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

AMERICAN HEALTH CARE ASSOCIATION, et al.,

PLAINTIFFS,

v.

SYLVIA MATHEWS BURWELL, in her official capacity, Secretary of Health and Human Services, et al.,

DEFENDANTS.

Case No. 3:16-cv-00233-MRM-RP

Judge Michael P. Mills
Magistrate Judge Roy Percy

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community, including in cases pending in the district courts. *See, e.g.*, *Associated Builders & Contractors of Ark. v. Perez*, No. 4:16-cv-00169-KGB (E.D. Ark.); *United States v. Vascular Solutions, Inc.*, No. 14-cr-00926 (W.D. Tex.); *United States v. Bayer Corp.*, No. 07-cv-00001 (D.N.J.). In particular, the Chamber regularly files amicus briefs in cases involving the enforceability of arbitration agreements. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Plaintiffs challenge a rule issued by the Centers for Medicare & Medicaid Services ("CMS") purporting to prohibit Medicare-participating skilled nursing facilities and Medicaid-participating nursing facilities from entering into pre-dispute arbitration agreements with residents at their facilities. *See* Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016) ("the Arbitration Rule"). That rule will affect the Chamber's members in two respects. First, the Arbitration Rule would directly affect Chamber members who are themselves nursing facilities or affiliated with such facilities. Second, if the Court upholds the Arbitration Rule, such a ruling could open the door to restrictions on a host of other types of pre-dispute arbitration agreements,

including consumer arbitration agreements and employment arbitration agreements. Such restrictions would affect many members of the Chamber and their customers, residents, and employees who depend on arbitration for its simplicity, informality, and expedition. The Chamber and its members thus have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chamber fully agrees with Plaintiffs' arguments that CMS's Rule is not authorized by the Medicare and Medicaid Acts and violates the Federal Arbitration Act ("FAA"). The Chamber also fully agrees with Plaintiffs' arguments that Plaintiffs will suffer irreparable injury absent a preliminary injunction, and that the balance of the equities and the public interest favor enjoining the Arbitration Rule. To minimize duplication, the Chamber will not reiterate those arguments.

Instead, the Chamber will present two arguments of particular importance to the Chamber's members. First, upholding CMS's rule would be inconsistent with the sound policy rationales that Congress intended to further when it enacted the Federal Arbitration Act. CMS concluded, without any supporting evidence, that pre-dispute arbitration agreements are harmful to nursing home residents, and therefore should be illegal. As Plaintiffs ably point out, CMS's overt and unapologetic hostility toward arbitration is a textbook violation of the Federal Arbitration Act. But the Arbitration Rule is not just illegal; it is also harmful. Arbitration is an inexpensive, efficient, and fair method of dispute resolution. Courts possess ample authority under state-law unconscionability principles to invalidate unfairly skewed arbitration agreements; CMS's speculation that even *fair* arbitration agreements are disadvantageous to nursing home residents has no factual basis. Prohibiting pre-dispute arbitration would increase the cost of nursing home care without providing any meaningful benefit for residents.

Second, the Arbitration Rule, if upheld by this Court, would provide a roadmap for other agencies seeking to ban a wide swath of pre-dispute arbitration agreements. CMS's Arbitration Rule purports to ban pre-dispute arbitration based not upon any direct statutory authorization but, rather, by invoking the agency's general views of good public policy. If CMS's reasoning stands up in court, other agencies with an anti-arbitration agenda would likely feel emboldened to invoke similar generic reasoning to ban consumer arbitration agreements, employment arbitration agreements, and other types of arbitration agreements that have long been enforceable. Upholding the Arbitration Rule, therefore, could cause radical changes to long-settled federal arbitration law.

ARGUMENT

I. The Arbitration Rule Undermines The Important Policies Embodied in the Federal Arbitration Act.

CMS banned nursing homes from entering into arbitration agreements—and laid the legal groundwork for other agencies to follow its lead—based on its view that arbitration is harmful for nursing home residents. That view is factually incorrect. Arbitration is good for both plaintiffs and defendants—both in general and in the particular context of nursing home arbitration agreements. It is faster, cheaper, and more efficient than litigation, and there is no empirical evidence for CMS's assumption that it places plaintiffs at a disadvantage. Finally, CMS's suggestion that parties could agree to arbitrate *after* a dispute arises is unrealistic. The Arbitration Rule will functionally eliminate arbitration in the nursing home context.

