No. 20-1799

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NORTHPORT HEALTH SERVICES OF ARKANSAS, LLC,
doing business as Springdale Health and Rehabilitation Center, *et al.*,

*Plaintiffs-Appellants,*

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

*Defendants-Appellees.*

On Appeal from the United States District Court
for the Western District of Arkansas

# BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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July 7, 2020

## CORPORATE DISCLOSURE STATEMENT

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## INTEREST OF AMICUS CURIAE[1]

Public Citizen is a national consumer advocacy organization that appears on behalf of its members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in issues concerning arbitration, and it has appeared as amicus curiae before the U.S. Supreme Court and other federal and state courts in many cases involving arbitration. Public Citizen submits this brief to assist the Court in considering claims that funding conditions through which federal agencies seek to carry out their statutory responsibilities by influencing funding recipients' use of arbitration conflict with the Federal Arbitration Act.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The appellants in this case (collectively, "Northport") are nursing homes that seek to receive the financial benefits of participation in the Medicare and Medicaid programs while compelling their patients to enter into binding arbitration agreements by denying them admission or

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to preparation or submission of this brief.

treatment if they do not. Northport challenges a federal regulation, 42 C.F.R. § 483.70(n) (the "Arbitration Rule" or "Rule"), that restricts Medicare and Medicaid eligibility to nursing homes that comply with modest limits on the use of arbitration agreements—limits designed to make it more likely that patients' assent to arbitration is voluntary. According to Northport, the Arbitration Rule constitutes an "extraordinary effort by the executive branch to restrict the use of arbitration agreements in long-term care facilities," Northport Br. 1, that "singles out arbitration for 'disfavored' treatment," *id.* at 35, and "penalize[s]" the use of arbitration, *id.* at 21. The Rule, Northport suggests, threatens to deprive nursing homes and their patients of the ability to obtain "prompt resolution of grievances," which Northport calls "a hallmark of arbitration, and one of its principal advantages over litigation." *Id.* at 30.

The Arbitration Rule is anything but an "extraordinary effort" to penalize the use of arbitration by nursing homes. The Rule does not prevent nursing homes from entering into or enforcing arbitration agreements with patients. Rather, to prevent patients from being coerced into agreeing to arbitration and to ensure that they understand any

arbitration agreement they may sign, the Rule provides that nursing homes that receive federal financial support through the Medicare and Medicaid programs must, as a condition of their eligibility for those programs, accept a small set of limits on the way they use arbitration agreements.

The principal condition the Rule imposes on nursing homes' participation in Medicare and Medicaid is that they may not require a patient or patient's representative "to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility." 42 C.F.R. § 483.70(n)(1). To make that limitation effective, the Rule also requires that a participating nursing home that asks a patient to sign an arbitration agreement must *tell* the patient she is not required to do so to be admitted or receive care, *id.*, and that the agreement must state that signing it is not a requirement for admission or care, *id.* § 483.70(n)(4). The Rule further provides that a participating nursing home must "explain" an arbitration agreement proffered to a patient "in a form and manner that he or she understands" and elicit acknowledgment that the patient understands it. *Id.* §§ 483.70(n)(2)(i)–(ii). And it provides that a participating nursing home

must allow a patient 30 days to rescind an arbitration agreement. *Id.* § 483.70(n)(3).

The Arbitration Rule applies only if a nursing home participates in Medicare and Medicaid and has no effect on nursing homes that choose not to participate in those programs. Even as to participating nursing homes, the Rule does not prevent the formation of contracts or their enforcement by the courts: A nursing home that violates the programs' eligibility requirements by conditioning a patient's admission or care on an arbitration agreement may enforce the resulting agreement in court if it is otherwise enforceable under generally applicable contract-law principles. *See* 9 U.S.C. § 2. As the Centers for Medicare & Medicaid Services (CMS) stated in promulgating it, the Rule does not affect whether an arbitration agreement is valid and enforceable in court: "This final rule does not purport to regulate the enforceability of any arbitration agreement." Dep't of Health & Human Servs., *Final Rule: Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements*, 84 Fed. Reg. 34,718, 34,718 (2019). Any violation of the eligibility conditions imposed by the Arbitration Rule is a matter between the nursing home and CMS, which

may terminate or impose conditions on continued participation in the programs by nursing homes that violate these and other eligibility requirements.

