IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

AMERICAN HEALTH CARE ASSOCIATION, *et al., Plaintiffs*,

v.

SYLVIA MATTHEWS BURWELL, Secretary of Health and Human Services, *et al.*, *Defendants*.

Case No. 3:16-cv-233-MPM-RP

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE, CENTER FOR MEDICARE ADVOCACY, JUSTICE IN AGING, MISSISSIPPI ASSOCIATION FOR JUSTICE, THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE, AND PUBLIC CITIZEN, INC. AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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October 31, 2016

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INTRODUCTION

Admitting a loved one into a nursing home can be one of the most stressful experiences a family endures. Emotions can run high, and legal awareness low. When signing admission papers, the constitutional right to a jury trial may be the furthest thing from anyone's mind. But, later, if abuse or neglect comes to light, a question arises: Did the resident really consent to arbitrate and give up her right to go to court? As this Court knows, that question can be difficult. And in resolving it, it frequently becomes apparent that a resident's consent was illusory.[1]

Recognizing that families "are often presented a 'take-it-or-leave-it' contract under circumstances where meaningful or informed consent for pre-dispute arbitration is often lacking," the Secretary of Health and Human Services, through the Centers for Medicare & Medicaid Services (CMS), issued a rule. 81 Fed Reg. 68,796 (Oct. 4, 2016). In addition to many existing requirements for nursing facilities that participate in Medicare and Medicaid, the new rule adds one more: It bars facilities from insisting on *pre-dispute* arbitration contracts, "while still preserving the option of arbitration if both parties decide to arbitrate a dispute." *Id.* at 68,797.

This rule falls comfortably within CMS's statutory authority. 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). This list includes rights to free

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[1] *See*, *e.g.*, *Liberty Health & Rehab of Indianola, LLC v. Howarth*, 11 F. Supp. 3d (N.D. Miss. 2014) (holding, after a bench trial, that nursing-home resident lacked mental capacity to enter into arbitration agreement); *J.P. Morgan Chase Co. v. Conegie*, 2006 WL 1666686 (N.D. Miss. 2006) (holding that next friend lacked legal right to sign away a nursing-home resident's right to a jury trial by initialing arbitration clause); *Mariner Healthcare, Inc. v. Green*, 2006 WL 1626581 (N.D. Miss. 2006) (holding that nursing home failed to show that daughter had authority to sign away mother's right to a jury trial); *see also Estate of Jackson v. GGNSC Batesville*, 2016 WL 1104492, at *4 (N.D. Miss. 2016) (noting the "difficult[y]" of competency and consent issues surrounding admission of "an elderly relative to a nursing home").

choice, informed consent, and fair dispute resolution—including the "right to voice grievances . . . without the fear of discrimination or reprisal" and "the right to prompt efforts by the facility to resolve grievances." *Id.* §§ 1395i-3(c)(1)(A), 1396e(c)(1)(A). And these rights are not exhaustive; Congress authorized the Secretary to impose "other requirements" and "establish[]" "any other rights" to protect residents. *Id.* §§ 1396r(c)(19)(A)(xi), (d)(f)(B), 1396r(c)(1)(A)(xi), (d)(4)(B).

The Federal Arbitration Act does not preclude CMS from using this broad authority to ensure that arbitration is voluntary. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 233, 238 (1987), the U.S. Supreme Court held that even a less specific delegation from Congress provides "sufficient statutory authority" to regulate arbitration. The SEC's authority to adopt rules "to further the objectives" of the Securities Act, the Court held, gave it "broad authority to oversee and regulate" the "adequacy of arbitration procedures"—including "expansive power" to "mandate the adoption of any rules [the SEC] deems necessary to ensure that arbitration procedures protect statutory rights." *Id.* There was no conflict between such rules and the FAA's "federal policy favoring arbitration." *Id.* at 226. This case cannot be easily distinguished from *McMahon*; the plaintiffs and their amicus, the U.S. Chamber of Commerce, don't even try.

Indeed, CMS's rule furthers the FAA's "basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen v. Animalfeeds*, 559 U.S. 662, 681 (2010). The FAA, of course, "requires courts to enforce agreements to arbitrate according to their terms," *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012), but it "does not confer a right to compel arbitration of any dispute at any time" or "require parties to arbitrate when they have not agreed to do so." *Volt Info. Sci. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). The CMS rule neither prohibits nor discourages voluntary arbitration. Nor does it preclude the enforcement of *any* arbitration agreement. And it applies only to facilities that choose to participate in, and obey the strict requirements of, Medicare and Medicaid. It should be upheld.