A. The Speed and Efficiency of Arbitration is Particularly Beneficial in the Context of Nursing Home Disputes.

As the Supreme Court has observed, arbitration is "'usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility

and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No.97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777); *see also, e.g.*, *Concepcion*, 563 U.S. at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

These advantages of arbitration are not only beneficial in general, but are particularly advantageous in the nursing home context. As noted in Plaintiffs' complaint, a 2015 survey of parties and attorneys who participated in arbitrations under the Kaiser Foundation Health Plan's arbitration system—which covers more than 7 million members in California—showed that 90 percent of the respondents who went through arbitrations that year reported that the arbitration system was as good or better than the state court system. Complaint ¶ 75 (citing Annual Report of the Office of the Independent Administrator of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System for Disputes with Health Plan Members, January 1, 2015 – December 31, 2015 at 53, available at http://www.oia-kaiserarb.com/pdfs/2015-Annual-Report.pdf). This survey reflects the fact that the low cost, speed, and other advantages of arbitration carry important benefits in health care disputes that may arise between nursing home facilities and their residents.

i. Arbitration is cheaper than litigation.

First, although CMS suggested that arbitration may be more expensive than litigation, 81 Fed. Reg. at 68,794, this suggestion is simply wrong. Arbitration is cheaper than litigation, as confirmed by both empirical evidence and common sense. Studies have long found, for example, that in practice, a large percentage of individuals who bring claims in arbitration pay

exactly nothing in fees to pursue their claim—no filing fees, no attorneys' fees. Elizabeth Hill, Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003) (lower-income employees "paid no forum fees" in 61% of the cases studied; employees also paid no attorneys' fees in 32% of the cases). The costs of presenting a claim in arbitration, moreover, are typically lower than litigating in court. The elaborate discovery procedures associated with litigation are largely absent from arbitration. Arbitration does not require a personal appearance to secure a judgment; claims can be adjudicated on the papers or on the basis of a telephone conference. See, for example, AAA, Consumer Arbitration Rules 22, Sept. 1, 2014, https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased. There is no need for a claimant to go to court, only to be forced to return another day if the court is unable to get through its docket.

Arbitration plaintiffs, moreover, need only submit the relevant documents and a common-sense statement of why they are entitled to relief, which they can often do without a lawyer. Indeed, as two prominent law professors noted in a recent study, in arbitration, "hiring an attorney offers little value to a [plaintiff] and is often unnecessary." Jason Scott Johnson & Todd Zywicki, The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique 25-26 (Mercatus Ctr., George Mason Univ., Working Paper, Aug. 2015) (observing that "self-represented plaintiffs were seven times more likely than represented plaintiffs to get an AAA arbitrator's decision in their favor" (emphasis added)).

Arbitration's cost savings for plaintiffs are particularly apparent in the context of nursing home disputes. First, in the typical nursing home lawsuit, the plaintiff will allege that the nursing home's actions caused illness or death, while the nursing home will respond that the

illness or death was attributable to the plaintiff's pre-existing condition. When such issues are litigated, an aggressive defense lawyer will serve invasive discovery requests on the nursing home resident requesting extensive information on the resident's medical history. Compliance with those requests will be both expensive and stressful.[1] Arbitration constrains defense counsel's ability to serve such discovery requests, which is beneficial to nursing home residents and their families.

Second, proponents of class actions assert that litigation is preferable to arbitration because plaintiffs can pursue small claims in litigation by aggregating them as a class action, whereas arbitration agreements typically require claims to be brought individually. While the Chamber strongly disagrees with this argument in general—as class members see virtually no benefit from these lawsuits as opposed to class lawyers—it is not even arguably applicable here because CMS acknowledged that suits by nursing home plaintiffs typically *cannot* be brought on a class-wide basis. 81 Fed. Reg. at 68,795 ("We also note that to date, litigation against LTC facilities has involved primarily malpractice claims, which tend to be individual-specific. Because class actions against LTC facilities remain rare, we believe that it is not yet clear that there is a problem that would require additional regulation."). Thus, the relevant comparison is between individual litigation and individual arbitration—and there should be no question that individual arbitration is cheaper.

ii. Arbitration is faster than litigation.

Arbitration is also faster and more efficient than litigation. For example, consumer arbitrations administered by the American Arbitration Association are typically resolved in four

[1] Notably, nursing home lawsuits are distinct in this sense from other types of lawsuits, such as antitrust suits brought by individual purchasers, in which the plaintiff serves almost all discovery requests.

to six months—a huge improvement over the 25.7 months that pass before the average civil lawsuit in federal court first reaches trial (in those rare cases that make it to trial). AAA, Analysis of the AAA's Consumer Arbitration Caseload, 2007, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 ("AAA Caseload Analysis"); U.S. District Court—Judicial Caseload Profile (2012), http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx; *see also* David Sherwyn et al., Assessing the Case for Employment Arbitration: A New Path for Empirical Research, 57 Stan. L. Rev. 1557, 1572-73 (2005) ("few dispute the assertion that arbitration is faster than litigation"). A plethora of empirical research and secondary literature confirms that arbitration is speedier than litigation. *See, e.g.*, Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003 - Jan. 2004); reporting findings that arbitration was 33% faster than analogous litigation); GAO Report to Congressional Requesters, *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards* 32 (June 2000), http://www.gao.gov/archive/2000/gg00115.pdf (reporting that the few securities claims to reach a judgment in court took 1,151 days—or over 3 years—on average); FINRA, *Dispute Resolution Statistics, Summary Arbitration Statistics October 2013*, http://www.finra.org/arbitrationandmediation/finradisputeresolution/additionalresources/statistics ("FINRA Statistics") (arbitration claims closed in 2013 through October were pending only 14.2 months on average).

