No. 11-394

IN THE

Supreme Court of the United States

CLARKSBURG NURSING HOME & REHABILITATION CENTER, LLC, D/B/A CLARKSBURG CONTINUOUS CARE CENTER; SHEILA JONES; AND JENNIFER MCWHORTER,

Petitioners,

v.

SHARON A. MARCHIO, EXECUTRIX OF THE ESTATE OF PAULINE VIRGINIA WILLETT,

Respondent.

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

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF BEVERLY ENTERPRISES-WEST VIRGINIA, INC., GENESIS HEALTHCARE LLC, KINDRED HEALTHCARE, INC., MANORCARE, INC., AND SUNBRIDGE HEALTHCARE, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF BEVERLY ENTERPRISES-WEST VIRGINIA, INC., GENESIS HEALTHCARE LLC, KINDRED HEALTHCARE, INC., MANORCARE, INC., AND SUNBRIDGE HEALTHCARE, LLC FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), Beverly Enterprises-West Virginia, Inc., Genesis HealthCare LLC, Kindred Healthcare, Inc., ManorCare, Inc., and SunBridge Healthcare, LLC respectfully move for leave to file the attached brief of *amici curiae* in support of the petition for a writ of *certiorari*. Petitioner has consented to the filing of this brief, but counsel for respondent has withheld consent.

As described in the first section of the attached brief entitled "Interest of *Amici Curiae*," *amici* are families of healthcare companies that operate long-term live-in patient facilities across the country, including in West Virginia. *Amici* regularly employ agreements to arbitrate in their contracts with nursing home residents, and those agreements typically cover personal injury and wrongful death claims arising from alleged negligence. Virtually all of the agreements employed by *amici* are executed prior to the existence of a dispute.

The West Virginia Supreme Court's decision purports to invalidate *all* pre-dispute agreements to arbitrate nursing home residents' claims of personal injury or wrongful death arising from negligence. That decision effectively invalidates thousands of current arbitration agreements entered into between *amici* and their residents in West Virginia. As a result, *amici* have a strong interest in review of the decision below.

Because the decision below directly impacts the otherwise valid and enforceable arbitration agreements entered into between *amici* and their residents, *amici* are well positioned to explain the importance of this case to in-patient skilled nursing facilities in West Virginia and across the country. *Amici* are also uniquely suited to describe the importance of arbitration agreements to their industry and their residents.

Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief as *amici curiae.*

October 28, 2011

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Beverly Enterprises-West Virginia, Inc., Genesis HealthCare LLC, Kindred Healthcare, Inc., ManorCare, Inc., and SunBridge Healthcare, LLC are families of healthcare companies that operate hundreds of live-in patient facilities across the country, including in West Virginia. Nationwide, *amici* collectively provide skilled nursing and assisted living services for hundreds of thousands of residents in their facilities each year, as well as rehabilitation services and post-acute care.

Amici regularly employ agreements to arbitrate in their contracts with residents. By agreeing to arbitrate, both residents and providers are able to avoid expensive and time-consuming litigation and concomitantly reduce the costs borne in part by residents and their families. In place of courtroom litigation, *amici* and their residents have adopted a dispute resolution procedure that is speedy, fair, inexpensive, and effective. Upon admission to a skilled nursing facility, each resident is presented with an arbitration agreement that is entirely optional and conspicuously advises the resident that execution

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1. Consistent with Supreme Court Rule 37.2, counsel for all parties received notice, at least ten days prior to the due date, of *amici curiae*'s intention to file this brief. Counsel for Petitioner consented, but counsel for Respondent declined to consent. As a result, *amici* have simultaneously sought leave of the Court to file this brief. Pursuant to Rule 37.6, *amici* confirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

of the agreement is not a condition of admission. Each resident also has the option of rescinding the arbitration agreement within the first 30 days after execution. Based on the strong legislative policy embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), and this Court's consistent application of the FAA to uphold valid arbitration agreements, *amici* have entered into literally tens of thousands of arbitration agreements with their residents in every state in which they operate, including West Virginia.