INTEREST OF *AMICI CURIAE*

The **American Association for Justice** (formerly the Association of Trial Lawyers of America) was established in 1946 to safeguard victims' rights, strengthen the civil justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. It has a strong interest in this case. AAJ has long been at the forefront of efforts to limit forced arbitration, including through federal agency action, and it files this brief to offer the Court its expertise on such efforts.

The **Center for Medicare Advocacy** is a national, private, non-profit law organization, founded in 1986, that provides education, analysis, advocacy, and legal assistance to assist people nationwide—primarily older people and people with disabilities—to obtain necessary health care, therapy, and Medicare. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care, and provides training regarding Medicare and health care rights throughout the country. It advocates on behalf of beneficiaries in administrative and legislative forums and serves as legal counsel in litigation of importance to Medicare beneficiaries and others seeking health coverage. The Center conducted a study and issued a report in 2003, entitled *Tort Reform and Nursing Homes*, that confirmed, among other findings, the importance of tort litigation as a legal procedure that complements the public regulatory system: Tort litigation both helps assure that all residents receive high quality care and compensates residents and their families who are injured.

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 the courts 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 each 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.

The **Mississippi Association for Justice** (formerly the Mississippi Trial Lawyers Association) is an organization composed of approximately 650 attorneys whose members principally represent plaintiffs in civil cases. MAJ supports the American system of trial by jury to resolve disputes. Many MAJ members represent nursing home patients or families who, to obtain needed medical care, have been forced to sign documents agreeing to mandatory arbitration of disputes. Other MAJ members represent consumers who are required to sign mandatory arbitration agreements in order to receive essential services or purchase essential items; these cases may also be affected by the Court's ruling in this proceeding. MAJ accordingly has an interest in the issues presented by this case and desires to join in the amicus brief of the American Association for Justice.

The **National Consumer Voice for Quality Long-Term Care** (Consumer Voice) is a national non-profit advocacy organization founded in 1975 out of public concern about substandard care in nursing homes. It is a primary source of information and tools for consumers, families, caregivers, ombudsmen, and citizen advocates to help ensure quality for individuals receiving long-term care services. Protection of individual rights is paramount to the mission and goals of the Consumer Voice, and it joins this brief because forced arbitration essentially removes litigation as a meaningful option for consumers to protect their rights.

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning barriers to individuals' access to the civil justice system, including forced arbitration, and its attorneys have participated as counsel to parties or amici in many cases involving such issues.

Collectively, the amici are dedicated to protecting the rights and interests of the most vulnerable Americans—including the residents of long-term care facilities—and to holding providers accountable through the civil justice system. Amici filed comments to CMS on the challenged rule, and they file this brief to provide this Court with crucial context to understand the rule's provision on arbitration clauses, and to show that CMS acted within its authority in promulgating the challenged regulation.

BACKGROUND

A. The unique circumstances surrounding nursing homes have prompted the organized bar and arbitration providers alike to call for a ban on pre-dispute 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 11B* (Feb. 16, 2009), *available at* http://bit.ly/2f9XuZ4. Although the ABA "consistently promote[s] the greater use of alternative dispute resolution, including arbitration, to resolve 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 issues." *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. (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 arbitration 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.* That rule remains in place today. 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, http://on.wsj.com/2eML9YT.

B. CMS's rule reflects these, as well as other, longstanding concerns.

CMS's conclusions—drawn from decades of the agency's own experience managing and regulating nursing facilities and their relationship with residents—confirm these views. As the agency has explained, "[t]here is a significant differential in bargaining power between [nursing] facility residents and [the] facilities." 81 Fed Reg. at 68,792. Agreements are "often made when the would-be resident is physically and possibly mentally impaired, and is encountering such a facility for the first time." *Id.* And, in many cases, "geographic and financial restrictions severely limit the choices available" to a potential resident and her family. *Id.* What's more, because long-term care facilities often serve as "the resident's residence" for a "prolonged period of time," providing not only "skilled nursing care, but also everything else a resident needs," "disputes over medical treatment, personal safety, treatment of residents, and quality of services provided are likely to occur." *Id.* As a result, given the "unique circumstances" of long-term care facilities, the agency determined that "demand[ing], as a condition of admission, that residents or their representatives sign a pre-dispute agreement for binding arbitration that covers any type of disputes between the parties for the duration of the resident's entire stay, which could be for many years," would strip residents of their right to make informed choices over how to pursue claims of wrongdoing. *Id.*

Beyond the "unique circumstances," of the nursing-facility admissions process, the agency pointed to other important considerations justifying its rule. *Id.* at 68,792. Principal among them is the secrecy that lies at the heart of arbitration. Facilities that employ forced arbitration understand that "[t]here is no public forum" for a resident's claim or case. *Id.* at 68,794. And any "arbitrator's decision will not usually be publically available, whereas a court decision would be a

matter of public record." *Id.* That scrutiny (or lack thereof) was crucial for the agency: "[P]ublic knowledge about a dispute and a public record of a decision are vitally important for checking the worst abuses of non-compliant [long-term care] facilities." *Id.* The "secrecy surrounding the arbitration process," therefore, "could result in some facilities evading responsibility for substandard care," "interfere[]" with regulators effort to learn about instances of substandard care, and jeopardize the agency's ability to "protect[] the health and safety of residents." *Id.* at 68,797–98.

