No. 08-805

IN THE

Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
D/B/A ODIN HEALTH CARE CENTER,
Petitioner,

v.

SUE CARTER, SPECIAL ADMINISTRATOR OF THE
ESTATE OF JOYCE GOTT,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN HEALTH CARE ASSOCIATION, THE ILLINOIS HEALTH CARE ASSOCIATION, THE ILLINOIS COUNCIL ON LONG-TERM CARE AND THE ALLIANCE FOR QUALITY NURSING HOME CARE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the lower court correctly held, in direct conflict with several of this Court's decisions, that an otherwise valid arbitration agreement was unenforceable solely on the basis of "public policy" embodied in a generalized anti-waiver provision of a state statute.
2. Whether, and to what extent, "public policy" qualifies as a ground for the "revocation of any contract" under Section 2 of the Federal Arbitration Act.

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae represent organizations whose members share a keen interest in a robust, well-functioning system of arbitration in the United States. Many of *amici*'s members employ arbitration agreements in contracts with their customers. Unless corrected, the erroneous reasoning of the lower court's decision threatens to spawn litigation over the enforceability of those agreements and thereby deprive both businesses and consumers of the substantial benefits of arbitration.

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest federation of business companies and associations. It represents an underlying membership of more than three million business, trade and professional organizations of every size, sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing briefs *amicus curiae* in cases involving issues of vital concern to the Nation's business community, including cases before this Court raising important questions under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1 *et seq.*

The American Health Care Association ("AHCA") is the national representative of nearly 11,000 non-profit and proprietary facilities dedicated to improv-

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

ing the delivery of professional and compassionate care to more than 1.5 million citizens who live in nursing facilities, assisted-living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. One way in which AHCA promotes the interests of its members is by participating as *amicus curiae* in cases with far-reaching consequences for its members, including cases brought under the FAA.

The Illinois Health Care Association ("IHCA") is a non-profit organization comprising approximately 500 licensed and certified long-term care facilities and programs throughout the State of Illinois. Founded in 1950, IHCA is the oldest and largest association of its kind in the State. Its members consist of proprietary and non-proprietary facilities which represent skilled, intermediate care, developmentally disabled, skilled pediatric, assisted living and sheltered care levels of care. Collectively, they provide health care to more than 31,000 people.

The Illinois Council on Long Term Care ("ICLTC"), founded in 1977, is a statewide, non-profit service association representing 24,000 long term care professionals and caregivers serving over 30,000 residents in nearly 200 Illinois nursing and rehabilitation facilities. One way in which the ICLTC promotes progressive public policy on behalf of its members is by participating as *amicus curiae* in cases with far-reaching consequences for the long term care profession.

The Alliance for Quality Nursing Home Care (the "Alliance") is a non-profit organization representing 17 national and regional post-acute providers, all of which offer skilled nursing facility services. Alliance members collectively operate nearly 2,000 facilities in

49 states. They treat as many as 500,000 patients each year and employ more than 300,000 people.

SUMMARY OF THE ARGUMENT

Section 2 of the Federal Arbitration Act provides that arbitration agreements are valid, irrevocable, and enforceable except upon "grounds" that exist "for the revocation of any contract." 9 U.S.C. §2. The lower court interpreted this quoted language to invalidate a model arbitration agreement, used throughout the nation by nursing homes, on the basis of "public policy" contained in the anti-waiver provisions of Illinois's Nursing Home Care Act ("INHCA"). That holding rests on two legal propositions: (1) a narrow proposition that this "public policy" defense includes generalized anti-waiver language in a state statute and (2) a broad proposition that Section 2's grounds for "revocation of any contract" include "public policy."

This Court has squarely rejected the narrow proposition, and the decision below can be summarily reversed on that basis. *The grounds "for revocation of any contract" do not include a "public policy" based on a generalized anti-waiver provision in a state statute*. That was the central lesson of *Southland Corp. v. Keating*, 465 U.S. 1 (1984), where this Court rejected a similar effort by the California Supreme Court to invalidate an arbitration agreement on the basis of "public policy" contained in an anti-waiver provision of the California Franchise Investment Law. This Court's non-arbitrability decisions support *Southland's* central lesson. The consistent principle unifying those decisions is that the prerogative to override the FAA's "mandate" lies exclusively with Congress, not with state legislatures or the courts. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220,

226 (1987). Disrespecting that principle, the decision below arrogates unprecedented power to state courts unilaterally to declare statutory claims non-arbitrable.