Amici are directly impacted by the West Virginia Supreme Court's ruling. Indeed, that decision announces a *per se* rule under West Virginia state law that invalidates and makes unenforceable any arbitration agreement in the skilled nursing home context applicable to negligence claims involving personal injury or death so long as the agreement is executed before the negligence occurs. If permitted to stand, that newly announced rule of West Virginia "public policy" would invalidate and render unenforceable thousands of arbitration agreements entered into by *amici*. The flawed analysis in the decision at issue also threatens to create an exception to this Court's FAA preemption authorities, which other state courts across the country may try to invoke to invalidate otherwise valid and enforceable arbitration agreements in countless other states. As a result, *amici* have a strong interest in review by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The West Virginia Supreme Court's decision is contrary to this Court's federal preemption decisions and the long-standing federal policy favoring arbitration under the Federal Arbitration Act ("FAA"). If permitted to stand, that erroneous decision would not only lead to the wholesale invalidation of tens of thousands of otherwise valid and enforceable arbitration agreements entered into by skilled nursing facilities and their residents in West Virginia, but also establish a gaping exception to this Court's FAA preemption jurisprudence that threatens to swallow the rule embodied in Section 2 of the FAA. Because the West Virginia Supreme Court's decision presents a direct challenge to the Supremacy Clause of the United States Constitution and the opinions of this Court, it should be reviewed.

Having first correctly determined that Section 15(c) of the West Virginia Nursing Home Act was preempted by the FAA under this Court's authorities, *see* Slip op. at 31, the West Virginia Supreme Court nonetheless proceeded to pronounce its own judge-made "public policy" rule that categorically invalidates arbitration agreements respecting personal injury claims in the nursing home context, on grounds that mirror those underlying the preempted state statute.[2] By invoking state "public policy" to invalidate the arbitration agreements at issue in only this particular context, the court below ignored the well-settled rule that the FAA compels enforcement of

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2. The opinion of the West Virginia Supreme Court is reported at __ S.E.2d __, 2011 WL 2611327.

agreements to arbitrate absent some contractual defense generally applicable to *all* agreements. 9 U.S.C. § 2.

In numerous respects, the West Virginia Supreme Court's holding and method of analysis contravene this Court's authorities, and pose serious issues of wide-ranging importance that warrant this Court's review.

First, the West Virginia Supreme Court's decision is substantively wrong under this Court's FAA preemption precedents, and if permitted to stand, it would invalidate and render unenforceable in West Virginia arbitration agreements that are otherwise "valid, enforceable, and irrevocable" under the FAA. 9 U.S.C. § 2. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011); *see also Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268-77 (1995); *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). By creating an outright prohibition against arbitration agreements in the nursing home context as to particular claims resulting in personal injury or death, the West Virginia Supreme Court has established a conflicting rule of state law that is necessarily "displaced by the FAA." *Concepcion*, 131 S.Ct. at 1747.

Second, the West Virginia Supreme Court's decision is contrary to this Court's authorities making plain that FAA preemption applies equally to state statutes

and judge-made law. *See, e.g., Concepcion*, 131 S. Ct. at 1747; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006); *Doctor's Associates, Inc.*, 517 U.S. at 685; *Perry*, 482 U.S. at 489; *Southland*, 465 U.S. at 13; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Although the court below recognized that the West Virginia statutory provision at issue was preempted under this Court's FAA preemption authorities, it then nonetheless pronounced its own judge-made "public policy" rule invalidating the agreements at issue, in derogation of this Court's FAA authorities preventing state courts from doing precisely "what . . . the state legislature cannot." *Perry*, 107 S.Ct. 492 n.9; *accord Concepcion*, 131 S.Ct. at 1747.

Third, the West Virginia Supreme Court's method of analysis in itself raises serious issues. The FAA's plain language broadly applies to *all* written agreements to arbitrate affecting interstate commerce. 9 U.S.C. § 2. To conclude that Congress did not intend the FAA's expansive language to reach pre-dispute arbitration agreements involving personal injury or death, the West Virginia Supreme Court relied on the *absence* of any decision of this Court involving this precise context as well as the *absence* of any particular references in the FAA's legislative history evidencing an intent to authorize and protect arbitration agreements in this context. This Court's authorities have never endorsed such a suspect analytic method, employed to carve out some particular subject matter from the broad scope of a generally applicable provision. Nor does the state court's reasoning for evading the plain language of the FAA and this Court's precedents have any legally legitimate basis. This aspect of the decision below also warrants review by this Court.

Finally, the West Virginia Supreme Court's decision warrants review because, if permitted to stand, it virtually invites courts across the country to similarly flout federal legislative policy and this Court's FAA preemption jurisprudence by invoking their own judge-made "public policy" exceptions to the Court's general rule enforcing the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24.

ARGUMENT

A. This Court's Review Is Necessary To Prevent The Frustration Of Many Thousands Of Otherwise Valid And Enforceable Arbitration Agreements

The West Virginia Supreme Court's ruling has immediate detrimental consequences for *amici* and other similarly situated nursing facilities in West Virginia. This Court's review is necessary to preserve those companies' justified expectation that, when they validly enter into written agreements to arbitrate claims arising in connection with nursing home admission agreements and nursing home care, those agreements will be enforced consistent with the directive of the FAA.