CMS also made clear that the contractual relationships between nursing facilities and their residents are not simply "business arrangements between two private individuals." *Id.* at 68,796. Quite the opposite: because Medicare and Medicaid are frequently "the sole payors for the services," these programs (and, by extension, the federal government) "have a significant interest in both the services being delivered as well as the well-being of the beneficiary." *Id.* Restricting arbitration, therefore, is consistent with the government's broad discretion to protect the "quality of care and the delivery of services in the [long-term care] context." *Id.*

C. CMS's rule allows both residents and nursing facilities the freedom to choose either court or arbitration.

The rule issued by CMS follows the blueprint suggested by these findings. The rule recognizes that residents "are often presented a 'take-it-or-leave-it' contract under circumstances where meaningful or informed consent for pre-dispute arbitration is often lacking." 81 Fed Reg. at 68,796. For this reason, the rule safeguards the freedom of choice—between litigating in court or pursuing arbitration—for both residents and nursing facilities. *Id.* The purpose of the rule is therefore much the same as other agency-approved rules: It "provide[s] residents with the protections they need to preserve their rights, while still preserving the option of arbitration if

both parties decide to arbitrate a dispute." *Id.* at 68,797; *see also id.* at 68,796 (finding "voluntary post-dispute arbitration agreements are the best way to balance" the competing interests).

CMS's approach to addressing the use of arbitration in nursing facilities is modest. By its terms, the rule explicitly "do[es] not prohibit arbitration between facilities and residents." *Id.* at 68,792. To the contrary, it encourages arbitration where mutually beneficial—both residents and facilities can continue to "avail themselves of the benefits of arbitration" if they "determine" it to be "an advantageous forum for them." *Id.* at 68,795. The rule requires only that, to "participat[e] in Medicare or Medicaid," a nursing facility must offer residents the freedom to choose arbitration *after* a dispute arises. *Id.* That way, "residents or their representatives will have the time to seek legal advice, if they choose to, and evaluate the option to arbitrate the dispute with the facility." *Id.* at 68,797. And a facility that wishes to continue forcing its residents to accept pre-dispute arbitration agreements as a condition of admission "is free" to do so. *Id.* at 68,792; *see also id.* at 68,800 (stating that the rule "has no effect on [long-term care] facilities that do not participate in the Medicare or Medicaid programs"). The rule explicitly does not "preempt or otherwise supersede" any arbitration agreements—even those "made after the effective date" of the rule. *Id.* at 68,792. CMS also made clear that the rule has no influence on the legal enforceability of any facility's arbitration agreement, explaining that the rule does not "create any new standard for determining whether an arbitration agreement is unconscionable." *Id.* at 68,800.

ARGUMENT

I. CMS acted well within its statutory authority when it conditioned a nursing facility's acceptance of Medicare and Medicaid funds on compliance with a requirement protecting a resident's right to choose whether to arbitrate or litigate any dispute.

CMS's decision—that, to qualify for Medicare or Medicaid funds, a nursing facility may offer residents arbitration only after a dispute has arisen—falls soundly within multiple sources of its statutory authority. A nursing facility may not accept Medicare or Medicaid funds unless it "meets" certain "requirements." *See* 42 U.S.C. § 1396r(a)(3). Among other things, as a result of the Nursing Home Reform Act, Pub. L. No. 100-203, 101 Stat. 1330 (1987), a nursing facility receiving federal funds "must" agree to "protect and promote the rights of each resident" by complying with a list of "Residents' Rights." *Id.* § 1396r(c)(1)(A). These statutorily mandated "rights" encompass a broad range of substantive and procedural protections: the list includes not only the "right to be free from physical or mental abuse" but also the "right to confidentiality of personal and clinical records," the "right of the resident to organize and participate" in various groups, and the "right to receive notice" of certain decisions. *See id.* Notably, the list encompasses rights to free choice, informed consent, and fair dispute-resolution procedures—including the "right to voice grievances . . . without the fear of discrimination or reprisal" and to "prompt efforts by the facility to resolve grievances." *Id.* §§ 1395i-3(c)(1)(A), 1396e(c)(1)(A). When Congress enacted this list, however, it also included a provision entitled "Other Rights," and specifically authorized the agency to "establish[]"—without limitation—"any other right[s]" with which a nursing facility must comply. *Id.* § 1396r(c)(1)(A)(xi).