Northport's arguments that these provisions "disfavor" arbitration reflect a remarkably negative set of assumptions about arbitration. Although it asserts that arbitration is advantageous to patients, Northport apparently believes that patients will be unwilling to agree to arbitration unless they must do so (or believe that they must) to receive care. Northport also apparently fears that if nursing homes explain arbitration agreements to patients in a manner the patients can understand, patients will choose not to sign them. And it assumes that if patients have a short period time to reconsider entering into arbitration agreements signed during the stressful process of admission to a nursing home, they are likely to rescind those agreements. Thus, Northport asserts, federal policy favoring arbitration will be thwarted unless nursing homes can use the threat of withholding needed medical care to coerce patients into signing arbitration agreements that they do not understand and cannot rescind.

Northport's arguments misconceive both the terms of the Federal Arbitration Act (FAA) and the policies it reflects. As the Supreme Court has repeatedly explained, the FAA's fundamental concern is that courts enforce arbitration agreements to the same extent as other contracts by applying generally applicable principles of contract law to issues concerning their formation, interpretation, validity and enforceability. The Arbitration Rule does not address those issues: It only imposes conditions on nursing homes' participation in the Medicare and Medicaid program. Those conditions are consistent with the terms of the FAA because they do not render any agreement to arbitrate unenforceable by a court, even if it is entered into in violation of the Rule's conditions.

Moreover, the Rule does not require courts to discriminate against arbitration agreements when applying contract law principles in disputes over their enforceability. Its conditions pose no conflict with the "pro-arbitration" policy of the FAA, which fosters judicial enforcement of agreements to arbitrate but is equally respectful of agreements *not* to arbitrate. And Northport's insistence that the Rule is unauthorized because the Nursing Home Reform Act does not clearly express an

intention to "override" the FAA is irrelevant because nothing in the Rule purports to override the FAA.

The Rule reflects only a determination by CMS, based on its authority to protect patients whose care is paid for by Medicare and Medicaid, that the interests of patients will be better served if federal subsidies are reserved for nursing homes who abide by a small set of provisions intended to protect the voluntariness of arbitration agreements with patients. Nothing in the FAA prohibits CMS from making that choice. Indeed, it is fully consistent with the Supreme Court's insistence that, under the FAA, arbitration is a matter of "consent, not coercion." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). That nursing homes may feel economic pressure to accept the Rule's requirements, as they do other conditions on their participation in Medicare and Medicaid, does not make the Rule invalid.

## ARGUMENT

### I. The Arbitration Rule does not conflict with the FAA's requirement that courts enforce arbitration agreements.

The FAA provides that written agreements to arbitrate in contracts involving commerce are "valid, irrevocable, and enforceable, save upon

such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That command is followed by provisions that address in detail the procedures by which courts are to enforce such contracts. The fundamental concern of the FAA is whether and how *courts* must enforce arbitration agreements in cases involving claims subject to them. Indeed, except for one provision authorizing arbitrators to issue subpoenas, 9 U.S.C. § 7, the FAA addresses no other subject. *See* 9 U.S.C. §§ 1–16. The plain language of the FAA "direct[s] courts to abandon their hostility [to arbitration] and instead treat arbitration agreements as 'valid, irrevocable, and enforceable.'" *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

The Arbitration Rule contains no provision in tension with, much less contrary to, this command. The challenged provisions of the Rule provide that if a nursing home chooses to avail itself of the benefits of participating in Medicare and Medicaid, it must undertake to comply with standards protecting the voluntariness of arbitration agreements with patients—just as it must comply with other program eligibility criteria. No nursing home is required to participate in Medicare and Medicaid, and the Rule has no effect on those that choose not to do so.

For those nursing homes that do participate, the Rule does not "purport to regulate the enforceability of any arbitration agreement." 84 Fed. Reg. at 34,718. Rather, even if a participating nursing home violates CMS's eligibility regulations by requiring a patient to sign an arbitration agreement to receive care, or fails to abide by one of the other provisions of the Arbitration Rule, the arbitration agreement is unaffected. Like a violation of any other regulation establishing requirements for participation in Medicare and Medicaid, violation of the Rule affects whether a nursing home may continue to "qualify to participate as a Skilled Nursing Facility in the Medicare program, and as a nursing facility in the Medicaid program." 42 C.F.R. § 483.1(b). Thus, like violations of other CMS program requirements, violation of the Arbitration Rule may be grounds to terminate the facility's participation agreement, *see id.* § 489.53(a)(1), or to require it to provide "reasonable assurance" that a violation "will not recur," *id.* § 489.57(b).