The decision below purports to create a *per se* rule invalidating otherwise valid and enforceable written arbitration agreements between nursing home facilities and their residents where those agreements apply to personal injury claims arising from negligence and are executed before the negligence occurs. Slip op. at 73. As set forth above, *amici* regularly employ agreements to arbitrate as a means of resolving disputes with their

residents, including personal injury claims arising from negligence, and virtually all of those agreements are executed before the negligence occurs. Notably, those agreements are mutual and entirely optional—they prominently advise residents that execution of an agreement to arbitrate is *not* a condition of admission. *See, e.g., Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167-68 (D.S.D. 2010) (describing an optional arbitration agreement used by a Beverly facility); *ManorCare Health Services, Inc. v. Stiehl*, 22 So. 3d 96, 105-09 (Fla. Dist. Ct. App. 2009) (attaching an optional arbitration agreement used by ManorCare); *Ruesga v. Kindred Nursing Centers West, L.L.C.*, 161 P.3d 1253, 1256 (Ariz. Ct. App. 2008) (describing the voluntary nature of an arbitration agreement used by a Kindred facility). The West Virginia Supreme Court's rule would categorically invalidate those agreements as contrary to West Virginia "public policy."

Under section 2 of the FAA, written arbitration agreements are "valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract." 9 U.S.C. § 2. In *Concepcion*, this Court reaffirmed the long-standing "'liberal federal policy favoring arbitration'" under the FAA, and specifically held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 1745, 1749 (citation omitted). *Concepcion* follows on the heels of a long line of this Court's FAA preemption precedents, all of which hold that states cannot place a class of claims off-limits to arbitration. *See, e.g., Preston*, 552 U.S. at 349-50; *Doctor's Assocs., Inc.*, 517 U.S. at 688; *Allied-Bruce Terminix*, 513 U.S. at 268-77; *Perry*, 482 U.S. at 491; *Mastrobuono*, 514 U.S. at 63-64; *Southland*, 465 U.S. at 16.

In "enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10. Thus, "even if a rule of state law would otherwise exclude such claims from arbitration," the FAA compels that the parties' arbitration agreement will be enforced. *Mastrobuono*, 514 U.S. at 58.

This Court held in *Concepcion* that section 2 of the FAA prevents states from "prohibit[ing] outright the arbitration of a particular type of claim." 131 S. Ct. at 1747. Yet that is *precisely* what the West Virginia Supreme Court has done. As a matter of judge-made "public policy," the court below pronounced an *outright prohibition* under West Virginia state law invalidating any pre-dispute arbitration agreements in the nursing-home context as applied to particular tort claims resulting in personal injury or death. Because virtually all arbitration agreements in the nursing home context are executed before the dispute arises, the effect of the West Virginia Supreme Court's ruling is to invalidate all agreements to arbitrate nursing home residents' personal injury and wrongful death claims. *See The Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before the S. Comm. On the Judiciary and S. Special Comm. on Aging*, 110th Cong. 618 (June 18, 2008) (statement of Stephen J. Ware, Professor of Law at Univ. of Kansas). Under *Concepcion* and this Court's precedents, such a state law simply cannot stand. The applicable FAA preemption analysis is "straightforward" and the West Virginia Supreme Court's "conflicting" rule of judge-made law is necessarily "displaced by" and preempted under the FAA.

Concepcion, 131 U.S. at 1747-48; *see also Buckeye Check Cashing*, 546 U.S. at 446; *Doctor's Associates, Inc.*, 517 U.S. at 685; *Perry*, 482 U.S. at 489; *Southland*, 465 U.S. at 13; *Moses H. Cone*, 460 U.S. at 24.

B. The West Virginia Supreme Court's Decision Ignores The Settled Rule That FAA Preemption Analysis Applies Equally To State Statutes And Judge-Made Law

Review of the decision below is also necessary because the decision pays lip service to, but then violates, this Court's authorities confirming that the FAA equally preempts state statutes and judge-made law. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1747; *Buckeye Check Cashing*, 546 U.S. at 446; *Doctor's Associates, Inc.*, 517 U.S. at 685; *Perry*, 482 U.S. at 489; *Southland*, 465 U.S. at 13; *Moses H. Cone*, 460 U.S. at 24.