The industry plaintiffs all but ignore this source of authority. In passing, they argue only that, under this provision, the agency "cannot create any 'right' it chooses" and suggest that any right must be "tethered by the statutory structure" and relate narrowly to "health, safety, and

well-being." Plfs. Br. at 14. But CMS's decision to establish and enforce a new right implicating 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 discretion afforded under this provision. *See* 81 Fed. Reg. at 68,793 (explaining that, under the Social Security Act, "the Secretary has the authority to create specified rights for [long-term care] facility residents, including, but not limited to, free choice, confidentiality, privacy, and grievances," including "any other rights" she deems necessary). Congress placed no textual limitation on the agency's authority to establish new rights, a standard that "fairly exudes deference" to the Secretary. *Webster v. Doe*, 486 U.S. 592, 600 (1988).

This species of delegated authority is neither controversial nor novel. When, under a "statutory scheme," Congress "expressly delegate[s] to the Secretary the authority to set standards of compliance," the "authority conferred upon the Secretary" is "very broad." *Am. Hospital Ass'n v. Schweiker*, 721 F.2d 170, 176 (7th Cir. 1983). And, when "Congress has expressly delegated to the Secretary the power to establish" certain conditions or rules, "deference to the Secretary'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 Secretary authority to grant exemptions," the Secretary's determinations are "entitled to great deference"). A court, therefore, may only "strike the regulation" if "the Secretary's decision is unreasonable." *Champion*, 33 F.3d at 966.

The U.S. Supreme Court has held that this type of congressional delegation constitutes "sufficient statutory authority" for an agency to regulate the use of arbitration procedures. *McMahon*, 482 U.S. at 233, 238. In *McMahon*, the Court had little difficulty recognizing that Congress's general grant of authority in the Exchange Act to the SEC to, "on its own initiative" "abrogate, add to, and delete from" any existing rules for self-regulatory organizations "if it finds

such changes necessary or appropriate to further the objectives of the Act" gave it "broad authority to oversee and regulate" the "adequacy of arbitration procedures employed" by regulated entities. *Id.* This authority included the "expansive power" to "mandate the adoption of any rules [the Commission] deems necessary to ensure that arbitration procedures protect statutory rights." *Id.* CMS's rule here is promulgated under a more specific grant of authority to protect nursing-home residents' rights, including rights relating to grievances, dispute resolution, and confidentiality.

In any event, the agency's decision to regulate nursing facilities' use of forced arbitration is also firmly "tethered" to its concern for the health, safety, welfare, and rights of residents. *See* 42 U.S.C. §§ 1395i-3(d)(4)(B), 1396r(d)(4)(B). In the absence of this rule, "refusing to agree" to an arbitration clause will, "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 68,789. That risk plainly implicates residents' health and safety.

That neither Congress nor the agency has previously chosen to regulate nursing facilities' use of arbitration is irrelevant. The challengers suggest (at 3–4, 7–8) that, because the CMS rule imposes a new condition, the rule exceeds the agency's authority. But agencies are "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). An agency "must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991). CMS has done just that here.

Given all this, it is surprising that the industry plaintiffs challenge CMS's authority to condition the receipt of Medicare or Medicaid funds on ensuring that residents can choose whether to proceed in court or arbitration. Not only has the Supreme Court itself blessed just such a regulatory effort under a general grant of authority, *see McMahon*, 482 U.S. at 238, but, in recent years, courts have soundly rejected similar efforts by challengers targeting HHS's "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) (observing, in the course of rejecting a challenger's claim that "HHS exceeded its authority to regulate," that "Congress simply cannot do its job absent an ability to delegate power under broad general directives"); *see also Kaiser Foundation Health Plan, Inc. v. Burwell*, 147 F. Supp. 3d 897, 905–06 (N.D. Cal. 2015) ("Congress has bestowed broad authority upon the Secretary to promulgate regulations as may be necessary to carry out the Medicare program and expressly delegated authority to the Secretary to establish" necessary requirements.); *Texas Clinical Labs, Inc. v. Shalala*, 1999 WL 1243200, at *6 (N.D. Tex. Dec. 21, 1999) ("Legally, the Secretary's broad discretion with respect to matters delegated to her by Congress is well-established.").