The increased speed of arbitration is primarily attributable to its decreased procedural complexity. But it is also attributable to the fact that courts are clogged. Forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association's "Task

Force on the Preservation of the Justice System," which was co-chaired by David Boies and Theodore B. Olson. Am. Bar. Ass'n ("ABA"), The Growing Crisis of Underfunding State Courts, Mar. 16, 2011 ("ABA Report"); see also G. Alan Tarr, No Exit: The Financial Crisis Facing State Courts, 100 Ky. L.J. 786, 787 (2011-2012). The effects of these funding cuts on state court administration have been devastating: as the Los Angeles Times has reported, in California, "[a]t least 53 courthouses have closed," and "[c]ourts in 20 counties are closed for at least one day a month." These and other "court closures have forced some San Bernardino [County] residents to drive up to 175 miles one way to attend to a legal matter." Maura Dolan, Budget cuts force California courts to delay trials, ax services, L.A. Times, Apr. 9, 2013, http://articles.latimes.com/2013/apr/09/local/la-me-court-cutbacks-20130410. In New York City, the wait for a court date is now four times as long as it was before recent budget cuts. *See* William Glaberson, Despite Cutbacks, Night Court's Small Dramas Go On, N.Y. TIMES, June 2, 2011, http://www.nytimes.com/2011/06/03/nyregion/despite-cutbacks-newyork- small-claims-courts-trudge-on.html; *see also* Jennifer Golson, Budget Cuts have 'Widespread' Impact on NY State Courts-Report, Reuters, Aug. 16, 2011 (quoting Michael Miller of the New York County Lawyers' Association).

Although the vast majority of civil claims are filed in state courts, the federal courts also have extraordinarily high caseloads, especially at the trial-court level, where the backlogs are particularly severe. The Brennan Center for Justice has found that "the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007. A judge in 1992 had an average of 388 pending cases on his or her docket. By 2012, the average caseload had jumped to 464 cases—a 20 percent increase." Alicia Bannon, Federal Judicial Vacancies: The Trial Courts 5, Brennan Ctr. for Justice, 2013,

http://www.brennancenter.org/publication/federal-judicial-vacancies-trial-courts. Arbitral forums do not have comparable backlogs and are capable of resolving disputes rapidly.

Speedy dispute resolution is particularly important in nursing home disputes. A sick nursing home resident may file a claim in order to improve the nursing home's living conditions; the resident obviously wants the desired change to occur immediately, not several years down the road. Moreover, nursing home residents often experience deteriorating health. If it takes several years for a nursing home resident's lawsuit to get to trial, the resident may have passed away or become unable to testify by the time trial begins.

iii. Arbitration's other advantages are beneficial in the nursing home context.

Arbitration carries other advantages for nursing home plaintiffs. As noted above, arbitration "normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties." *Allied-Bruce*, 513 U.S. at 280. This point is particularly important at nursing homes, in which a plaintiff may file suit against a facility at which he continues to live. A nursing home resident is vulnerable and dependent on the care of the facility and its employees, and there is obvious value in keeping hostilities between the facility and its residents to a minimum.

In *Allied-Bruce*, the Court also noted that arbitration "is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Id.* This aspect of arbitration is also beneficial to nursing home residents, who may have difficulty traveling long distances to attend court hearings or depositions.

B. Plaintiffs Are Just As, If Not More, Successful In Arbitration Than They Are In Court.

The premise of the Arbitration Rule is that plaintiffs are more likely to prevail in court than in arbitration. CMS cited the views of a commentator stating that nursing home facilities

had engaged in "resident neglect" because the facilities "believe[d] that they were immune to any legal consequences for their mistreatment because of the likelihood that they would prevail in binding arbitration." 81 Fed. Reg. at 68,793. It also cited commenters' views that because arbitration clauses cover "claims involving serious bodily harm and death," arbitration agreements "allow facilities to escape accountability for neglect and abuse." *Id.* These unsupported statements could only be true if plaintiffs were disadvantaged in arbitration relative to litigation.