This Court has never directly addressed the broad proposition—whether Section 2's grounds "for revocation of any contract" include "public policy"—so, alternatively, it could grant the petition to resolve that question. The scope of Section 2 is critically important for companies using arbitration agreements. Some courts are relying on doctrines such as "public policy" and "unconscionability" to invalidate arbitration agreements. Yet, in many cases the so-called "applications" of these "general" doctrines are indistinguishable from rules that "single out arbitration," something that the FAA clearly disallows. In contrast to more fact-specific doctrines like fraud and duress, subjective, policy-laden doctrines like "public policy" and "unconscionability" sweep more broadly. They can invalidate entire classes of arbitration clauses or, as in this case, invalidate arbitration clauses in an entire industry. Such refusals to enforce arbitration agreements on the basis of "public policy" represented precisely the sort of "judicial hostility" which Congress, by enacting the FAA, sought to overcome. Thus, if this Court chooses not to summarily reverse on the narrow ground suggested above, it should grant the petition to clarify Section 2's scope.

Regardless of whether this Court summarily reverses the lower court's judgment on the narrow proposition or grants *certiorari* to address the broad one, the issues presented here are sufficiently important to warrant this Court's intervention. The arbitration agreement invalidated in this case was based on a model agreement used by nursing homes through-

out the nation. It provided residents and their guardians a choice whether to accept the benefits of arbitration such as speedier results, lower costs, and confidential proceedings. The decision below deprives individuals of this choice and thereby denies them the benefits of arbitration that this Court previously has recognized. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). The decision below also encourages forum shopping. Not only does it deepen divides between federal and state courts, it invites arbitration's opponents to utilize Illinois, including the famous "plaintiff's haven" of Madison County, as a favorable forum in which to challenge these model arbitration agreements. Subsequent opinions handed down in the wake of the decision below provide concrete evidence that just such litigation will materialize unless this Court intervenes.

ARGUMENT

I. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW AND REAFFIRM THE IMPORTANT PRINCIPLE THAT COURTS MAY NOT RELY ON GENERALIZED ANTI-WAIVER LANGUAGE IN STATUTES TO INVALIDATE ARBITRATION AGREEMENTS ON PUBLIC POLICY GROUNDS.

Several principles of law appear to be uncontested in this case. First, Section 2 of the Federal Arbitration Act applies in state court. *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008); *Southland*, 465 U.S. at 15-16. Second, under Section 2, arbitration agreements "shall be valid, irrevocable, and enforceable" except upon such grounds that exist "for the revocation of any contract." 9 U.S.C. §2. Third, this quoted language represents a "national policy favoring arbitra-

tion," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), and effectively "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996) (quoting *Southland*, 465 U.S. at 10). Fourth, Section 2 consequently preempts both state legislative enactments *and judicial constructions* of those enactments which frustrate the FAA's national, arbitration-promoting objective. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

The state court decision in this case, which effectively invalidates arbitration agreements across an entire industry, unquestionably undercuts the FAA's policy "requir[ing] that [courts] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). So the only basis upon which the lower court's judgment can be sustained is if "public policy," as embodied in the INHCA's anti-waiver provisions, is a ground "for revocation of any contract."

This Court has never held—or even suggested—that the grounds "for revocation of any contract" include "public policy." The decisions referring to Section 2's defenses have used various formulations such as "fraud," *Southland*, 465 U.S. at 16 n. 11; "fraud, duress or unconscionability," *Casarotto*, 517 U.S. at 686; and "fraud or excessive economic power." *McMahon*, 482 U.S. at 226. So there is strong reason to believe that the lower court's reliance on "public policy" is simply erroneous. *See Cardegna,* 546 U.S. at 446 (rejecting state supreme court's view that "enforceability of the arbitration agreement should turn

on Florida public policy and contract law") (internal quotations omitted).

