IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

NORTHPORT HEALTH SERVICES OF ARKANSAS, LLC, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Case No. 5:19-cv-05168-TLB

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE, ARKANSAS TRIAL LAWYERS ASSOCIATION, NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE, AND JUSTICE IN AGING AS AMICI CURIAE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THE GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In the rule at issue in this case, the Centers for Medicare & Medicaid Services (CMS) sought to strike a "balance" that "accommodates the use of arbitration agreements while also protecting the rights" of nursing-home residents. On the one hand, the agency recognized the general pro-arbitration policy embodied in the Federal Arbitration Act and thus declined to deny nursing homes a "method of resolving disputes that is potentially more cost effective and efficient." On the other, the agency addressed the growing problem of nursing homes "coercing residents to sign" such agreements by giving residents the right to make an "informed decision" without being forced to "choos[e] between signing … or not receiving care." Amici agree with the agency that the resulting balance is a modest step in that direction that does nothing to undermine the validity or enforceability of arbitration agreements. Indeed, they have argued that the agency could (and should) have gone much further to address the problem without running afoul of the FAA.

Amici submit this brief to address another basis for upholding the rule overlooked by the parties. Although the plaintiff nursing homes purport to base their argument on the "long line of Supreme Court precedent" establishing the FAA's policy in favor of arbitration, the rule they advance is actually an unprecedented one. They argue that, absent an express statutory command to the contrary, the FAA's pro-arbitration policy prohibits agencies from enacting *any* regulation of arbitration procedures. That novel theory would reach far beyond the boundaries of this case, upsetting the reliance interests of industries regulated under congressional delegations to numerous federal agencies—including the Departments of Agriculture, Commerce, Education, Labor, Transportation, and Treasury, as well as independent agencies such as the Federal Trade Commission and the Securities and Exchange Commission.

There is no support, either in the FAA or the cases interpreting it, for the nursing homes' position. On the contrary, the Supreme Court in *Shearson/American Express, Inc. v. McMahon* held

that a federal agency does not run afoul of the FAA when it relies on its general rulemaking authority to regulate arbitration where "necessary or appropriate to further the objectives" of a federal statute or to "protect statutory rights." 482 U.S. 220, 233–34 (1987). That recognition—which the Court has never called into question—forecloses the nursing homes' cramped view of agency authority here.

Although *McMahon* is directly on point, the nursing homes ignore it entirely. Instead, they rely on *Epic Systems Corp. v. Lewis*, which required a "clearly expressed congressional intention" before finding that a statute conflicts with and therefore displaces the FAA. 138 S. Ct. 1612, 1624 (2018). But nobody here is suggesting the existence of such a statutory conflict. It is not CMS's statutory rulemaking authority itself that potentially displaces the FAA, but the regulations that CMS adopted *under* that statutory authority. Those regulations have the same force of law as a statute, and there is no doubt that they clearly express the agency's intent to exercise its congressionally delegated powers to regulate arbitration notwithstanding the FAA.

The only question then is whether CMS's regulations fall within the scope of its rulemaking authority. On that question, *McMahon* holds that an agency's delegated statutory authority—even if that authority says nothing about arbitration—includes authority to regulate the "adequacy of the arbitration procedures" within the agency's regulatory sphere. 482 U.S. at 233. Indeed, the agency has "expansive power" to "mandate the adoption of any rules it deems necessary" to further its statutory mandate. *Id.* at 233–34. *Epic Systems,* which did not even involve agency rulemaking, did not purport to overrule *McMahon* or to limit the broad authority recognized there.

Under *McMahon*, CMS could have adopted much broader restrictions—or even a total ban—on arbitration in the nursing-home context. The modest rule that it instead chose—even assuming that the rule encroaches on the FAA's policy—falls well within the scope of its rulemaking power.