In fact, however, that is not true. Empirical studies have shown that plaintiffs are just as likely to win in arbitration as they are to win in court. A recent study by scholars Christopher Drahozal and Samantha Zyontz of claims filed with the American Arbitration Association found that consumers win relief 53.3% of the time. Christopher R. Drahozal & Samantha Zyontz, An Empirical Study of AAA Consumer Arbitrations, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010). This success rate compares favorably with the success rate of plaintiffs in state and federal court, who prevail roughly 50% of the time. *See, e.g.*, Theodore Eisenberg et al., Litigation Outcomes in State and Federal Courts: A Statistical Portrait, 19 Seattle U. L. Rev. 433, 437 (1996) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

The Drahozal and Zyontz study is consistent with a 2005 study by Ernst & Young LLP examining sample AAA case files involving consumer-initiated cases filed with the AAA. The E&Y study concluded that consumers prevailed more often than business—55% of the time—and received a favorable result (including outcomes like settlements) almost 80% of the time. Almost 70% of consumers surveyed by E&Y said they were "satisfied" or "very satisfied" with the arbitration process. Ernst & Young, Outcomes of Arbitration: An Empirical Study of

Consumer Lending Cases (2005). Similarly, a study comparing employment discrimination suits in arbitration and federal court found that 46% of those who arbitrated won, as compared to only 34% in litigation; the median monetary award in arbitration was higher; only 3.8% of the litigated cases studied ever reached a jury trial; and the arbitrations were resolved 33% faster than in court. Michael Delikat & Morris M. Kleiner, *Comparing Securities Awards and Trial Verdicts in Employment Disputes*, 58 Disp. Resol. J. 56, 58 (Nov. 2003). In 2004, the National Workrights Institute compiled all available employment-arbitration studies, and concluded that employees were almost 20% more likely to win in arbitration than in litigated employment cases. It also concluded that in almost half of employment arbitrations, employees were seeking redress for claims too small to support cost-effective litigation. Median awards received by plaintiffs were the same as in court, although the distorting effect of occasional large jury awards resulted in higher average recoveries in litigation. National Workrights Institute, Employment Arbitration: What Does the Data Show? (2004), https://web.archive.org/web/20090423052708/http://www.workrights.org/current/cd_arbitration.html.

CMS appeared to believe that plaintiffs were disadvantaged in arbitration because the *substantive* law was less favorable in arbitration. For instance, CMS asserted that in arbitration, there would be "limitations on … damages, such as punitive damages, which might have been available if the dispute were settled in a court." 81 Fed. Reg. at 68,794. That is incorrect. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.

614, 628 (1985). Thus, just as in court, plaintiffs who win in arbitration are able to recover not only compensatory damages but also "other types of damages, including attorneys' fees, punitive damages, and interest." Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 902. In particular, Drahozal and Zyontz found that 63.1% of prevailing claimants who sought attorneys' fees were awarded them. *Id.*

Of course, plaintiffs may be disadvantaged by arbitration agreements that are unfairly skewed in favor of the defendant. But such agreements are already illegal under state law. For instance, the unconscionability doctrine allows courts to invalidate agreements when their terms are substantively unfair or were agreed to under unfair procedures. Thus, courts have struck down arbitration agreements that contained biased procedures for selecting an arbitrator. *See, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-25 (9th Cir. 2013) (holding that an arbitration agreement was unconscionable because it "would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s]" and barred selection of "institutional arbitration administrators"); *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002) (invalidating an arbitration agreement that gave the employer the sole right to create a list of arbitrators from whom the employee could then pick).

Courts have similarly struck down arbitration agreements requiring that arbitration take place in a location inconvenient to the plaintiff. *See, e.g., Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (refusing to enforce an agreement that would have required an Oregon consumer to travel to California to arbitrate a dispute concerning a debt-relief agreement); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. Spotsylvania Cnty. 2001) (invalidating an arbitration agreement that required consumers who had bought used cars in Virginia to arbitrate their claims in Los Angeles); *see also, e.g., College Park Pentecostal*

Holiness Church v. Gen. Steel Corp., 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Dominguez v. Finish Line, Inc.*, 439 F. Supp. 2d 688 (W.D. Tex. 2006) (severing provision that would have required Texas retail store manager to arbitrate in Indianapolis, Indiana); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (severing provision that would have required Missouri consumer to arbitrate in Arkansas); *Pinedo v. Premium Tobacco Stores, Inc*., 102 Cal. Rptr. 2d 435 (Ct. App. 2000) (refusing to enforce agreement that would have required Los Angeles employee to travel to Oakland for arbitration).

