's Son, Marvin Wilson, held a Health Care Power of Attorney, and his Brother, Bobby Wilson, held a General Durable Power of Attorney for financial matters.

The Decedent was admitted to Fair Haven on October 7, 2021. The Decedent was admitted to Diversacare on April 1, 2022.

The issues before the Court are (1) Is the Healthcare Power of Attorney sufficient to bind the Decedent to the arbitration agreement executed at the time of admission. And (2) Did the Defendant's adequately inform the Decedent's representative of the arbitration clause, and the right associated therewith.

First, as to the Healthcare Power of Attorney, while this document grants the POA broad power it is limited in its scope of authority. The Court particular notes in bullet points 8 and 9 on page two of said POA

> ***"To take any action necessary to effectuate the intent and purpose of this broad grant of powers, including, without limitation, granting any waiver of release from liability required by any health care provider or related agency"***

Appendix B

> ***"To sign any document relative to health care in any way whatsoever and pursuing legal action in my name at the expense of my estate, should that be necessary to enforce compliance with my wishes as determined by my agent pursuant to the authority given herein"***

While both clauses tend to hint at litigation authority both, when taken in the context of the document are limited to the execution of the wishes of the Grantor regarding health care decisions.

The Court notes that the Alabama Appellate Courts have not addressed the issue of such Powers of Attorney and what authority Healthcare Powers of Attorney hold. From the Document itself the authority to engage in litigation or waiving liability for care is limited to carrying out the wishes of the Grantor.

Second, did the Defendants adequately inform the Decedents Agents of the conditions and rights not to sign the arbitration agreement. In both cases the agreements were presented along with and in addition to a stack of documents for admission. The question then becomes did the Defendant's Representative adequately inform the Plaintiff's agent of the right to (1) not sign the agreement, and (2) rescind it within 30 days. To the Court it becomes a question of fact did the Agent of the Defendant's clearly, specifically and intentionally explain the agreement and its federal requirements to the signing party. How much time was taken in the process of such disclosure? Was it

given extra attention and specific separate instruction? Or was it merely another document in a stack of paper, to sign in the admission process. In this case it is not clear and convincing that the disclosures were properly communicated to the admitting party.

In this matter the non-moving party raises specific questions that when taken under the circumstances of an admission to a health-care facility clearly warrant increased scrutiny.

Based on the foregoing the Defendants Fair Haven Retirement Community and Diversicare Management Southeast Motion to Compel Arbitration is hereby **DENIED.**

DONE this 25th day of November, 2025.

/s/ GREGORY J REID
CIRCUIT JUDGE