Because the Rule undisputedly prevents neither the formation nor the enforcement of a valid arbitration agreement, it cannot, as Northport asserts (Br. 20) conflict with the FAA's enforcement mandate. *See Calif. Ass'n of Private Postsecondary Schools v. DeVos*, 436 F. Supp. 3d 333,

343–44 (D.D.C. 2020) (holding that the FAA does not displace an Education Department regulation conditioning a school's eligibility to participate in the federal student loan program on its agreement not to enter into arbitration agreements with students), *appeal pending*, No. 20-5080 (D.C. Cir.) (*CAPPS*). As the well-reasoned district-court opinion in *CAPPS* explains, an eligibility requirement for federal funding does not contradict the FAA if it "does not invalidate any arbitration agreement" and "does not provide a basis for … resist[ing] a motion to compel arbitration." *Id.* at 344. The FAA provides only that arbitration agreements are valid and enforceable on the same terms as other contracts, 9 U.S.C. § 2, and sets forth mechanisms for their judicial enforcement, *see id.* §§ 3–16. It does not address requirements that do not affect the enforceability of arbitration agreements, such as eligibility conditions to which persons or entities agree in exchange for payments from the federal government.

Northport briefly asserts that the regulation controls enforceability because "a contract entered in violation of federal statutory or regulatory law is unenforceable." Northport Br. 31 (citing *Resolution Trust Corp. v. Home Savings of America*, 946 F.2d 93, 96 (8th Cir. 1991)). Statutes and

regulations that render contracts illegal, as *Resolution Trust* indicates, often make them unenforceable. But Northport cites no authority holding that violation of a regulatory condition on eligibility to participate in a federal spending program has the same consequence, when the contract is otherwise lawful and the agency has expressly disclaimed any intention to regulate its enforceability.

Northport's further assertion that the regulation would render arbitration agreements unenforceable "as a practical matter" because participating nursing homes would likely agree not to enforce them in order to remain eligible to participate in Medicare and Medicaid, *see* Northport Br. 31, n.4, is irrelevant. The FAA requires that otherwise valid agreements be *enforceable*. A party's *choice* not to enforce them for financial reasons does not contravene the FAA.

## II. The Rule does not implicate the FAA's "equal-treatment principle."

Because the Rule does not directly conflict with the FAA's enforceability mandate, Northport argues that the Rule violates the FAA's "'equal-treatment' rule" by "discriminat[ing] … against" or "disfavor[ing]" arbitration. Northport Br. 6 (quoting *Epic Sys.*, 138 S. Ct. at 1622; *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426

(2017)). Northport's argument misunderstands the FAA's equal-treatment principle. That principle is derived from, and limited by, the "saving clause" of section 2 of the FAA, which makes arbitration agreements valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Supreme Court has explained, section 2 "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred*, 137 S. Ct. at 1426 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)); *see also Epic Sys.*, 138 S. Ct. at 1622.

The equal-treatment principle applies to state contract-law rules and other legal principles that affect whether courts will recognize the validity and enforceability of arbitration agreements. *See CAPPS*, 436 F. Supp. 3d at 344. Specifically, it determines whether a claimed defense to enforcement of an arbitration agreement is cognizable. *See Epic Sys.*, 138 S. Ct. at 1622. The equal-treatment principle is, first and foremost, a preemption doctrine applicable to state-law rules relating to

enforceability and validity of contracts. *See Kindred*, 137 S. Ct. at 1426. Because this case does not involve preemption of state law, but a claimed conflict between federal laws, preemption doctrines do not apply, *see POM Wonderful LLC v. Coca- Cola Co.*, 573 U.S. 102, 111 (2014), though they may be "instructive" about how "to assess the interaction of laws that bear on the same subject." *Id.* at 112. Here, the equal-treatment principle provides no relevant instruction because the provisions of the Arbitration Rule do not supply contract-law defenses to the existence, validity, or enforcement of arbitration agreements and, therefore, fall outside the principle's bounds.