INTEREST OF AMICI CURIAE[1]

The **American Association for Justice** (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in state nursing home cases. Throughout its more than seventy-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

The **Arkansas Trial Lawyers Association, Inc.** (ATLA), incorporated in 1963, is Arkansas' most active voluntary statewide legal organization with respect to friend-of-court participation. Its members are attorneys dedicated to protecting the health and safety of Arkansas families, to enhancing consumer protection, and to preserving every citizen's right of access to courts and trial by jury. ATLA's members are committed to providing high-quality legal representation for Arkansas families. The goals of ATLA include promoting the efficient administration of justice and the constant improvement of the law and serving as a line of defense against assaults on the rights of consumers. ATLA's members are attorneys who regularly appear in the state and federal courts of Arkansas to represent injured persons asserting claims against those responsible. ATLA has compelling interests in this case. Enforcement of any contract against a third-party beneficiary is contrary to long-established third-party beneficiary law. Enforcement of arbitration clauses against third-party beneficiaries in these circumstances deprives those persons of the right to trial

[1] No party objects to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from amici curiae, no person contributed money intended to fund the brief's preparation and submission.

by jury when they have not expressly agreed to arbitration. These overriding legal issues are particularly appropriate for *amicus* participation. The decision in this case will affect more than the litigation from which it arises. The fundamental and constitutional right to a jury trial will be undercut by a decision forcing arbitration on third-party beneficiaries who never agreed to arbitrate their cases.

The **National Consumer Voice for Quality Long-Term Care** (Consumer Voice) is a national non-profit advocacy organization whose members include residents of long-term care facilities and other long-term care consumers, their families and advocates, statewide nursing home resident advocacy groups, state and local long-term care ombudsman programs, and other groups and individuals dedicated to improving quality in long-term care and protecting the rights of the 1.4 million residents of nursing homes and other long-term care facilities. Consumer Voice's mission is to promote the interests of long-term care consumers, their families and advocates. Since 1975, it has provided assistance to nursing home residents across the country and has represented their interests before federal and state legislative and administrative entities, and as *amici* before federal and state courts. Specific policy goals of the Consumer Voice are to improve the quality of life and protect the rights of residents of long-term care facilities.

Justice in Aging (formerly the National Senior Citizens Law Center) is a national, non-profit law organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and legal representation for older adults with limited resources. Its attorneys are nationally recognized experts on the rights of nursing home residents, authoring the legal treatise *Long-Term Care Advocacy* (Matthew Bender and Co.), and have long counseled consumers and their advocates about common but improper provisions of nursing home admission agreements. Through years of experience, Justice in Aging understands that moving into a nursing home often is a traumatic and confusing experience. The organization's policy

advocacy and work with consumers and advocates would be advanced by a ruling upholding the federal regulatory requirement that nursing-home arbitration agreements be entered into only after a dispute has arisen.

BACKGROUND

A. The circumstances surrounding nursing homes render arbitration agreements uniquely vulnerable to abuse.

Admitting a loved one into a nursing home can be one of the most stressful experiences a family endures. Nearly two-thirds of nursing-home residents suffer cognitive impairment, putting the burden on family to review and sign long and confusing admissions contracts. *See* CMS, *Nursing Home Data Compendium 2015 Edition* 2 (2015), https://perma.cc/LG66-SRRT. For residents suffering serious illness and family members facing a dramatic decline in a loved one's health, emotions can run high. And it is at that moment that a nursing home presents its bulky, legalistic admissions contracts. *See* Benjamin Pomerance, *Arbitration over Accountability? The State of Mandatory Arbitration Clauses in Nursing Home Admission Contracts*, 16 Fla. Coastal L. Rev. 153, 172–76 (2015). Unsurprisingly, the contractual waiver of the resident's constitutional right to a jury trial buried in that pile of documents usually goes unnoticed. Residents and family thus end up "unwittingly sign[ing] arbitration agreements that are later found to be against their best interests." *Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements*, 84 Fed. Reg. 34,718, 34,727 (July 18, 2019).

Even those with the self-possession and legal knowledge to understand the rights they are giving up usually have no choice but to sign in the face of a nursing home's ultimatum: Sign the agreement to arbitrate or forgo care entirely. As CMS has noted, "residents or their families usually do not have many … facilities to choose from." *Id.* at 34,728. They thus feel obligated to sign these contracts out of fear that, if they do not, care will be denied them. *See Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68,688, 68,793 (Oct. 4, 2016). And "[t]he resident's immediate need

for nursing care and lack of experience with arbitration means that residents are unlikely to ask for time to seek legal advice concerning the agreement." *Id.* at 68,797.