II. CMS's rule is fully consistent with the Federal Arbitration Act.

A. The rule does not preclude the enforcement of any arbitration agreements.

The FAA provides that "[a] written provision in any . . . contract . . . to settle by arbitration a controversy . . . *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any such contract." 9 U.S.C. § 2 (emphasis added). Its purpose is "to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Although the industry challengers contend that CMS's rule "flatly violates the FAA's mandate that pre-dispute

arbitration agreements be enforced," Plfs. Br. at 1, the FAA poses no barrier here. It "requires courts to enforce agreements to arbitrate according to their terms," *CompuCredit Corp.*, 132 S. Ct. at 669, but it "does not confer a right to compel arbitration of any dispute at any time." *Volt Info.*, 489 U.S. at 479. Because the Secretary's rule does not affect the enforceability of agreements one way or another, it does not implicate the FAA.

As the agency itself went out of the way to explain, the rule does not "render" arbitration agreements—preexisting or otherwise—"unenforceable." 81 Fed. Reg. at 68,800. Indeed, it is difficult to see how the challengers could seriously draw any other conclusion from the agency's commentary surrounding the rule (they certainly offer no explanation or evidence). At almost every turn, the agency made clear that its rule would "not affect" the enforceability of any arbitration agreements used by nursing facilities. *Id.* at 68,792. The rule, the agency explained, "does not create any new standard for determining whether an arbitration agreement is unconscionable." *Id.* at 68,800. And it "does not purport to preempt or otherwise supersede arbitration agreements made after the effective date." *Id.* The industry challengers ignore these statements. But, taken together, they illustrate why CMS's rule comes nowhere close to creating a conflict with the FAA. Under the FAA, there is no legitimate way that a court could rest a decision to invalidate a nursing facility's arbitration agreement on this rule.

Falling back, the industry challengers raise a second objection to CMS's rule, claiming that it runs afoul of "Section 2 of the FAA" because it "forbid[s]" nursing facilities "from entering into new arbitration agreements." Plfs. Br. at 6; *see also id.* at 7 (arguing that CMS cannot "prohibit what the FAA protects—the right to enter into binding arbitration agreements"); Compl. at 3 (claiming that the rule "deprive[s]" facilities and their residents "of the ability to choose arbitration"). But the rule here does no such thing. As the agency, again, made crystal clear: "The requirements in this rule do not prohibit arbitration between facilities and residents."

81 Fed Reg. at 68,792. A nursing facility remains "free to continue" using whatever type of arbitration agreement it "wishes," including one that forces residents to agree to pre-dispute arbitration as a condition of admission. *Id.* The consequence of using such an agreement, however, is simply that the facility would "continue in business without Medicare or Medicaid residents." *Id.*

Though the challengers fail to cite it, the Fifth Circuit's decision in *D.R. Horton* provides a useful guide for understanding the difference between an agency rule that may run afoul of the FAA (at least under current Fifth Circuit precedent) and one that does not. *See D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). In that case, the National Labor Relations Board (NLRB) determined that any "employee-employer contract" that included a class-action ban in an arbitration agreement was unenforceable under the National Labor Relations Act (NLRA). *Id.* at 358. In the Board's view, because Section 7 of the NLRA allows employees to "act in concert with each other," an employer's arbitration agreement that includes a "bar to class actions" is "invalid[]." *Id.* at 358. As a result, the Board has taken the position that a court must refuse to enforce any employer's arbitration agreement that includes such a class-action ban. *Id.* The Fifth Circuit rejected this view, holding that the Board's rule impermissibly conflicts with the FAA because it would result in the *actual invalidation* of an employer's (otherwise validly formed) arbitration agreement if that agreement contained a class-action ban. *Id.* at 360 (explaining that the Board's rule "invalidating the waiver of class procedures in the arbitration agreement" violates the FAA). Quoting the Supreme Court's decision in *Concepcion*, the Fifth Circuit explained that the "overarching purpose of the FAA," is to ensure that courts "enforce[]" arbitration agreements "according to their terms." *Id.* at 359. The Board's rule would, the court found, do the opposite—courts deferring to the Board's interpretation would be required to invalidate the same agreement.

Here, even assuming the soundness of the Fifth Circuit's analysis,[2] because CMS's rule *does not* require the invalidation of any arbitration agreement, the agency's position does not jeopardize the enforceability of any nursing facility arbitration agreements. The CMS rule is thus fundamentally different from the California state law and NLRB rule at issue in *Concepcion* and *D.R. Horton*, both of which directly conditioned the enforcement of arbitration clauses on the availability of class procedures. *Compare D.R. Horton,* 737 F.3d at 358 (holding that the NLRB violated "the requirement under the FAA that arbitration agreements must be enforced according to their terms") *with* 81 Fed. Reg. at 68,791 (explaining that the rule does not "render" arbitration agreements "unenforceable").