For instance, the Rule does not "prohibit[] arbitration of a particular type of claim," as did the state contract-law principle invalidated in *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 533 (2012). The Rule does not require courts to condition enforcement of arbitration agreements upon the adoption of procedures that "interfere[] with fundamental attributes of arbitration," as did the state decisional law struck down in *Concepcion*, 563 U.S. at 344. And the Rule does not govern a nursing home's capacity to form an enforceable arbitration contract: It neither denies nursing homes the power to enter into binding

arbitration agreements nor imposes more stringent limits on their ability to enter into legally valid and enforceable arbitration agreements than agreements of any other kind, unlike the state-law doctrine invalidated in *Kindred*. *See* 137 S. Ct. at 1428.

In short, the Rule neither "selectively find[s] arbitration agreements invalid because improperly formed … [nor] selectively refus[es] to enforce those agreements once properly made." *Id*. It thus does not implicate the FAA's two core concerns: "the 'enforce[ment]' of arbitration agreements" and "their initial 'valid[ity]'—that is, what it takes to enter into them." *Id*. Instead, the Rule only imposes federal program eligibility consequences on a nursing home that violates its conditions.

None of the precedents Northport relies on addresses such a rule, let alone suggests that it violates the equal-treatment principle. *Kindred*, for example, holds that the equal-treatment principle applies to judicial application of contract-law principles concerning formation of contracts as well as their validity and enforceability. *See id.* That holding is of no help to Northport, however, because the Arbitration Rule does not address whether an arbitration agreement entered in violation of the

conditions it imposes is a binding contract. The Rule creates financial incentives for nursing homes not to enter into arbitration agreements in ways that violate its conditions, but it does not create a discriminatory rule governing "what it takes to enter into" a legally binding arbitration agreement. *Id.* *Kindred* neither "holds—[n]or even implies—that agencies may not dissuade program participants from entering into arbitration agreements that relate to the federal programs they administer." *CAPPS*, 436 F. Supp. 3d at 345.

Likewise, the Supreme Court's decision in *Epic Systems* does not, as Northport suggests, broadly stand for the proposition that federal agencies may not issue rules that affect the use of arbitration agreements. *See* Northport Br. 32. Rather, *Epic Systems* confirms that the FAA's equal-treatment principle is grounded in the judicial-enforcement mandate of section 2 and addresses the grounds on which "agreements to arbitrate [may] be invalidated" by courts and what "defenses" to their enforcement are judicially cognizable. 138 S. Ct. at 1622 (quoting *Concepcion*, 563 U.S. at 339). As the court in *CAPPS* explained, *Epic Systems* holds that "federal agencies lack the authority, absent express congressional authorization, to invalidate arbitration

agreements," not that they lack authority to do anything that might be characterized as "disfavor[ing] arbitration agreements in any respect." 436 F. Supp. 3d at 345.

Northport asserts, incorrectly, that *Epic Systems* did not involve application of the equal-treatment principle to an issue concerning enforcement of arbitration agreements, and claims that "if the FAA were concerned only with the enforcement of arbitration agreements, then there would have been no potential conflict between the FAA and the NLRA to resolve." Northport Br. 32. But the issue in *Epic Systems* was in fact whether provisions of the National Labor Relations Act (NLRA) and Norris-LaGuardia Act (NLGA) that render agreements interfering with concerted activity by workers illegal and unenforceable, *see* 29 U.S.C. § 158(a)(1) (NLRA); *id.* § 103 (NLGA), barred *courts* from enforcing arbitration agreements prohibiting class proceedings. The potential conflict at issue in *Epic Systems* arose precisely because of the claim that federal labor laws made an arbitration agreement *unenforceable*. And *Epic Systems* held that such a prohibition on *judicial*

*enforcement* would contravene the FAA's mandate that courts "enforce, not override, the terms of … arbitration agreements." 138 S. Ct. at 1263.[2]

Because its application of the "equal-treatment principle" concerned the circumstances under which courts are prohibited from enforcing arbitration agreements, *Epic Systems* does not control the outcome here. The Arbitration Rule, unlike the interpretation of the NLRA posited by the employees in *Epic Systems*, does not affect the validity or enforceability of arbitration agreements. *Epic Systems* says nothing to suggest that agencies are precluded from conditioning federal subsidies in ways that may influence how arbitration is used but do not affect the validity or enforceability of arbitration agreements.