Other general state-law contract defenses, such as fraud and duress, also protect residents against unfair arbitration provisions. For example, courts will apply the duress defense to strike down arbitration agreements when "one party takes unjust advantage of the other party's economic necessity or distress to coerce the other party into making [the] agreement." *See In re RLS Legal Solutions, L.L.C.*, 156 S.W.3d 160, 163 (Tex. App. 2005) (denying mandamus where trial court invalidated arbitration agreement on duress grounds, because employer had induced employee to sign the agreement by withholding her pay from her). These doctrines are amply sufficient to prevent residents of nursing home facilities or their families from being unduly pressured into signing arbitration agreements or from being misled about the content of those agreements.

C. "Post-Dispute" Arbitration is not a Feasible Alternative to Pre-Dispute Binding Arbitration Agreements.

While CMS's new rule did not prohibit nursing homes and residents from agreeing to arbitrate claims after a dispute arose, that option is entirely illusory. Without arbitration agreements that commit both sides to a potential dispute to arbitrate before the dispute arises,

arbitration in fact will be rare indeed—and the result will be that plaintiffs are relegated to the judicial system in precisely those cases where burdensome court procedures and overcrowded courts are likely to stymie their claims.

Empirical evidence has shown, and the consensus among academics confirms, that once a particular dispute arises, the opposing parties will rarely if ever agree to arbitration. This unwillingness has nothing whatsoever to do with the relative benefits or burdens of arbitration or litigation in court, and instead has everything to do with the practical burdens of administering dual systems and the tactical choices of lawyers in the context of particular cases. A business, such as a long-term care provider, that sets up an arbitration program incurs significant administrative costs in connection with carrying out arbitrations—costs that it does not incur in connection with judicial litigation. Businesses will be unwilling to expend the effort and resources involved in setting up an effective, plaintiff-friendly arbitration system unless they know it will save them the cost of litigating in court. If a business is faced with the prospect of running an arbitration system and simultaneously having to deal with judicial litigation, the rational response is for that business to reduce transaction costs by not having an arbitration system at all.

Less rational factors also contribute to the unwillingness of parties to enter into even mutually beneficial post-dispute agreements to arbitrate. Once a dispute has arisen, the parties "often have an emotional investment in their respective positions" that skews their preference in favor of vindication in court. Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol J. 32, 37 (2012). The lawyers for one or both sides may also be enticed by the fee-generating possibilities of prolonged in-court litigation and may

therefore advise clients to choose a forum that is really in the lawyers' own best interest rather than in that of their clients.

Thus, post-dispute arbitration agreements "amount to nothing more than a beguiling mirage." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 U. Mich. J.L. Reform 783, 790 (2008). They simply do not—and would not—happen. "[P]re-dispute agreements to arbitrate," which preserve a plaintiff's right to an affordable forum, accordingly represent the only real-world option for addressing the very significant gap in access to justice under the court system. Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping it Lawful*, 60 Case W. Res. L. Rev. 629, 636 (2010).

In short, arbitration provides many plaintiffs who could not obtain effectual relief in court with an affordable and accessible means of seeking redress. A prohibition on the use of arbitration agreements by long-term care facilities would harm residents much more than it would benefit them.

II. Upholding the Arbitration Rule Could Invite Widespread Agency Bans on Statutorily Protected Pre-Dispute Arbitration Agreements.

Although the Arbitration Rule by its terms applies only to nursing homes, the rationales underlying the rule are neither specific to CMS nor specific to nursing homes. Rather, other agencies could invoke those same rationales in order to impose widespread restrictions on arbitration agreements. If the Court holds that CMS's rule is lawful, then innumerable agencies with an anti-arbitration agenda would have license to ride roughshod over statutorily protected pre-dispute arbitration agreements.

A. CMS's Statutory Authority, Which Consists of a General Grant of Power That Makes No Mention of Arbitration, Is No Different From the Authority Held by Numerous Other Federal Agencies.

The statutes on which CMS relied in banning pre-dispute arbitration say nothing about arbitration. Rather, they are generic grants of power that are no different from the power possessed by numerous agencies.

CMS relied on its authority to enact "requirements relating to the health, safety, and well-being of residents or relating to the physical facilities thereof as the Secretary may find necessary." 81 Fed. Reg. at 68,791 (quoting Sections 1819(d)(4)(B) and 1919(d)(4)(B) of the Social Security Act (footnote omitted)). In CMS's view, CMS possesses regulatory authority over nursing home arbitration agreements because they are unsafe for nursing home residents: they "have a deleterious impact on the quality of care for Medicare and Medicaid patients, which clearly warrants our regulatory response." *Id.*