To be sure, this Court has repeatedly applied FAA preemption to strike down state legislative attempts to carve out particular claims for judicial resolution, holding that such legislation is in "unmistakable conflict" with the FAA's directive that private arbitration agreements be "rigorously enforced." *Perry*, 482 U.S. at 490-91 (internal citations and quotations omitted); *see also Preston*, 552 U.S. at 349-50; *Southland*, 465 U.S. at 6; *Allied-Bruce Terminix*, 513 U.S. at 268-77; *Doctor's Assocs., Inc.*, 517 U.S. at 688. But judge-made law and judicial pronouncements of state "public policy" are by no means exempt from FAA preemption. On the contrary, this Court has not hesitated to apply FAA preemption to judge-made rules, enforcing the bedrock principle that the FAA prohibits state courts from doing "what . . .

the state legislature cannot." *Perry*, 482 U.S. at 492 n.9; *Concepcion*, 131 S.Ct. at 1747. Indeed, *Concepcion* itself involved FAA preemption of a judge-made rule, "California's *Discover Bank* rule." *Id.* at 1753.

The West Virginia Supreme Court ruled that Section 15(c) of the West Virginia Nursing Home Act was preempted by the FAA because it "singles out for nullification written arbitration agreements with nursing home residents, and does not apply to any other type of contractual agreements." Slip op. at 48. As such, the West Virginia statute directly conflicts with section 2 of the FAA, given that the statute does not constitute "a defense that exists at law or equity 'for the revocation of *any* contract' under Section 2 of the FAA." *Id.* (quoting 9 U.S.C. § 2) (emphasis in original). The West Virginia court also acknowledged that a state "common-law doctrine, which targets arbitration provisions for disfavored treatment and which is not usually applied to other types of contract provisions, stands as an obstacle to the accomplishment and execution of the purposes and objectives of Section 2 of the FAA and is preempted." *Id.* at 46. But the court nevertheless went on to pronounce its own *per se* rule barring arbitration agreements in nursing home contracts respecting personal injury claims, as a matter of West Virginia "public policy," on grounds that mirror those underlying the preempted West Virginia statute. *Id.* at 72-73. For instance, the court explained, "[o]nly by having to publicly account for their misfeasance or malfeasance is a defendant likely to mend his, her, or its ways." *Id.* at 72.

Under this Court's FAA preemption authorities, the West Virginia Supreme Court's judge-made rule is *just*

as preempted by the FAA as the state statutory provision invalidated by the same court. The FAA's "liberal federal policy favoring arbitration agreements" is necessarily paramount under the Supremacy Clause "notwithstanding *any* state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24 (emphasis added).

C. The West Virginia Supreme Court's Flawed Method Of Analysis To Exempt Nursing Home Arbitration Agreements From Section 2 Of The FAA Provides Another Basis For Review

The FAA broadly applies to *any* "agreement in writing to submit to arbitration an existing controversy," so long as that agreement appears in a "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. As the court below acknowledged, there was "substantial evidence that the nursing home admission agreements in question are contracts evidencing a transaction affecting interstate commerce under section 2 of the FAA." Slip op. at 46. Thus, the agreements indisputably fell within the broad scope of the FAA. *Id.* at 47.

Nevertheless, the court below determined that the FAA's broad and generally applicable language in section 2 does not apply to arbitration agreements in the nursing home context involving personal injury claims. In derogation of Section 2's broad statutory text, the court relied on the *absence* of any positive pronouncement on the issue by this Court or in the FAA's legislative history to conclude (without any authority or precedent) that "Congress did not intend" the FAA to apply to written arbitration agreements in the nursing-home context

applicable to personal injury or wrongful death suits. *See* Slip op. at 50-51, 66, 71-72.[3]

As this Court has held, where the language of a federal statute expressly applies to the subject matter at issue, the "authoritative statement" of Congressional intent is "the statutory text," and "not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005); *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (when "the intent of Congress is clear [from the statutory text], that is the end of the matter"). Unlike statutory text, "legislative history is itself often murky, ambiguous, and contradictory," and for precisely this reason, this Court has long decried reliance on legislative history to contradict statutory text. *Exxon Mobil Corp.*, 545 U.S. at 568. The Court has similarly rejected reliance on the *absence* of legislative pronouncements of intent to contradict otherwise clear statutory text. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000) (criticizing state's "inference of Congressional intent" based on "the silence of Congress"); *Milner v. Dep't of Navy*, 131 S.Ct. 1259, 1266 (2011) ("We will not take the . . . tack of allowing ambiguous legislative history to muddy clear statutory language."). This Court

3. Notably, Congress has in recent years *rejected* legislation that would invalidate arbitration agreements in this very context. In 2008 and 2009, legislation entitled the "Fairness in Nursing Home Arbitration Act," was introduced that would have invalidated all pre-admission arbitration agreements between nursing home residents and long-term care providers. Each time, the legislation failed to advance past committee. *See* S. 2838, 110th Cong. (as reported by S. Comm. Sept. 11, 2008); S. 512, 111th Cong. (referred to Comm. on the Judiciary Mar. 3, 2009).

has cautioned that unwarranted "judicial reliance on legislative materials" could give the legislators, their staff, and lobbyists perverse incentives "to attempt strategic manipulations of legislative history to secure the results they were unable to achieve through the statutory text." *Exxon Mobil Corp.*, 545 U.S. at 568-69.