Northport's invocation of *Preston v. Ferrer*, 552 U.S. 346 (2008), to suggest that the "equal-treatment principle" applies outside of contract disputes over the existence and enforceability of arbitration agreements is equally misguided. In *Preston*, the issue *was* about judicial

[2] Although the Court thus held that the FAA's saving clause did not accommodate the asserted NLRA prohibition of class-action waiver agreements, the Court also had to determine whether that prohibition existed, in which event the two statutes would conflict and the NLRA would, arguably, impliedly repeal the FAA's judicial-enforceability mandate. *See* 138 S. Ct. at 1623–24. The Court determined that there was no conflict because the NLRA did *not* prohibit class-action waivers.

enforcement of an arbitration agreement, and specifically about whether a party could enforce that agreement without first litigating an arbitrable claim before an administrative agency, as state law required. *See id.* at 350. And the Supreme Court's holding was also about enforcement: The Court held that the state law was invalid because it "imposes prerequisites to *enforcement* of an arbitration agreement that are not applicable to contracts generally." *Id.* at 356 (emphasis added).

Northport also misses the mark when it invokes *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989), and *Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990), as examples of cases in which "other courts have rejected the … enforceable-therefore-no-conflict theory." Northport Br. 33. Those cases involved the very different question whether state laws or regulations that prohibit outright the formation of particular types of arbitration agreements, and impose penalties for violations, are impliedly preempted by the FAA because they conflict with its "purposes and objectives." *See Sec. Indus. Ass'n*, 883 F.2d at 1123; *Saturn Dist. Corps.*, 905 F.2d at 722. In each case, a state had enacted a law or regulation that, while not directly controlling judicial enforceability of arbitration agreements, made them illegal. The

courts in both cases held that the FAA's purpose and objective of rendering arbitration agreements enforceable notwithstanding contrary state contract-law principles would be frustrated if a state could "escape its enforcement duties under § 2 by banning the formation of arbitration agreements." *Saturn Dist. Corps.*, 905 F.2d at 723 (citation omitted).

The implied-conflict preemption principles applied in those two cases have no application here, where state law is not at issue. Moreover, the Arbitration Rule, unlike the state regulations at issue in those cases, does not make it illegal for nursing homes to enter into arbitration agreements that violate its terms, but only denies them a federal subsidy if they do so. Such a regulation is a "far cry" from a law imposing a penalty on the use of arbitration. *CAPPS*, 346 F. Supp. 3d at 346. Unlike a ban on formation of arbitration agreements, such a regulation does not interfere with the FAA's objective of ensuring that arbitration agreements are governed by generally applicable contract terms.

## III. The Rule does not violate the FAA's "pro-arbitration" policy.

Northport argues that although the Rule leaves its members' ability to enter into and judicially enforce arbitration agreements under the FAA intact, the Rule is nonetheless invalid because it conflicts with the FAA's

"liberal federal policy favoring arbitration agreements." Northport Br. 6 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). That a regulation authorized by a federal statute allegedly conflicts with the "policy" of another statute—but not its terms—does not establish a basis for setting aside the regulation as "not in accordance with law" under the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A). After all, "courts do not apply federal policies; they apply federal statutes." *CAPPS*, 346 F. Supp. 3d at 344.

Thus, regardless of how expansive the FAA's "policy" may be, a court may set aside the Arbitration Rule only if it is irreconcilable with the FAA itself, *see Carcieri v. Salazar*, 555 U.S. 379, 395 (2014)—a determination that depends on "[a]nalysis of the statutory text," *POM Wonderful*, 573 U.S. at 112. The "simplistic[]" assumption that "*whatever* furthers [a] statute's primary objective must be the law" is an insufficient basis for setting aside an action based on another statute given that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987); *see also PBGC v. LTV Corp.*, 496 U.S. 633, 646 (1990) (holding that a lower court erred in setting aside an agency action for failure to consider "principles and policies" of other statutes

that the agency did not administer). Because the FAA and the Arbitration Rule can each be "fully enforc[ed] … according to its terms," *POM Wonderful*, 573 U.S. at 118, the latter should not be set aside based on assertions that the "policy" of the former requires that the statute be "expand[ed] … beyond the field to which it is unambiguously limited," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012)—the validity and judicial enforceability of arbitration agreements.