Compounding the problem, family members often do not have legal authority to contract on the resident's behalf. Nursing homes often try to get around a resident's lack of competency by asking a relative to sign the admissions agreement. *See Am. Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921, 927 (N.D. Miss. 2016). But as the Eighth Circuit recently held, family members ordinarily lack the legal authority to bind each other in that way. *See Northport Health Servs. of Arkansas, LLC v. Posey*, 930 F.3d 1027, 1029, 1030–31 (8th Cir. 2019) (holding that, under Arkansas law, a resident suffering disorientation and delusions was not bound by an admissions contract signed by his son).[2]

For all those reasons, among others, CMS determined that "take-it-or-leave-it" arbitration agreements signed in the context of "significant differential[s] in bargaining power" effectively prevent residents and their families from giving their "meaningful or informed consent" to the waiver of their right to a jury trial. 81 Fed Reg. at 68,792, 68,793, 68,796.

B. These concerns have prompted the organized bar and arbitration providers alike to call for limits on forced arbitration contracts.

In 2009, the American Bar Association commissioned a report to study the use of forced arbitration in nursing homes. *See* ABA, Commission on Law and Aging, *Policy on LTC Facility Arbitration Agreements* (Feb. 16, 2009), https://perma.cc/3AZX-TMBF. Although the ABA "consistently promote[s] the greater use of alternative dispute resolution, including arbitration, to resolve

[2] Northport has much experience with this tactic. It has frequently come before this Court seeking to enforce admission agreements signed by family members on behalf of incompetent residents. *See Northport Health Servs. of Arkansas, LLC v. Posey*, 2018 WL 3014808, at *3 (W.D. Ark. June 15, 2018), *rev'd,* 930 F.3d 1027 (8th Cir. 2019); *Northport Health Servs. v. Medlock*, 2014 WL 12843528, at *6 (W.D. Ark. May 30, 2014); *Northport Health Servs. v. Cmty. First Tr. Co.*, 2014 WL 217893, at *8 (W.D. Ark. Jan. 21, 2014); *Northport Health Servs. v. Rutherford*, 2009 WL 10673107, at *5 (W.D. Ark. Mar. 17, 2009).

disputes short of litigation," it concluded that, in nursing homes, arbitration "should only be used when both parties knowingly consent to the process after a dispute has arisen." *Id.*

In reaching this conclusion, the ABA explained that "admission to a long-term care facility" is often fraught—involving an "extremely emotionally-charged process" in which "residents and families are faced with arbitration agreements in a crisis, and are at a distinct disadvantage, often without full understanding and under pressure to secure immediate care." *Id.* "Nursing home admission is inherently a time of enormous stress for residents and families;" often, the "trigger for admission" is a "frightening health crisis, abrupt hospital discharge, or sudden loss of a family caregiver." *Id.* The "need for speedy hospital discharge" and, in turn, "immediate care," the Commission explained, means that contracts—including forced arbitration clauses—are "signed in a rush and without the opportunity for an informed and deliberative process." After all, "the family and resident are not thinking of litigating poor care," they are "focused on finding the best care" and are not concerned with "technical legal clauses." *Id.* Given these circumstances, binding residents to forced arbitration at the admissions stage was, in the ABA's view, "inappropriate." *Id.*

Major arbitration providers have reached the same conclusion. In 2012, the American Health Lawyers Association's Alternative Dispute Resolution service—the country's premiere health-care arbitration provider—revised its arbitration rules to permit arbitration of a "consumer health care liability claim" only if "all of the parties agreed in writing to arbitrate the claim *after* the injury has occurred." 81 Fed. Reg. at 68,797 (emphasis added). (That provider has since stepped back from its position, in response to industry pressure.) Meanwhile, the American Arbitration Association—the largest arbitration provider in America—has issued what it called a "Healthcare Policy Statement" warning nursing facilities that it "would not administer healthcare arbitrations between individual patients and healthcare service providers that relate to medical services, such as negligence and medical malpractice disputes, unless all parties agreed to submit the matter to

arbitration after the dispute arose." *Id.* As the Wall Street Journal has reported, the AAA "frowns on agreements requiring arbitration in disputes over nursing-home care and generally refuses such cases" because, as AAA's general counsel explained, patients "really are not in an appropriate state of mind to evaluate an agreement like an arbitration clause." Nathan Koppell, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, Wall St. J., Apr. 11, 2008.