Yet, the Court does not need to resolve that question in order to summarily reverse the decision below. Even if public policy might qualify as a Section 2 "ground" in some hypothetical case—a position that *amici* do not concede—it cannot be stretched to include a generalized anti-waiver provision contained in a state statute. That was the central lesson of *Southland*. *Southland* involved California's Franchise Investment Law which contained an anti-waiver provision but did not specifically "single out" arbitration. 465 U.S. at 4 n. 1. As Justice Stevens recognized, the California Supreme Court relied on the public policy defense to invalidate an agreement requiring arbitration of claims arising under the franchise law. *Id.* at 19-21 (Stevens, J., concurring in part and dissenting in part). This Court reversed the California Supreme Court's judgment and held that invocation of a public policy based on an anti-waiver provision in a state statute did *not* qualify as a ground "for the revocation of *any* contract" but, instead, "conflict[ed] with the [FAA]." *Southland*, 465 U.S. at 16 n. 11.

This case is indistinguishable from *Southland*. Just like the California Franchise Investment Law, the INHCA contains generalized anti-waiver language that has been judicially construed to preclude arbitration. Indeed, by comparison to *Southland*, the conflict in this case between the state statute and the FAA is even more pronounced. Whereas the generalized anti-waiver language in *Southland* was merely directed at compliance with the franchise law's substantive provisions, the INHCA explicitly attempts to channel disputes toward litigation by making jury

waivers unenforceable. *Compare* 465 U.S. at 5 n. 1 (California law), *with* Pet. at 3 (Illinois law). Thus, on the authority of *Southland*, the lower court's "public policy" holding cannot stand.

This Court's jurisprudence on the arbitrability of statutory claims also supports this reading of *Southland*. In the decades following the FAA's enactment, this Court limited its application in cases involving certain claims arising under federal statutes, such as those arising under the federal securities laws. *See, e.g., Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989). Those laws, just like the INHCA, contain generalized anti-waiver provisions that do not explicitly mention arbitration. *See Wilko*, 346 U.S. at 430 n. 6. More recent decisions reconsidered—and in some cases overruled—those early decisions in light of exploding dockets and a growing awareness of arbitration's efficacy. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991); *Rodriguez de Quijas*, 490 U.S. at 479-86; *McMahon*, 482 U.S. at 227-33. In the years that followed, this Court consistently held statutory disputes to be arbitrable even where those statutes were alleged to advance "important social policies." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). *See also McMahon*, 482 U.S. at 226 ("[T]his duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights."). The upshot of these decisions is that the mere presence of an anti-waiver provision in a federal statute does not render disputes arising under the statute non-arbitrable. Rather, "[h]aving made the bargain to arbitrate, the party should be held to it unless *Congress itself* has evinced an intention to preclude a waiver of judicial

remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler*, 473 U.S. 614, 627 (1985) (emphasis added). *See also McMahon*, 482 U.S. at 226 (FAA's "mandate may be overridden by a contrary *congressional* command.") (emphasis added).[2]

This Court's decision in *Mitsubishi* exemplifies the relationship between *Southland* and the limits on state power to regulate the arbitrability of disputes arising under state law. While *Mitsubishi* principally concerned the arbitrability of federal antitrust claims, the Court also addressed an ancillary argument that claims under local antitrust law were not arbitrable. The Court summarily rejected that view in a footnote explaining that "any contention that the local antitrust claims are non-arbitrable would be foreclosed by this Court's decision in [*Southland*] where we held that the [FAA] withdrew the power of the states to require a judicial forum for the resolu-

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[2] During the last legislative session, Congress considered bills that would have invalidated certain arbitration agreements between long-term care facilities and their residents (or persons acting on their behalf). *See* Fairness in Nursing Home Arbitration Act (H.R. 6126/S. 2838). Those bills validate *amici's* view that decisions about the arbitrability of disputes reside with Congress, not the courts. Those bills have not yet been reintroduced in the 111th Congress, and their reintroduction would not supply a reason to deny *certiorari*. In recent decades, Congress has considered numerous bills that would declare certain disputes off-limits from arbitration but, in the eighty four years since the FAA's adoption, only passed such legislation twice. *See* 15 U.S.C. §1226 (2006); 10 U.S.C. §987(f)(4) (2006). Moreover, the bills only apply to disputes or claims that arise *after* the date of their enactment. *See id.* §4. Thus, even if enacted, they would not affect this dispute or the numerous *existing* disputes around the country involving the enforceability of arbitration agreements in contracts with long-term care facilities.

tion of claims which the contracting parties agreed to resolve by arbitration." 473 U.S. at 623 n. 10 (internal quotations omitted).