Statutory "policies," moreover, are enforceable only to the extent that the statute itself pursues them. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[W]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says … what it means and means … what it says.'"). The FAA's "pro-arbitration" policy is much more limited than Northport asserts. The FAA embodies no generalized preference for arbitration over litigation in all circumstances, let alone a definitive congressional determination that arbitration is desirable in all settings where Congress has not explicitly authorized prohibiting or limiting it. Rather, as Justice Thomas explained in *Granite Rock Co. v. International Brotherhood of*

*Teamsters*, "'the federal policy favoring arbitration' … is merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" 561 U.S. 287, 302 (2010) (quoting *Volt*, 489 U.S. at 478). That is, the policy is one of *judicial* enforcement of arbitration agreements—a policy that, as explained above, the Rule does not contravene.

Thus, in every Supreme Court case that Northport cites in support of its attempt to rely on the FAA's "policy," including *Epic Systems*, the issue was whether an arbitration agreement was valid and enforceable according to its terms. Each case involved what the Supreme Court has described as the FAA's two central concerns: "the 'enforce[ment]' of arbitration agreements" and "their initial 'valid[ity]'." *Kindred*, 137 S. Ct. 1421 at 1426. Northport cites no support for its assertion that the "pro-arbitration" policy of the FAA extends beyond the validity and enforceability of arbitration agreements.

Moreover, the FAA's policy is not to "force arbitration on parties who enter into contracts involving interstate commerce." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 66 (1995). It operates only

where parties consent to arbitration, *see Granite Rock*, 561 U.S. at 300–02; *Volt*, 489 U.S. at 479, and its "proarbitration policy does not operate without regard to the wishes of … contracting parties." *Mastrobuono*, 514 U.S. at 57. Thus, an agreement *not* to enter into arbitration agreements except under specified conditions—such as the agreement that, under the Arbitration Rule, a nursing home that chooses to participate in Medicare and Medicaid enters into—is as consistent with the FAA's policy as an agreement to engage in arbitration.

The FAA's policy not only freely permits nursing homes to agree with CMS to accept limits on arbitration with patients, but also imposes no obstacle to CMS's conditioning its dispensation of federal funds on practices that best achieve the Nursing Home Reform Act's purposes. Nothing in the FAA's policy requires federal agencies to subsidize arbitration, or to agree that parties seeking benefits from them may impose arbitration agreements on other parties if such agreements (although enforceable under the FAA) would have adverse consequences for the federal programs they administer. Indeed, the Supreme Court has rejected the notion that the FAA's policies requiring enforcement of private agreements to arbitrate limit the powers of federal agencies to

carry out their own statutory mandates: "[T]he proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). The Court in *Waffle House* specifically refused to permit courts to "balance the policy goals of the FAA" to limit an agency's authority under its organic statute and expand the effect of the FAA beyond its proper sphere of making private arbitration agreements enforceable in court as between the parties to those agreements. *Id.* at 293–94.

In any event, the characterization of the FAA as expressing a uniform, definitive federal statutory policy favoring arbitration is inaccurate. Congress has sharply limited companies' ability to use forced arbitration in some contexts by, for example, prohibiting forced arbitration in consumer credit contracts with some servicemembers or their dependents, 10 U.S.C. § 987(e)(3); forbidding commodities merchants from conditioning access to their products on a consumer's agreement to an arbitration clause, 7 U.S.C. § 21(b)(10)(A); prohibiting forced arbitration in livestock and poultry contracts, 7 U.S.C. § 197c; barring forced arbitration provisions in residential mortgage

agreements, 15 U.S.C. § 1639c(e); and prohibiting auto manufacturers from imposing forced arbitration on dealerships, 15 U.S.C. § 1226.