C. CMS's rule addresses these concerns while honoring the policy of the FAA.

CMS's rule seeks to address the concern that nursing homes are "taking advantage of or coercing residents to sign" such agreements and that, under these unique circumstances, consent to arbitration is often illusory. 84 Fed. Reg. at 34,721. It does that by prohibiting facilities that participate in Medicare and Medicaid from requiring an agreement to arbitrate as a condition of care. *See id.* at 34,720–21. It also provides as a condition of participation that such facilities explain proposed arbitration terms to residents in terms they can understand, and that they provide a thirty-day period in which to rescind the agreement. *See id.* Together, those requirements give residents the chance to make an "informed decision" about whether to agree to arbitration, without being forced to "choos[e] between signing … or not receiving care." *Id.* at 34,727, 34,735.

At the same time, however, CMS recognized the federal policy in favor of arbitration that Congress adopted in the FAA and declined to "deny facilities a method of resolving disputes that is potentially more cost effective and efficient." *Id.* at 34,727. The agency agreed with industry commenters that "judicial proceedings may not be a preferable way for resolving all disputes," noting that agreements to arbitrate can be "advantageous to both providers and beneficiaries because they allow for the expeditious resolution of claims without the costs and expense of litigation." *Id.* at 34,732. Based on that sensitivity to the FAA's pro-arbitration policy, the agency rejected the call by numerous commenters—including amici here—for a prohibition on pre-dispute arbitration

agreements, backing away from an earlier version of the rule that would have imposed such a prohibition. *See id.* at 34,725. Although amici would have preferred a rule prohibiting the use of forced arbitration in the nursing-home context, CMS sought to strike a "balance" that "accommodates the use of arbitration agreements while also protecting the rights" of nursing-home residents. *Id*.

ARGUMENT

I. *McMahon* establishes agencies' authority to regulate arbitration under general rulemaking authority.

The plaintiff nursing homes' argument in this case hinges on the Court's adoption of a new, unforgiving limit on federal agencies' congressionally delegated rulemaking authority. Even when Congress has expressly delegated rulemaking authority to an agency, they argue, the agency is nevertheless powerless to regulate arbitration provisions "absent clear congressional approval to override the mandates of the FAA." Northport Br. at 16. Under that rule, agencies that regulate under general statutory grants of rulemaking authority would be categorically prohibited from promulgating rules that regulate the role of arbitration.

That theory, however, is squarely foreclosed by the Supreme Court's decision in *Shearson/Am. Express Inc. v. McMahon,* 482 U.S. 220 (1987). The statute at issue there authorized the SEC to "abrogate, add to, and delete from" existing rules for self-regulatory organizations "if it [found] such changes necessary or appropriate to further the objectives" of the Securities Exchange Act. *Id.* at 233. That general delegation of rulemaking authority, the Court unanimously held, was "sufficient statutory authority" for the agency's regulation of arbitration. *Id.* at 238. Although the statute said nothing about arbitration, the Court nevertheless read it to confer "broad authority to oversee and to regulate" the "adequacy of the arbitration procedures employed" by regulated entities—including "expansive power" to "mandate the adoption of any rules it deems necessary to ensure

that arbitration procedures adequately protect statutory rights." *Id.* at 233–34. And it did so notwithstanding the FAA's "policy favoring arbitration." *Id.* at 226.

Under that expansive power, CMS could have adopted much broader restrictions on arbitration in the nursing-home context than the modest rule that it chose. Many other agencies have done so. Since *McMahon*, for example, the SEC has taken an even more active role in approving rules governing arbitral procedures, including a rule prohibiting members of a self-regulatory organization from compelling arbitration against members of class-action lawsuits. *See Self-Regulatory Organizations*, 57 Fed. Reg. 30,519, 30,520 (July 9, 1992); *see also* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 Stan. J. Complex Litig. 1, 27–28 (2012). And the SEC's regulations represent just a fraction of existing arbitration rules. "Over the last four decades, … many federal agencies have regulated arbitration—even though the substantive statutes they were interpreting did not explicitly mention arbitration." Matteo Godi, *Administrative Regulation of Arbitration*, 36 Yale J. on Reg. 853, 864 (2019). In rules designed to protect farmers, students, airline passengers, workers, and nursing-home patients, among others, more than a dozen federal agencies have long regulated arbitration within the statutory schemes that they oversee to fulfill their congressional mandates to secure fair dealing among industry participants and meaningful forms of redress for aggrieved parties. *See id.* at 864–69. Like the SEC, these agencies have relied on *McMahon*'s understanding that arbitration falls comfortably within an agency's general congressional delegation of rulemaking authority. *See id.* at 864.