Accordingly, the West Virginia Supreme Court's method of analysis in arriving at its *per se* "public policy" rule invaliding arbitration agreements in the nursing-home context provides yet another reason why this Court should review the decision below.

D. The Court's Ruling Below Invites Similar End-Runs Around Federal Statute And Supreme Court Precedent Under The Guise Of State "Public Policy"

Finally, the West Virginia Supreme Court's decision at issue should be reviewed by this Court because that decision may invite state courts across the country similarly to flout this Court's FAA preemption jurisprudence by carving out whatever "public policy" exceptions they wish from this Court's general rule enforcing the FAA's liberal federal policy favoring arbitration agreements.

In the skilled nursing facility context alone, courts in other states may similarly try to evade this Court's FAA preemption jurisprudence by adopting their own preferred "public policy" prohibitions, which might conceivably extend beyond personal injury and wrongful death suits to whatever sorts of claims they wish to deem off limits in permissible arbitration agreements. Judgments of this type would impose significant costs and burdens on the

already heavily taxed long-term healthcare industry. Indeed, providing long-term healthcare to the country's aging population is becoming increasingly expensive, while obtaining reimbursement for that expense is becoming more difficult. The Centers for Medicare and Medicaid Services has recently reduced the amount of reimbursement made available to long-term care facilities. *See Nursing Homes Squeezed by Medicare Cuts*, U.S. NEWS MONEY MAGAZINE (Aug. 8, 2011). For *amici* and other similarly-situated healthcare facilities, arbitration is an important procedural tool for resolving disputes quickly, fairly, and cost effectively, thereby allowing healthcare facilities to focus their resources on resident care instead of litigation. Residents similarly benefit from arbitration, as the process enables them to obtain speedy resolution of their claims, achieve better results, and avoid the costs of protracted litigation. *See* Peter B. Rutledge, *Arbitration – A Good Deal for Consumers: A Response to Public Citizen*, U.S. CHAMBER INST. FOR LEGAL REFORM at 3-9 (April 2008), http://www.instituteforlegalreform.org/issues/arbitration-adr. The West Virginia Supreme Court's decision threatens to eliminate this important procedural device.

The West Virginia Supreme Court itself recognized the danger of sanctioning a "public policy" loophole to the otherwise expansive reach of the FAA. As the court emphasized, there is already a "substantial body of case law from other jurisdictions involving nursing home admission agreements which, like the instant cases, have challenged whether an arbitration clause in the admission agreement was binding and enforceable." Slip op. at 50 (citing Marjorie A. Shields, *Validity, Construction, and Application of Arbitration Agreement in Contract for Admission to Nursing Home*, 50 A.L.R. 6th 187 (2010)).

Other state courts have recently refused to enforce arbitration agreements in the nursing home context on state "public policy" grounds. *See, e.g., Carter v. SSC Odin Operating Co.*, 885 N.E.2d 1204, 1209 (Ill. App. Ct. 2008), *rev'd*, 927 N.E.2d 1207 (2010) (invalidating arbitration agreement as violative of "public policy" embodied in state legislation); *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 2006) ("It would be against public policy to permit a nursing home to dismantle the protections afforded patients by the Legislature through the use of an arbitration agreement."). Unlike those cases, this case provides the Court with an opportunity to resolve any misconception that the FAA permits state "public policy" carve-outs for particular types of claims.

More broadly, the decision below virtually invites courts to invalidate arbitration agreements on state "public policy" grounds in a wide variety of contexts – so long as this Court's rulings do not apply the FAA in that precise context and the FAA's legislative history does not specifically reference it.

But this is precisely the type of end-run around the FAA that the Court in *Concepcion* sought to prevent. As this Court confirmed, the FAA was specifically designed to ameliorate "judicial hostility towards arbitration" and to prevent "a great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1741 (internal citation omitted). The West Virginia Supreme Court's decision must be reviewed—if not summarily reversed—because, on its face, it is but the most recent variety of "public policy" rationales for invalidating arbitration agreements in particular cases and contexts that flies in the face of this Court's modern FAA jurisprudence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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