Moreover, the Supreme Court has long acknowledged that arbitration may threaten the protection of statutory rights and, accordingly, has acknowledged agency authority to take appropriate action in such circumstances. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), for example, the Court recognized that the Securities and Exchange Commission (SEC) has the authority to address harmful applications of arbitration in the securities industry and may exercise that power if it does not contravene the FAA's requirements. *Id.* at 234. Thus, the Financial Industry Regulatory Authority (FINRA), the self-regulatory organization that oversees broker dealers, has—with the SEC's approval—long prohibited FINRA members (that is, securities broker-dealers) from entering into agreements that prohibit judicial class actions by requiring individual arbitration of all claims, even though the FAA itself renders such agreements enforceable by a court. *See* FINRA Rule 2268(f), https://www.finra.org/rules-guidance/rulebooks/finra-rules/2268 (governing contents of arbitration agreements); FINRA Rule 12204, https://www.finra.org/rules-

guidance/rulebooks/finra-rules/12204 (governing arbitration procedure); s*ee also Charles Schwab & Co. Inc. v. FINRA*, 861 F. Supp. 2d 1063 (N.D. Cal. 2012) (describing background and basis of FINRA rules).[3]

Ultimately, Northport's argument rests on its view that the policy embodied in the FAA is not just one of requiring enforcement of arbitration agreements, but one of promoting arbitration under any and all circumstances. Nothing in the Supreme Court's arbitration jurisprudence suggests the existence of that policy, let alone holds that such a policy, untethered to any statutory text, could serve as a basis for finding that an agency action can be set aside under the APA as "not in accordance with law." 5 U.S.C. § 706(2)(A).

The FAA's directive that arbitration agreements be *enforced* by courts does not foreclose debate over whether it is desirable that parties

[3] Notably, the FINRA rule long predates a Dodd-Frank Act provision that in 2010 conferred express authority on the SEC to regulate predispute arbitration. *See* 15 U.S.C. § 78o(o). Section 78o(o) gives the SEC authority to prohibit enforcement of arbitration agreements *notwithstanding* the FAA. The pre-existing FINRA rule, by contrast, imposes a condition on FINRA membership, just as the Arbitration Rule imposes conditions on nursing homes that participate in Medicare and Medicaid. Neither rule renders an agreement entered into in violation of that condition invalid or unenforceable, and thus neither implicates the FAA's terms, or the policy they embody, requiring enforcement of arbitration agreements.

should enter into such agreements in all circumstances. *See Epic Sys.*, 138 S. Ct. at 1632. "[P]olicymakers in the political branches" remain free to "contest[]" that issue and take action on the basis of their conclusions as long as they do not contravene the FAA's directive "that arbitration agreements … must be enforced as written." *Id.* Although the FAA resolves the latter point, it does not address whether an agency may incentivize parties who seek financial benefits from the federal government to agree to forgo particular harmful practices when forming arbitration agreements. Thus, the district court in *CAPPS* held that the Education Department could condition financial support to schools on their agreement to eschew predispute arbitration agreements altogether, *see* 436 F. Supp. 3d at 347—a significantly greater limitation than the one at issue here.

The Arbitration Rule's much more modest conditions aim only at preventing patients from being coerced into arbitration and ensuring that they understand and have an opportunity to consider any proffered arbitration agreement. The FAA certainly does not embody a congressional policy that arbitration is always so beneficial that agencies must offer financial subsidies to entities that coerce others into agreeing

to arbitrate. Rather, the fundamental policy of the FAA is that "arbitration is a matter of consent, not coercion." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 (2019). The Arbitration Rule advances that policy by conditioning federal subsidies on nursing homes' willingness to refrain from coercing patients to accept arbitration agreements through threats of denial of needed care. Nothing in the FAA prevents the federal government from using its financial resources to encourage nursing homes to make their arbitration agreements more consistent with the FAA's ideal of consent.

## IV. The Rule's lawfulness does not depend on a clear and manifest congressional authorization to "override" the FAA.

Northport contends that the Arbitration Rule is unlawful because the Nursing Home Reform Act does not embody "a 'clearly expressed congressional intention" to "override the FAA." Northport Br. 2 (quoting *Epic Sys.*, 138 S. Ct. at 1624). That claim is misguided for much the same reason as Northport's argument that the Rule violates the FAA's equal-treatment principle and pro-arbitration policy: The Rule does not "override" the FAA, so no "clearly expressed congressional intention" to do so is necessary.