In that respect, *McMahon* enshrined a basic principal of agency authority: That a "general conferral of rulemaking authority" is sufficient to "validate rules for *all* the matters the agency is charged with administering." *City of Arlington v. F.C.C.*, 569 U.S. 290, 306 (2013). *McMahon*, in other words, followed the principle that, when it comes to agency rulemaking, "the whole includes all of its parts." *Id.* As long as an agency's "general rulemaking authority is clear," courts need not review

"*every* agency rule" to determine whether each "*particular issue w*as committed to agency discretion." *Id.*

In the three decades since it decided *McMahon*, the Supreme Court has never questioned its view of agency authority. "Until the Supreme Court itself overrules" the decision, "the lower courts must follow its holding[]." *Groninger v. Davison*, 364 F.2d 638, 642 (8th Cir. 1966). For that reason, CMS should prevail even if the Court concludes that its rule affected the validity of arbitration agreements. The agency could have gone much further, as amici asked it to do, but the rule it chose at least is well within the authority recognized in *McMahon*.

II. *Epic Systems* does not contradict *McMahon*'s holding.

The plaintiff nursing homes fail to distinguish *McMahon* or even to acknowledge its existence. Instead, they rest their sweeping attack on the longstanding framework governing agency regulation on the Supreme Court's later decision in *Epic Systems*, 138 S. Ct. 1612 (2018). There, the Court held that a party suggesting that "two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Id.* at 1624. The nursing homes read *Epic Systems* as establishing a new principle of agency law, that rules regulating arbitration "cannot be imposed by a federal agency absent clear congressional approval to override the mandates of the FAA." Northport Br. at 16. They reason that, since the Medicare and Medicaid Acts do not mention arbitration, they cannot contain a clearly expressed intent to displace the FAA. *Id.* at 20.

Epic Systems recognized no such principle for a simple reason: The case did not involve an agency regulation. To the contrary, the only question *Epic Systems* addressed was how to discern when Congress has *itself* decided to prohibit arbitration. Specifically, the case addressed whether a statute—the National Labor Relations Act—contained Congress's "clear and manifest" intent to displace the FAA. *Epic Sys.*, 138 S. Ct. at 1624. In the course of examining the statute for that intent,

the Court considered and rejected the National Labor Relations Board's own reading as contrary to the statute's unambiguous meaning. *Id.* at 1629–30. But because the agency had not exercised any congressional delegated authority to enact new regulations, the only law at issue was the statute itself. The Court did not announce a new and unprecedented rule of agency law or in any way undermine *McMahon*. The Court favorably cited *McMahon* on other points, but did not call into question or even discuss the earlier decision's holding on the scope of an agency's delegated rule-making authority. *See id.* at 1627.

This case, unlike *Epic Systems*, is not about a conflict between statutes. Nobody argues here that the Medicare and Medicaid Acts—standing alone—displace the FAA. The statutes reflect Congress's judgment that regulation is warranted, but they delegate to CMS the authority to decide what those regulations should be. And there is no question that the regulations adopted by the agency pursuant to that delegated authority manifest a clear intent to regulate arbitration in the nursing-home context, notwithstanding the FAA's pro-arbitration policy. *See* 84 Fed. Reg. at 34,725. To be sure, the government argues (and we agree) that the agency's modest decision to allow nursing-home residents the opportunity to make informed choices about arbitration does not even implicate the FAA's policy. To the extent that it does, however, *McMahon* holds that the agency had "sufficient statutory authority" to make that decision. 482 U.S. at 238.

When an agency regulates pursuant to its congressionally delegated rulemaking authority, it is just as capable as Congress at displacing the FAA's background pro-arbitration policy. Such regulations have "the force of law, … just as if all the details had been incorporated into the congressional language." *United States v. Mersky*, 361 U.S. 431, 437–38 (1960); *see also, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law."). And where a regulation conflicts with an earlier statute, "just as with conflicting statutory provisions, courts will hold that

the later of the two controls and supersedes the former to the extent of the actual conflict." Bernadette Bollas Genetin, *A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 Emory L.J. 677, 704–05 & 705 n.135 (2002); *see, e.g.*, *Henderson v. United States*, 517 U.S. 654, 672 (1996). Thus, when an "agency reasonably concludes that the use of arbitration should be limited or prohibited because arbitration negatively impacts the agency's statutory mandate," it has the power to do so notwithstanding the FAA. David L. Noll, *Arbitration Conflicts*, 103 Minn. L. Rev. 665, 725 (2018).