To win, then, the challengers must convince this Court that the rule is something other than what it is. They assume that task by, in effect, inventing a different rule—claiming that the rule "prohibit[s] [facilities] from entering into arbitration agreements." Compl. at 24; *see also* Chamber Br. at 3 (stating that, with this rule, "CMS banned nursing homes from entering into arbitration agreements"). But the plaintiffs never explain why the Court should not simply read the rule as it is written. *See Rucker v. Wabash R.R. Co.*, 418 F.2d 146, 149–50 (7th Cir. 1969) (administrative rules "are to be construed to effectuate the intent of the enacting body," and court must "look first to the plain language" and the "purpose behind its enactment"). Moreover, the challengers never offer any reason to doubt the Secretary's interpretation, to which this Court owes deference. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195 (2011). "When an agency

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[2] Recently, two circuits have called the Fifth Circuit's decision into question, *see Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young LLP*, __ F.3d __, 2016 WL 4433080 (9th Cir. Aug. 22, 2016). Although *D.R. Horton* continues to remain controlling in this Circuit, four petitions for certiorari on the issue are currently pending (including one filed by the U.S. Solicitor General) and the issue may soon be taken up by the U.S. Supreme Court. *See Patterson v. Raymours Furniture Co.*, No. 16-388 (filed Sept. 22, 2016); *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016); *Epic Systems Corp. v. Lewis*, No. 16-285 (filed Sept. 2, 2016); *Ernst & Young LLP v. Morris*, No. 16-300 (filed Sept. 8, 2016).

interprets its own regulation," courts, "as a general rule, defer[] to it unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). The Court should take the agency at its word—not only because there is no basis to doubt its sincerity, but also because principles of agency deference require that it do so.

B. The CMS rule applies only to those facilities that choose to accept Medicare or Medicaid residents.

Even apart from the fact that the rule does not prevent the enforcement of any arbitration agreements, the voluntary nature of the rule provides an independent reason why this case is controlled by neither *Concepcion* nor *D.R. Horton*. Nursing facilities may freely choose whether to either (1) continue to participate in the Medicare or Medicaid programs under the conditions set forth by the agency's rule or (2) avoid those conditions by opting not to "participate in the Medicare or Medicaid programs." 81 Fed. Reg. at 68,800.

The industry challengers accept that this reading of the rule is correct but deny that facilities may freely make this choice, analogizing (at 10) to Spending Clause cases like *South Dakota v. Dole*, 483 U.S. 203 (1987), and *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). Spending Clause jurisprudence, however, says nothing about the federal government's ability to impose obligations on regulated *private parties*, and specifically rests on the States' unique status as "separate and independent sovereigns." *NFIB*, 132 S. Ct. at 2603; *see id.* at 2601 (explaining that the "basic principle" of the Spending Clause is that the "Federal Government may not compel *the States* to enact or administer a federal regulatory program") (quoting *New York v. United States*, 505 U.S. 144, 188 (1992) (emphasis added)). The challengers here are private facilities that simply object to CMS's considered view on what conditions are required for participation in a federal program. That garden-variety complaint does not raise any constitutional concerns whatsoever because Congress "may attach appropriate conditions to

federal taxing and spending programs to preserve its control over the use of federal funds." *Id.* at 2603 (internal quotations omitted); *see, e.g.*, *Burditt v. Dep't of Health & Humans Servs.*, 934 F.2d 1362, 1376 (5th Cir. 1991) (constitutional challenge to governmental regulation brought by "regulated groups" that are "not required to participate in the regulated industry" but instead may "voluntarily" participate "if they consider it in their best interests to do so" is "without merit").

In any event, the challengers offer nothing more than speculation (at 9) to support their hyperbolic claim that compliance with this rule will "bludgeon" nursing facilities "into abandoning arbitration." Even on its face, this claim can't be taken seriously if one is to trust the challengers' own view of the bilateral benefits of arbitration. Consider: the industry challengers view arbitration as a tool that all stakeholders—"long-term care providers and their residents and patients"—"have relied on" for many years because it is "fair, faster, simpler, and less adversarial and expensive than litigating a matter in court." Plfs. Br. at 3. If arbitration is (as the challengers claim) "equally fair" for "residents and their families," "far simpler and less costly" for both sides, and a "preferable alternative to court proceedings," then a facility that provides its residents with the truly voluntary option to arbitrate under fair procedures after a dispute arises has nothing to fear. Compl. at 3, 21.

C. The CMS rule can—and therefore must—be harmonized with the Federal Arbitration Act's policies.

Unable to identify a square conflict between the rule and the FAA, the industry challengers suggest (at 9) that the FAA's policies impede agencies from ever restricting or regulating the use of arbitration if the "purpose and effect" of such a regulation would be to interfere with "contracting parties' freedom to structure their arbitration agreements as they see fit." Nothing in existing FAA jurisprudence supports that suggestion.