Similar grants of authority to administrative agencies to further general policies within their regulatory domain are ubiquitous. The Occupational Safety and Health Administration (OSHA), for example, has the authority to promulgate an "occupational safety or health standard" if certain conditions are met, 29 U.S.C. § 655(a); this statutory term is defined as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Id.* § 652(8). Likewise, the Secretary of Transportation has the authority to prescribe "motor vehicle safety standards," which must be "practicable, meet the need for motor vehicle safety, and … stated in objective terms." 49 U.S.C. § 30111. And the Federal Aviation Administration has the power to prescribe "regulations and minimum standards for other practices, methods, and procedure the

Administrator finds necessary for safety in air commerce and national security." 49 U.S.C. § 44701. Given that federal agencies have broad regulatory authority to protect public safety, upholding CMS's rationale that arbitration agreements are unsafe would allow any or all of these agencies, if bent on ensuring that the plaintiffs' bar have access to court, to claim authority to ban any arbitration agreements within their regulatory purview. That result would not only undermine the federal statutory policy favoring arbitration, but also deprive both plaintiffs and defendants of the benefits of arbitration that both Congress and the Supreme Court have recognized.

CMS also relied on its authority to enact "such rules as may be necessary to the efficient administration of the functions of the Department." 81 Fed. Reg. at 68,791. It pointed out that Medicare and Medicaid providers are required by statute to "agree to certain conditions in order to participate." *Id.* It thus inferred that the "statutory authority of the Secretary to set general practice parameters for payment under medical and Medicaid" encompassed the imposition of a condition that nursing homes cease using arbitration agreements. *Id.* It stated that if a "facility wishes to continue to utilize pre-dispute agreements, it is free to continue in business without Medicare or Medicaid residents"—doubtless aware that this is not realistic for the majority of nursing homes. *Id.* at 68,792.

CMS's logic is not limited to nursing home arbitration agreements. *Any* health care facility which accepts Medicare or Medicaid funds—in practice, essentially all of them—could be forced to stop using arbitration agreements under the same logic. Indeed, CMS embraced this point: It agreed that "concerns about pre-dispute binding arbitration are applicable to any resident that signs one as a condition of receiving services, regardless of provider or supplier

type," and declared long-term care facilities to be only its "first priority." 81 Fed. Reg. at 68,794.

Moreover, many other agencies possess similar leverage. For instance, the Department of Defense ("DOD") has the authority to set the terms of defense contracts. Under CMS's logic, the DOD could ban any defense contractor from entering into an arbitration agreement with its employees or subcontractors as a condition of obtaining government contracts. Notably, Congress has expressly required contractors to agree not to arbitrate *certain types* of disputes as a condition of obtaining federal money, Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454-55 (2009); yet the reasoning underlying the Arbitration Rule would make this express legislative prohibition superfluous, because under CMS's view, the DOD could prohibit *all* arbitration agreements as part of its general authority to negotiate contracts.

Similarly, the Department of Education routinely imposes conditions on schools and universities that accept federal funding; applying CMS's reasoning, it could attempt to force schools and universities to forego pre-dispute arbitration with their employees or students as a condition of federal funding. Likewise, CMS's reasoning, if upheld, could be invoked by the Department of Housing and Urban Development to force any landlords who accept Section VIII vouchers from entering into arbitration agreements with their tenants. And so forth. If federal agencies could use their contracting or grant authority as leverage to ban pre-dispute arbitration agreements, they would have the power to eliminate arbitration in vast swaths of the economy, in violation of federal statutory law and policy.

The Eastern District of Texas has recently rejected an almost identical effort by the government to use its contracting leverage as a mechanism to restrict arbitration. On July 31,

2014, President Obama issued Executive Order 13673, which purported to prohibit contractors and subcontractors who enter into contracts for non-commercial items over $1 million from entering into any pre-dispute arbitration agreements over certain types of employment torts. Fair Pay and Safe Workplaces, 79 Fed. Reg. 45309 (Aug. 5, 2014). This order was implemented in an August 25, 2016 amendment to the Federal Acquisition Regulation. *See* Federal Acquisition Regulation, "Fair Pay and Safe Workplaces," 81 Fed. Reg. 58562 (Aug. 25, 2016) (to be codified at 48 C.F.R. pts. 1, 4, 9, 17, 22, 42, and 52); Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces," 81 Fed. Reg. 58654 (Aug. 25, 2016) (to be codified at 48 C.F.R. pts. 22 and 52). On October 24, 2016, the Eastern District of Texas enjoined this rule, holding that it is not "authorized by the FAA in the absence of any congressional command that would override the requirement that arbitration agreements be enforced in accordance with their terms." *Associated Builders and Contractors of Southeast Texas v. Rung*, No. 16-cv-00425, Dkt. 22, at 28 (E.D. Tex. Oct. 24, 2016). CMS's Arbitration Rule violates the FAA for the same reason.