Because the nursing homes focus on the Medicare and Medicaid Acts, they never really confront the impact of CMS's own rulemaking authority. Their only argument on that point is that the agency lacks the authority to regulate arbitration under "general rulemaking powers" because "Congress has expressly withheld that power through the FAA." Northport Br. at 23. But that argument, made without citation to authority, makes no sense. Even if Congress intended to forbid future exceptions to the FAA when it passed the statute in 1925 (and there is no evidence that it did), it had no authority to limit the power of future Congresses to create such exceptions, either through statutory language or delegated authority to agencies.

Nor does the FAA constrain future agency rulemaking. Congress designed the Act to overcome "judicial hostility" to private arbitration contracts, not to prevent federal regulation. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 & n.14 (1985). When Congress has given an agency the statutory authority to act, the FAA's general "pro-arbitration policy goals … do not require [an] agency to relinquish its statutory authority if it has not agreed to do so." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). And when the agency acts under that authority, the statute does "not authorize the courts to balance the competing policies of the … FAA or to second-guess the agency's judgment." *Id.* at 297. "To hold otherwise would … undermine[] the

agency's independent statutory responsibility" to exercise the regulatory authority that Congress delegated to it. *Id.* at 288.

III. CMS acted well within its statutory authority when it conditioned a nursing home's acceptance of Medicare and Medicaid funds on requirements promoting informed consent.

The only remaining question is whether CMS's regulation of arbitration falls within the scope of its delegated rulemaking authority. Under *McMahon*, it clearly does. Indeed, the statutory delegation on which CMS relies here is even more specific than the one that *McMahon* held sufficient to give the agency "broad authority" to adopt "any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." 482 U.S. at 233–34.

Enacted in response to widespread abuse and neglect, the Nursing Home Reform Act authorizes CMS to require that nursing homes, as a condition on Medicare or Medicaid funds, "must protect and promote the rights of each resident" by complying with a comprehensive list of substantive and procedural "Residents' Rights." 42 U.S.C. §§ 1395i-3(c)(1)(A), 1396r(c)(1)(A). That list includes rights to free choice, informed consent, and fair dispute resolution—including the "right to voice grievances … without discrimination or reprisal" and "the right to prompt efforts by the facility to resolve grievances." *Id.* §§ 1395i-3(c)(1)(A)(iv), 1396r(c)(1)(A). And those rights are not exhaustive; Congress authorized the Secretary to impose "other requirements" and "establish[]" "any other right[s]" to protect residents. *Id.* §§ 1396r(c)(1)(A)(xi), (d)(4)(B).

The nursing homes urge an extremely narrow interpretation of Congress's statutory delegation, arguing that CMS may only impose "requirements that actually involve resident care" inside a nursing home. Northport Br. at 24. Thus, they claim, the agency can make rules about things like medical care and nutrition for current residents, but has no authority to regulate an agreement entered before (or at the time of) admission. *Id.* at 24–25. But CMS's regulation of such agreements is in fact firmly tethered to the provision of care. *See* 42 U.S.C. §§ 1395i-3(d)(4)(B),

1396r(d)(4)(B). In the absence of that regulation, "refusing to agree" to an arbitration clause would, "in most cases," mean "that care will be denied"—a clear threat to those "Medicare and Medicaid beneficiaries" who "are aged or disabled and ill" but need long-term care assistance. 81 Fed. Reg. at 68,792. What's more, because forced arbitrations are shrouded in secrecy, potential residents, regulators, and the public may never discover whether a facility offers "substandard care" or has been involved in "instances of abuse or neglect." *Id.* at 68,798–99. That risk plainly implicates the provision of care.

In any event, CMS's modest decision to establish rules regarding a residents' free choice, informed consent, and fair dispute resolution—the "right to access the court system if a dispute with a facility arises"—falls well within the scope of its broad statutory discretion "to create specified rights for [nursing-home] residents." *Id.* at 68,793. Those rights can include "free choice, confidentiality, privacy, and grievances," as well as "any other rights" the agency deems necessary. *Id.* at 68,791–93. Congress placed no textual limitation on the authority to establish such rights, a standard that "fairly exudes deference" to the agency. *Webster v. Doe*, 486 U.S. 592, 600 (1988).