*Epic Systems* illustrates why the clear-statement requirement is inapplicable here. *Epic Systems* rejected the argument that the NLRA overrode the FAA by prohibiting courts from enforcing employment arbitration agreements containing class-action waivers—agreements that the FAA would "normally require[] [courts] to enforce." 138 S. Ct. at 1623–24. Faced with the claim that the NLRA expressly negated the FAA's judicial-enforcement mandate, the Court took its usual approach to claims of implied repeal based on an asserted "irreconcilable conflict" between two statutes, *id.* at 1624: It applied the ordinary "'stron[g] presump[tion]' that repeals by implication are 'disfavored'" and will be found only where there is "a clearly expressed congressional intention" that one statute displace another. *Id.* (citations omitted). The Court found no clear expression of intent in the NLRA to create a right to engage in collective legal proceedings at all, let alone an intention to override the FAA's otherwise applicable requirement that agreements requiring individual arbitration be enforced. *See id.* at 1624–27.

That holding has no application here because the Arbitration Rule does not purport to prohibit judicial enforcement of any arbitration agreement and thus is not premised on the view that Congress

authorized the displacement of the FAA's requirement that such agreements be enforced. As the Supreme Court explained in *Epic Systems*, each of its previous decisions imposing the requirement of a clear congressional command to displace the FAA involved a claim that a federal statute prohibited courts from enforcing the terms of arbitration provisions with respect to claims arising under that statute. *See* 138 S. Ct. at 1627 (citing *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); and *McMahon*, 482 U.S. 220). *None* of those decisions imposed a requirement of clear and manifest congressional intent where, as here, the rule said to conflict with the FAA in fact left the FAA's requirement of judicial enforcement of arbitration agreements intact.

Thus, Northport's observation that "Congress has … shown that it knows how to *override* the [FAA] when it wishes," Northport Br. 29 (quoting *Epic Sys.*, 138 S. Ct. at 1626; emphasis added), is beside the point. A regulation need not be backed by a clear expression of congressional intent to override the FAA if the regulation does *not*

override the FAA. *See CAPPS*, 436 F. Supp. 3d at 350. Absent a clear-statement requirement, the Nursing Home Reform Act's grant of authority to CMS to establish rights and protections for nursing home patients, *see* 42 U.S.C. §§ 1395i-3, 1396r, provides ample authority for the Arbitration Rule.

## V. The Rule's provisions are permissible conditions on federal funding.

Finally, Northport's contention that the conditions imposed by the Arbitration Rule are impermissibly coercive is baseless. Northport relies on *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 582 (2012), which holds that Spending Clause conditions that coerce *states* in exercising sovereign powers protected by the Tenth Amendment are unconstitutional. *Sebelius's* reasoning is limited to claims of coercion asserted by states, because the substantive protection against coercion that it applies derives from the Tenth Amendment principle that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992), *quoted in Sebelius*, 567 U.S. at 575. Private entities have no similar constitutional protection against "compulsion" and, hence, cannot

claim the benefit of *Sebelius*'s condemnation of "coercive" funding conditions imposed on states.

Coercion may also be relevant in determining whether conditions on a grant of federal funds infringe the exercise of some other constitutional right. *See Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 51 (2006)). But Northport does not even attempt to demonstrate that the Arbitration Rule limits exercise of constitutional rights. There is no freestanding prohibition on "coercive" funding conditions that renders such conditions impermissible whenever some private entities feel economic compulsion to accept them. *See CAPPS*, 436 F. Supp. 3d at 350. If such a limitation existed, all the conditions the Medicaid and Medicare programs impose on nursing homes for which federal funding is part of their business model would be vulnerable to challenge.

Northport's insistence that the agreement of participating nursing homes to forgo using arbitration agreements that violate the Arbitration Rule is not "voluntary" enough to pass muster is ironic given that Northport seeks the right to coerce patients into signing arbitration agreements by threatening to withhold care. Northport, however, is unconcerned that, absent the Rule, its patients would have "no real

option but to acquiesce" to such agreements. *Sebelius*, 567 U.S. at 582. Northport assumes that agreements secured in such a manner are sufficiently voluntary to fall within the FAA's protection. If so, there can be no question that a nursing home's choice to seek the lucrative benefits of participation in the Medicare and Medicaid programs is likewise voluntary and that limits on arbitration that the facility thereby agrees to are a matter of indifference from the standpoint of the FAA. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016).

## CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

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July 7, 2020

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 6,433 words, less than half the number of words permitted by the Court for the parties' briefs. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

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## CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on July 7, 2020.

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## CERTIFICATE OF SERVICE FOR PAPER BRIEF

I hereby certify that on July 10, 2020, one paper copy of the foregoing brief has been served on counsel for all parties by first-class mail, postage prepaid, as follows:

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