Worse, CMS's purported reliance on its authority to set the terms and conditions of Medicare and Medicaid grants was a mere fig-leaf. The statutory question is not whether CMS possesses the *general* authority to set the terms and conditions of Medicare and Medicaid grants. The statutory question is whether CMS possesses the authority to set *this particular* condition on obtaining Medicare and Medicaid funds. CMS concluded that the FAA's mandate could give way based on the most generic statutory language imaginable: the statutory authority to ensure "efficient administration" of CMS. If CMS's authority to ensure "efficient administration" sufficed to override the liberal federal statutory policy favoring arbitration, it is difficult to imagine any general grant of regulatory authority that would not.

B. CMS's Rationales Are Not Limited to a Particular Context or Type of Arbitration Agreement.

CMS's rationales for prohibiting pre-dispute arbitration are especially sweeping because they are not limited to any particular context or type of arbitration agreements. Indeed, much of CMS's reasoning consisted of inveighing against arbitration in general. For instance, CMS made the remarkable statement that "predispute arbitration clauses are, by their very nature, unconscionable." 81 Fed. Reg. at 68,792. It reasoned that:

> Arbitration changes the manner in which a dispute will be resolved by, among other things, waiving the right to a jury trial, and providing only limited grounds to appeal the arbitrator's decision. … [A]rbitration can be very expensive for the resident, with some agreements requiring the resident to bear some of the costs of the arbitration, and the limited discovery generally allowed puts the resident at a distinct disadvantage … both parties are waiving their right to a jury trial. There is no public forum and the arbitrator's decision will not usually be publically available … A resident cannot usually challenge an arbitrator's decision even if it is based on a mistake in the applicable law for the issue in dispute.

Id. at 68,794. These arguments—which, as explained above, are deeply flawed—could be applied to any arbitration agreement. The very definition of an arbitration agreement is an agreement in which the parties waive their right to a jury trial. Moreover, limits on discovery and judicial review are inherent features of arbitration; indeed, they are precisely the reasons that arbitration is faster, cheaper, and more efficient than litigation, and precisely the reasons that there is such an emphatic federal statutory policy favoring arbitration. If such rationales, standing alone, were sufficient to justify a ban on arbitration, virtually all arbitration could be banned.

CMS also stated that "it is almost impossible for residents or their decision-makers to give fully informed and voluntary consent to arbitration before a dispute has arisen." *Id.* at 68,792. It found "highly unlikely" that "they would have consulted a lawyer about the agreement." *Id.* at 68,796. It cited the "significant differential in bargaining power between

LTC facility residents and LTC facilities," and pointed out that arbitration agreements are offered on a take-it-or-leave-it basis. *Id.* at 68,792, 68,795.

But this logic, too, may apply much more broadly than this case. People who start new jobs or purchase consumer goods or services typically enter into contracts without hiring lawyers to review the contractual terms. Moreover, a lawyer would not even serve a practical purpose in most cases; employment agreements (at least for entry-level employees at big companies) and consumer agreements are generally presented on a take-it-or-leave-it basis. Yet it is well-settled that arbitration provisions in such agreements—like the many other provisions of such agreements—are enforceable. *Rent-a-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010) (employment agreements); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (cell phone service agreements). Adopting CMS's reasoning would upend that settled understanding.

CMS also stated that the "would-be resident is physically and possibly mentally impaired, and is encountering such a facility for the first time." 81 Fed. Reg. at 68,792. It noted that "admission to a LTC facility is usually an extremely stressful time for the resident and his or her family. The resident may have a serious injury, surgery, or illness, is being removed from their usual living arrangements, and is being admitted to a facility for an indeterminate period of time." *Id.* at 68,796. But that reasoning is not a principled basis for the Arbitration Rule.

Many nursing home residents are not mentally impaired and state law invariably bars enforcement of contracts signed by incompetent individuals. *Liberty Health & Rehab of Indianola, LLC v. Howarth*, 11 F. Supp. 3d 684, 688 (N.D. Miss. 2014) (Mills, J.) (invalidating nursing home arbitration agreement because resident lacked the competence to enter into the agreement). The Arbitration Rule thus goes far beyond the justification provided by CMS: It bars pre-dispute arbitration agreements across the board, regardless of whether a particular

nursing home resident is legally capable of signing a contract. Moreover, the Arbitration Rule singles out arbitration agreements for non-enforceability even when the remainder of the contract signed by a nursing home resident *is* legally enforceable. Under the Arbitration Rule, a nursing home could enter into a legally enforceable contract with a resident setting forth the cost of the nursing home and other terms of the parties' relationship; it simply could not agree to arbitrate disputes arising out of that contract. The vulnerability of nursing home residents cannot justify the differential treatment of arbitration agreements relative to other types of agreements; that differential treatment can be justified only based on hostility to arbitration itself.