The nursing homes' claim that the limitation they read into the statutes is necessary to avoid giving CMS "near boundless authority" is seriously overblown. Northport Br. at 24. The agency's statutory authority to protect the "health, safety, welfare, and rights" of nursing-home residents, even if not so limited, is hardly "boundless." *Id.* Even if there were a valid concern about the breadth of the CMS's statutory authority, it would be no reason for a court to set aside Congress's policy choice. When, under a "statutory scheme," Congress "expressly delegate[s] … the authority to set standards of compliance," the "authority conferred" is "very broad." *Am. Hosp. Ass'n v. Schweiker*, 721 F.2d 170, 176 (7th Cir. 1983). And, when "Congress [has] expressly… delegated … the power to establish" certain conditions or rules, "deference to the [agency's] decision is particularly important." *Champion v. Shalala*, 33 F.3d 963, 966 (8th Cir. 1994); *see also AFL-CIO v. Donovan*,

757 F.2d 330, 343 (D.C. Cir. 1985) (when a "statute expressly grants the … authority to grant exemptions," the agency's determinations are "entitled to great deference"). The Eighth Circuit has thus rejected similar efforts by challengers targeting the Department of Health and Human Services' "broad authority" and "wide discretion" to regulate under "general directives." *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1023–24 (8th Cir. 2015). As the court observed, "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.*

The nursing homes also ask this Court to construe the lack of specific authority to regulate arbitration as evidence of Congress's intent to *deny* that authority. Congress, they contend, "has repeatedly demonstrated that it knows how to empower agencies to regulate arbitration when it wants to do so." Northport Br. at 23. But *McMann* establishes that no such express authority is required to regulate in furtherance of the agency's statutory mandate. *See* 482 U.S. at 233–34. As long as the agency has "general rulemaking authority," it does not need specific authority for each "*particular issue*" it chooses to regulate. *City of Arlington*, 569 U.S. at 306. The best explanation for the lack of an express reference to arbitration is therefore that Congress did not view it as necessary. *See Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

Moreover, when Congress granted CMS its regulatory authority in 1987, nursing homes had not yet commonly begun the practice of including arbitration agreements in their admissions contracts. Not until the late 1990s did they become "among the biggest converts to the practice." Nathan Koppell, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, Wall St. J., Apr. 11, 2008. And only recently, as arbitration clauses became ubiquitous in consumer contracts of all kinds, did Congress begin including express arbitration provisions in grants of agency authority. *See* Godi, *Administrative Regulation of Arbitration*, 36 Yale J. on Reg. at 876. It is thus not surprising that the primary example of express authority on which the nursing homes rely (the Dodd-Frank Wall Street Reform and Consumer Protection Act) was passed in 2010. *See* 12 U.S.C. § 5518 (authorizing

the Consumer Financial Protection Bureau to prohibit or limit arbitration if it found that doing so would be "in the public interest and for the protection of consumers"). The only other example they give is—somewhat ironically—another provision of Dodd-Frank that added express authority to the Securities Exchange Act for the SEC to limit arbitration agreements between securities brokers and their customers. *See* 15 U.S.C. §78o(o). But the nursing homes fail to acknowledge the preexisting provisions of the Securities Exchange Act that lacked such an express grant of authority but that the Supreme Court in *McMahon* nevertheless held created authority to regulate arbitration. *See* 482 U.S. at 233 (citing 15 U.S.C. § 78s(b)(2), (c)).

Even if there were doubts about the scope of CMS's statutory authority, the agency's own construction of its authority to include regulation of arbitration terms in admissions agreements would be due substantial deference. *See City of Arlington*, 569 U.S. at 307. As long as the agency's construction is "based on a permissible construction of the statute, that is the end of the matter." *Id.* The nursing homes' argument that CMS lacks authority to regulate arbitration absent a statutory provision specifically granting it thus gets it backward. Proper deference to the agency's construction of its own statutory authority in fact establishes the opposite principle: That CMS *has* the authority to regulate arbitration absent a statutory provision specifically *restricting* that authority. The question "is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Id.* at 301. Here, it does not.

CONCLUSION

This Court should deny the plaintiffs' motion for summary judgment and enter judgment in favor of the United States.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I electronically filed the foregoing amici brief with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel required to be served.

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