Contrary to both *Mitsubishi* and the broader non-arbitrability jurisprudence, the decision below arrogates to state courts the power to override the FAA's mandate. The lower court tries to justify that power by distinguishing between a state legislative act and a judicial decision. *See* Pet. at 9a. That distinction collides with this Court's teachings in *Southland* and *Perry*. Both of those decisions stressed that the judge-made law of state courts, no less than state statutory law, can conflict with the FAA and, consequently, be preempted. *Southland*, 465 U.S. at 16 n. 11; *Perry*, 482 U.S. at 492 n. 9.

Here the conflict is unmistakable. Under the FAA, agreements to arbitrate INHCA claims are "valid, irrevocable, and enforceable." Under the lower court's construction, they are not. Consequently, the INHCA as construed by the lower court frustrates the FAA's "goals and policies." *Casarotto*, 517 U.S. at 688. *See McMahon*, 482 U.S. at 226 (Absent a claim of fraud or excessive economic power, the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."). Unless the decision below is corrected, state courts, by means of this "public policy" doctrine, will enjoy unparalleled power to declare disputes non-arbitrable—a power that neither state legislatures nor federal courts (or even this Court) currently enjoy.

Thus, on the authority of *Southland*, reinforced by this Court's more recent decisions on the arbitrability of statutory claims such as *Mitsubishi*, the grounds for "revocation of any contract" do not include "public

policy," at least where based on a generalized anti-waiver provision in a state statute. Once that narrow proposition of law is accepted, then the decision below cannot stand and should be summarily reversed.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT *CERTIORARI* TO DECIDE WHETHER THE GROUNDS "FOR REVOCATION OF ANY CONTRACT" INCLUDE "PUBLIC POLICY."

As noted above, this Court has never held that Section 2's grounds "for revocation of any contract" include "public policy." Nor have its descriptions of the scope of Section 2's "grounds" been consistent. *Southland* described Section 2 most narrowly to include only defenses such as "fraud." 465 U.S. at 16 n. 11. Dicta in *Casarotto* described Section 2 most broadly to encompass defenses "such as fraud, duress, or unconscionability." 517 U.S. at 686. This uncertainty over the scope of Section 2 has sown confusion among the lower courts and has allowed anti-arbitration rules masquerading as generally applicable contract defenses to creep into the FAA jurisprudence.

As the decision below illustrates, courts can repackage almost any judicially crafted anti-arbitration rule as an application of a general contract defense. Had the Illinois Legislature enacted a rule that declared arbitration clauses in long term-care contracts to be unenforceable, the FAA would have preempted such as statute. *See Preston*, 128 S. Ct. at 983. Despite that clear prohibition, the court below announced precisely the same rule and, by describing it as a specific application of the "public policy" doctrine, sought to avoid FAA preemption. Despite the differences in labels, both rules—the explicit anti-arbitration provision and the particular application of

the public policy defense—have precisely the same deleterious effect: they invalidate arbitration agreements and, thereby, undermine the FAA's "federal policy favoring arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

This thin line between anti-arbitration rules, which the FAA prohibits, and alleged applications of certain generally available contract defenses is evident from the number of courts relying on doctrines like "public policy" and unconscionability to invalidate arbitration agreements. *See, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (arbitration clause containing class action waiver held unconscionable and contrary to public policy); *Kruger Clinic Orthopaedics, L.L.C. v. Regence BlueShield*, 138 P.3d 936 (Wash. 2006) (arbitration clause limiting remedies held unenforceable as contrary to public policy as embodied in state statute); *Presidential Leasing, Inc. v. Krout*, 896 So. 2d 938 (Fla. Dist. Ct. App. 2005) (arbitration clause held unenforceable as contrary to public policy embodied in statute's fee-shifting provision). These courts often fail meaningfully to explain—and indeed cannot explain—*why* particular features of an arbitration clause or arbitral regime satisfy the elements of a contract defense; rather they simply assert it to be so.