The reality is that CMS was not merely hostile to arbitration agreements with nursing home residents; it was hostile to arbitration agreements in general, or at least those arbitration agreements that are not signed after arm's length negotiations between equally sophisticated parties. But form contracts are a fact of commercial life, both in general and in the specific context of nursing homes. Nursing homes have no choice but to enter into contracts with their residents when those residents arrive, and it is neither practical nor desirable that new residents engage in individualized arm's length negotiations through counsel with nursing homes before they are able to move in. The whole point of the FAA is to ensure that if other provisions of contracts are enforced, arbitration provisions are enforced too. *See, e.g.*, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) ("The goals and policies of the FAA … are antithetical to threshold limitations placed specifically and solely on arbitration provisions" (internal quotation marks omitted)). Upholding the Arbitration Rule would set the stage for other agency regulations purporting to abolish arbitration outside the context of arm's length negotiations. Such rules would be a profound deviation from decades of settled federal arbitration law.

C. CMS's Anti-Arbitration Rule is Part of a Broad Executive Branch Effort to Ban Arbitration Agreements.

As explained above, if the Court upholds the Arbitration Rule, agencies which are hostile to arbitration *could* invoke CMS's rationales to enact wide-ranging restrictions on arbitration agreements. There are also powerful reasons to believe they *would* do so. There are several recent examples of agencies attempting to restrict arbitration.

- As noted above, Executive Order 13673, entitled "Fair Pay and Safe Workplaces" directed Federal Acquisition Regulatory Council and the Department of Labor to issue regulations and guidance that, among other things, prohibits employers that seek federal contracts of $1 million or more from requiring their employees to enter into mandatory pre-dispute arbitration agreements regarding certain disputes. This rule was recently enjoined by a federal district court in Texas. *Supra*, at 19.
- The National Labor Relations Board has ruled that employee arbitration agreements with class action waivers are illegal; the issue has precipitated a circuit split and will likely be resolved by the Supreme Court. *Compare Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (rejecting NLRB's ruling), *petition for cert. filed*, 85 U.S.L.W. 3096 (U.S. Sept. 9, 2016) (No. 16-307), *with Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 3084 (U.S. Sept. 2, 2016) (No. 16-285), *and Morris v. Ernst & Young, LLP*, No. 13-16599, -- F.3d --, 2016 WL 4433080 (9th Cir. Aug. 22, 2016) (upholding NLRB's ruling), *petition for cert. filed*, 85 U.S.L.W. 3096 (U.S. Sept. 8, 2016) (No. 16-300).

- The Department of Labor's "Fiduciary Rule" would ban class action waivers in arbitration agreements in contracts subject to the rule's coverage. *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. 20,946 (Apr. 8, 2016); Best Interest Contract Exemption, 81 Fed. 21,002, 21,076-79 (Apr. 8, 2016).
- The Department of Education has issued a notice of proposed rulemaking that would prohibit the use of pre-dispute arbitration agreements in most higher education contracts. *See* Student Assistance General, Provisions, Federal Perkins Loan Program, Federal Family Education, Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed Reg. 39329 (June 16, 2016).
- An FCC Commissioner has declared publicly that "[t]he Commission should also limit pre-dispute arbitration clauses, in communications services contracts. The tide is turning against these consumer-unfriendly provisions that have already been banned by the Center for Medicaid Services, the Department of Education, the Department of Defense, and others." Keynote Remarks of Commission Mignon L. Clyburn, http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1020/DOC-341824A1.pdf (Oct. 19, 2016).

In part, these developments reflect the fact that the advantages of arbitration accrue to the parties, rather than to federal agencies. For instance, arbitration is valuable because it is efficient: parties in one-off disputes frequently want to put the disputes behind them and move on with their lives. Federal agencies, however, have no particular reason to prefer disputes to be resolved rapidly. Moreover, arbitration is valuable because it is cheap, but litigation cost is not

an issue to federal agencies; unlike ordinary clients, the United States does not receive monthly invoices enumerating its attorneys' billable hours.

In substantial part, however, these rules simply reflect disagreement by federal agencies with the "liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339 (quotation marks omitted). Federal agencies disagree with the FAA and the policies underlying it. They have therefore decided to defy the FAA and issue regulations reflecting their own hostility toward arbitration—despite the complete absence of statutory authority to do so. Upholding the Arbitration Rule would embolden other agencies to enact similar rules in defiance of federal law.

CONCLUSION

For the foregoing reasons, the Chamber respectfully contends the Court should grant the Plaintiffs' motion for a preliminary injunction.

Dated: October 26, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2016, I filed this document with the Clerk of Court through the Court's CM/ECF system, which will serve a true and correct copy of the foregoing by electronic notification to all other parties through their counsel of record.

This the 26th day of October, 2016.

/s/ William Lucien Smith, Jr.