To the contrary, the Supreme Court has made clear that a federal agency does not run afoul of the FAA's pro-arbitration policies when it employs its general authority delegated from Congress to regulate and restrict arbitration procedures where "necessary or appropriate to further the objectives" of a federal statute or to "protect statutory rights." *McMahon*, 482 U.S. at 233–34. Indeed, the rule here follows the path first charted by the SEC under the very authority approved in *McMahon*. There, the SEC's congressionally delegated authority to regulate was general—it said nothing specific about arbitration—yet the Supreme Court definitively ruled that the congressional grant of authority nonetheless gave the SEC "expansive power" and "broad authority" to regulate "arbitration procedures" to ensure that arbitration was both "consistent with the requirements of the Act" and only being used to "further the objectives of the Act." *Id.* at 233 (discussing the SEC's authority under 15 U.S.C. § 78s). And the Court blessed the SEC's authority in this respect notwithstanding the FAA's "federal policy favoring arbitration." *Id.* at 226.[3] Not surprisingly, then, FAA-based challenges to the SEC's rulemaking authority since *McMahon* have been soundly rejected. *See Charles Schwab & Co. v. FINRA*, 861 F. Supp. 2d 1063 (N.D. Cal. 2012); *In re Dep't of Enforcement v. Charles Schwab & Co.,* 2014 WL 1665738 (FINRA Bd. 2014). And the Supreme Court has never suggested that a federal program offends the FAA merely by encouraging participants in the program to forgo arbitration or placing conditions on its use. Here, in fact, because the agency's rule ensures that arbitration agreements are actually voluntary, it furthers the FAA's "basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681.

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[3] In its brief, the challengers point to another provision in the Exchange Act, § 78o(o), in support of their argument that Congress must explicitly "vest[] federal agencies with the authority to regulate or prohibit the use of arbitration agreements." Plfs. Br. at 7. That provision, however, was enacted as part of the Dodd-Frank Act in 2010—nearly two decades *after* the Court's clear pronouncement in *McMahon* that the SEC had "expansive power" to regulate arbitration under its general grant of authority.

Even assuming some inchoate tension between the Secretary's rule and what the industry challengers identify as the FAA's pro-arbitration policies, the Court has an obligation to harmonize the two sources of federal law. The challengers disagree, of course, arguing (at 7) that the FAA will trump any other statute that is "'silent' on the question of arbitration." But that position ignores the rule that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2236–2239 (2014). Courts, in other words, "are not at liberty to pick and choose" among these sources of federal law. *Morton*, 417 U.S. at 551; *see* Bernadette Bollas Genetin, *A New Framework For Resolving Conflicts Between Congressional Statutes And Federal Rules*, 51 Emory L.J. 677, 701–726 (2002). And this principle applies no differently for an agency rule than it does for a statute. The Secretary's rule has "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), and "[r]egulations are generally subject to the same rules of construction as statutes," *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982), including the fundamental obligation to reconcile statutes capable of coexistence.

Here, the two sources of law are easily capable of coexistence. One (the FAA) requires that validly formed arbitration agreements be enforced in court "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The other (CMS's rule) does not infringe on this requirement, but rather conditions participation in a federal spending program on allowing nursing-facility residents the right to choose for themselves whether to arbitrate or litigate any dispute they may have with a nursing facility.

D. Efforts by federal agencies and Congress to restrict or limit forced arbitration have long coexisted with the FAA.

For almost fifty years, agencies across the federal government have regulated the use of arbitration—in comfortable coexistence with the FAA. The CMS rule is but one of dozens of regulations found in the Federal Register that specify what arbitration procedures private parties may use when acting in a regulated space.

The regulations began in the financial sector. The Commodities Futures Trading Commission has had in place for forty years a rule that any arbitration agreement contained in a commodities contract must abide by certain restrictions. 41 Fed. Reg. 42,942 (Sept. 29, 1976). The SEC, too, was among the first to regulate arbitration to preserve class actions. In 1992, at the request of FINRA (a self-regulatory organization for broker-dealers), the SEC approved a rule governing "the content of [any] pre-dispute arbitration agreements" entered into between FINRA members and their customers. 52 S.E.C. Docket 2189, 1992 WL 324491 (October 28, 1992). That rule allowed individual arbitration but prohibited FINRA members from compelling arbitration against members of certified or putative class actions.[4] *Id.* For nearly twenty-five years, every FINRA member has complied with this regime. *See* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 Stan. J. Complex Litig. 1, 24–29 (2012).