Such judicially crafted rules are far worse than state statutes that overtly discriminate against arbitration. Statutes at least have the virtue of clarity, and the legislative process enables a thorough inquiry into the underlying policies. By contrast, nebulous, judicially crafted rules "complicat[e] the law and breed[] litigation from a statute [the FAA]

that seeks to avoid it." *Allied-Bruce Terminix*, 513 U.S. at 275.

Certain of these so-called defenses also pose an especially grave threat to the "national policy favoring arbitration." *Cardegn*a, 546 U.S. at 443. Some defenses such as fraud and duress usually end up only invalidating *specific* contracts. For example, if an arbitration agreement is void on duress grounds because one party has held a gun to the other party's head, that holding will not result in the invalidation of many arbitration clauses beyond the instant one before the Court. By contrast, others such as unconscionability and public policy threaten to sweep much more broadly. Invoking the unconscionability doctrine to invalidate a clause containing a particular set of features potentially invalidates all clauses with the offensive features. Invoking the public policy doctrine, as the decision below demonstrates, can sweep even more broadly and invalidate arbitration agreements across an entire industry, regardless of the agreement's content.

The history behind the FAA's enactment demonstrates the risk that state courts might embed their hostility toward arbitration agreements in such "public policy" arguments. As this Court previously has noted, the FAA was enacted to counter judicial hostility toward arbitration agreements. *Southland*, 465 U.S. at 13–14. The form of that historic hostility is illuminating—courts declared such agreements "void" on the grounds that they ousted the courts of jurisdiction and accordingly *violated "public policy.*" Gary B. Born and Peter B. Rutledge, *International Civil Litigation in United States Courts* 1090 (3d ed. 2006). *See also Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 983-84 (2d Cir. 1942)

(describing how, prior to the FAA's enactment, American courts relied on public policy arguments to invalidate arbitration agreements). There is simply no difference between the historic "public policy" invalidations of the 19th century and the type of "public policy" invalidation effected by the court below. Both types of decisions ultimately represent the sort of jealous guarding of jurisdiction that the FAA sought to overcome. Unless corrected, the 21st century "public policy" doctrine threatens to usher in a new era of judicial hostility to arbitration agreements.

Finally, this Court's recent decision in *Cardegna* casts further doubt on the availability of "public policy" as a Section 2 defense. *Cardegna*, which also construed Section 2 of the FAA, involved whether judges or arbitrators should determine the enforceability of a contract containing an arbitration clause where there is an underlying claim that the contract is "void" under state law. Citing Florida contract law and "public policy," the Florida Supreme Court held that judges should decide the matter. This Court rejected that view and, citing *Southland*, held that the enforceability of the arbitration agreement should not "turn on 'Florida public policy and contract law.'" 546 U.S. at 446. While *Cardegna* concerned the doctrine of separability, its unequivocal rejection of the Florida Supreme Court's invocation of "public policy" lends further reason to be skeptical about the lower court's invocation of that doctrine in this case.

Thus, *certiorari* should be granted to offer further guidance to lower courts and parties over whether "public policy" qualifies as a "ground for the revocation of any contract" and, more generally, to clarify Section 2's scope.

III. REGARDLESS OF WHETHER THE COURT SUMMARILY REVERSES OR GRANTS *CERTIORARI*, THE IMPORTANCE TO THE NURSING HOME INDUSTRY OF THE ISSUES PRESENTED IN THIS CASE JUSTIFIES THIS COURT'S INTERVENTION.

Enforceable arbitration agreements are important in disputes in many industries. These agreements are especially important in disputes between nursing homes and their residents. As a long-time nursing home provider recently explained to Congress:

> [A]rbitration is more efficient, less adversarial and has a reduced time to settlement. . . . Timely resolution of disputes is of unique importance to residents of long term care facilities. . . . In addition, because it vastly reduces transaction costs, arbitration may also enable patients and their families to retain a greater proportion of any financial settlement than with traditional litigation

Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Judiciary Comm., (June 18, 2008) (statement of Kelley Rice-Schild, Executive Director, Floridean Nursing and Rehabilitation Center) ("Schild Testimony"), *available at http://aging.senate.gov/events/hr196kr.pdf*.