In 2003 and 2004, Fannie Mae and Freddie Mac both decided to stop purchasing all mortgages with forced arbitration clauses. Kenneth R. Harney, *Fannie Follows Freddie in Banning Mandatory Arbitration*, Wash. Post, Oct. 9, 2004, *available at* http://wapo.st/2bm97eb. Although lenders remain free to include pre-dispute forced arbitration provisions in their loan agreements,

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[4] *See* FINRA Code of Arbitration Procedure for Customer Disputes 12204(d); S.E.C., Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions From Arbitration Proceedings, 57 Fed. Reg. 52,659, 52,661 (Nov. 4, 1992) (citing Securities and Exchange Act, section 19(b)(1), 15 U.S.C. § 78s(b)(1), and Rule 19b-4, 17 C.F.R. 249.819).

such loans "are ineligible for sale to, or securitization by," either Fannie Mae or Freddie Mac. *See* B8-3-02: Special Note Provisions and Language Requirements (August 20, 2013), *available at* https://www.fanniemae.com/content/guide/selling/b8/3/02.html.

Beyond the consumer financial and investment-services industries, many other regulators have likewise moved to limit forced arbitration. The Department of Education has just adopted a rule that prohibits colleges and career-training programs that participate in its federal direct loan program from entering into or relying on pre-dispute arbitration agreements with students for certain claims. *See* Unofficial Final Regulations, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2016/index.html (released Oct. 28, 2016). The Federal Trade Commission's regulations implementing the Magnuson-Moss Warranty Act have barred the use, in consumer warranty agreements, of arbitration clauses that would result in binding decisions. *See* 80 Fed. Reg. 42,710 (July 20, 2015). The Department of Agriculture has restricted the ability of companies to force arbitration on poultry farmers by requiring that production contracts include language on the signature page allowing farmers to decline arbitration. 76 Fed. Reg. 76,874 (Dec. 9, 2011). And the Department of Labor has recently finalized a new rule that would condition an exemption from ERISA's prohibited transactions on a regulated entity's compliance with a requirement not to force consumers who purchase certain retirement products and services to agree to forced arbitration clauses that include class-action waivers. *See* 81 Fed. Reg. 21,002 (Apr. 8, 2015).

For its part, Congress, too, has often restricted the use or enforcement of forced arbitration for certain sorts of statutory claims. *See, e.g.*, 7 U.S.C. § 26(n)(2) (banning enforcement of forced arbitration clauses in CFTC whistleblower suits); 15 U.S.C. § 1226(a)(2) (banning enforcement of forced pre-dispute (but not voluntary post-dispute) arbitration clauses in motor vehicle franchise contracts). To protect our nation's soldiers from predatory lending, the

Department of Defense has exercised authority specifically delegated to it under the Military Lending Act to ban forced arbitration clauses in certain loans made to servicemembers. *See* 10 U.S.C. § 987(e) (making certain extensions of credit to servicemembers unlawful where "the creditor requires the borrower to submit to arbitration"); *id.* § 987(f)(1) (making a knowing violation of the prohibition a misdemeanor); 80 Fed. Reg. 43,559 (July 22, 2015) (expanding definition of covered consumer credit and banning arbitration clauses in such products). In other contexts, Congress has restricted who can take advantage of a particular arbitration agreement, for example, by barring certain private federal contractors from enforcing pre-dispute arbitration agreements in any case involving either claims under Title VII of the Civil Rights Act or common-law sexual assault or harassment claims. *See* Department of Defense Appropriations Act 2010, Pub. L. No 111–118, § 8116, 123 Stat. 3409, 3454 (2009) and Consolidated Appropriations Act 2016, Pub. L. No. 114–113, § 8096, 129 Stat. 2242, 2374 (2015) (enforcing such restrictions for large defense contractors as a condition of federal funding).

Finally, in May of this year—following a congressionally mandated study—the Consumer Financial Protection Bureau (CFPB) proposed a rule to "prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court" and require companies "to submit certain records relating to arbitral proceedings to the Bureau," effectively creating a public record of how consumers fare. 81 Fed. Reg. 32,829, 32,830 (May 24, 2016).

The industry challengers and their amicus, the U.S. Chamber of Commerce, claim that upholding the narrowly tailed CMS rule on nursing-home arbitration "would set the stage" for a new wave of freewheeling agency regulations "purporting to abolish arbitration." Chamber Br. at 22. But, as the history of these rules show, agencies (and Congress) have decades of experience carefully tailoring arbitration regulations to address important concerns. This rule is no different.

CONCLUSION

The plaintiffs' motion for a preliminary injunction should be denied.

October 31, 2016

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* *pro hac vice* admission pending

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, I electronically filed the foregoing amicus 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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October 31, 2016