The agreement invalidated by the court below is based on a model agreement developed by the nursing home industry and used throughout the country.[3]

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[3] It also tracks the views of the Centers for Medicare & Medicaid Services, a division of the federal Department of Health and Human Services overseeing the nursing home industry, which has publicly stated that, at least in some cases,

In several respects, that model agreement seeks to harness the above-described benefits of arbitration:

- The resident or guardian's consent to arbitration is not a condition of admission, and declining to sign the form does not affect admission to the facility (indeed, in this case, the Respondent signed the arbitration agreement six days after the resident was admitted)
- Residents and their guardians enjoy a period during which they may rescind their agreement to arbitrate
- The nursing home company agrees to pay the arbitrator's fees and up to $5,000 of the resident's attorneys' fees
- The resident retains the absolute right to determine the situs of the arbitration

Pet. at 28a-32a. Thus, the model agreement in this case extends significant rights to residents in nursing homes. While *amici* should not be understood to suggest that such terms are *necessary* for an arbitration agreement to be enforceable, they validate this Court's oft-stated principle that arbitration can benefit individual litigants. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Allied-Bruce Terminix*, 513 U.S. at 280. Yet by invalidating the model agreement on public policy grounds, the lower court's decision categorically deprives individuals of the right to choose these benefits.

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the use of an arbitration agreement "is an issue between the resident and the nursing home" provided that the resident's consent is not a condition of admission. *See* Dep't of Health and Human Services, Centers for Medicare & Medicaid Services, Memorandum of Steven A. Pelovitz, Director of Survey and Certification Group (Jan. 9, 2003).

The impact of the decision below extends far beyond the nursing home industry in Illinois. It lays the groundwork for similar invocations of public policy to invalidate arbitration agreements in other states and in other industries. Several states have enacted similar statutes which regulate the nursing home industry and contain generalized anti-waiver language. *See, e.g.,* N.Y. Pub. Health Law §2801-d (McKinney 2008) (residential health care facility law authorizing cause of action and containing anti-waiver provision); Okla. Stat. Ann. tit. 63, §1-1939 (West 2008) (same); W. Va. Code §16-5N-15 (2008) (same). States also have enacted legislation regulating other industries such as alcoholic beverages and hazardous substances through statutes that, like the INHCA, authorize a cause of action and contain generalized anti-waiver language. *See, e.g.,* Ala. Code §28-9-11 (2008) (beer wholesalers); Ark. Code Ann. §8-7-1010(c) (2008) (hazardous substances). Under the logic of the decision below, all of these statutes could easily be read to express a public policy necessitating the invalidation of agreements to arbitrate disputes arising under those statutes.

Finally, the decision below also encourages forum shopping, something that this Court has sought to discourage in its FAA jurisprudence. *Allied-Bruce Terminix*, 513 U.S. at 272. Not only does it deepen divides between several federal courts and other state courts, Pet. at 19-28, it also encourages parties seeking to circumvent their arbitration agreements to file suit in Illinois. Two other decisions of the Illinois appellate courts already have relied on the decision below to invalidate arbitration agreements. *See Mitchell v. Beverly Enterprises*, Slip Op. No. 5-07-0637 (Ill. App. 2008); *Blazier v. Beverly Enterprises*, Slip Op. No. 5-08-0011 (Ill. App. 2008). Both of those

cases, perhaps unsurprisingly, were filed in Madison County, Illinois which enjoys an unrivaled reputation as one of the most financially punitive venues in the country. *See Kelly v. Martin & Bayley, Inc.*, 503 F.3d 584, 585-86 (7th Cir. 2007). Given the financial vulnerability of the nursing home industry to costly and abusive litigation, *see* Schild Testimony at 5-6, the decision below threatens to unleash a flood of financially crippling lawsuits.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below or, alternatively, grant the petition for a writ of *certiorari*.

Respectfully submitted,

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