No. 16-1458

In the Supreme Court of the United States

EILEEN HERNANDEZ, M.D., and
WOMEN'S CARE FLORIDA, LLC d/b/a
PARTNERS IN WOMEN'S HEALTHCARE, *et al.*,
Petitioners,

v.

LUALHATI CRESPO and JOSE CRESPO, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the Florida Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners have misstated the holding of the Supreme Court of Florida and therefore incorrectly framed the question presented. Before this Court may determine whether to consider the merits of Petitioners' Federal Arbitration Act (FAA) preemption claim, it first must resolve questions of jurisdiction and the applicability of the FAA. Accordingly, the questions presented are:

1.) Whether the Petitioners' failure to raise any federal or FAA argument until the rehearing stage – after the Supreme Court of Florida had issued its decision – bars this Court from reviewing this case.

2.) Whether arbitration agreements that expressly adopt and incorporate by reference state arbitration codes and law – and never refer to the FAA – can be enforced under the FAA.

3.) Whether the FAA governs a purely intrastate agreement between Florida obstetrical groups and their Florida patients;

4.) Whether the FAA is a procedural rule that does not apply in state courts.

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JURISDICTION

This Court lacks jurisdiction because the judgments of the Supreme Court of Florida and the Fifth District Court of Appeal of Florida were not rendered in a case in which a party timely drew the validity of any Florida statute into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or claimed a right, title, privilege or immunity under the Constitution or laws of the United States, as required for jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition omits the pertinent statutory provisions listed below:

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The pertinent provisions of the Florida Arbitration Code and the Florida Medical Malpractice Act are lengthy, and therefore set out in the Appendix, as provided in this Court's Rule 14(f). The Appendix contains the following statutes:

Fla. Stat. § 682.03 (2011)
Fla. Stat. § 682.06 (2011)
Fla. Stat. § 682.08 (2011)
Fla. Stat. § 682.09 (2011)
Fla. Stat. § 682.10 (2011)
Fla. Stat. § 682.12 (2011)
Fla. Stat. § 682.13 (2011)
Fla. Stat. § 682.15 (2011)
Fla. Stat. § 682.20 (2011)
Fla. Stat. § 766.106 (2011)
Fla. Stat. § 766.201 (2011)
Fla. Stat. § 766.203 (2011)
Fla. Stat. § 766.204 (2011)
Fla. Stat. § 766.207 (2011)
Fla. Stat. § 766.209 (2011)

INTRODUCTION

The petition should be denied because this case is not about the Federal Arbitration Act (FAA). The FAA does not apply to this case for four separate reasons. First, Petitioners never argued in the state courts below that the FAA applied until *after* the Supreme Court of Florida issued its opinion, and this Court thus lacks jurisdiction to address their newly asserted reliance on federal law. Second, the form arbitration agreements drafted by the Petitioners expressly adopt and incorporate by reference the *state* arbitration codes and never once mention the FAA. Third, the transactions governed by the agreements – physician-

patient relationships between pregnant Florida women and their obstetricians – do not involve interstate commerce, and Petitioners never presented below any argument or evidence to support a finding that they do involve interstate commerce. Fourth, in accordance with Justice Thomas' view, the FAA does not apply to state court proceedings.

For many of these same reasons, the case would be a poor vehicle for deciding any issue of the scope of FAA preemption. Because the FAA issue was not raised below, the lower court did not address and flesh out the factors that would bear on the potential application of the FAA to the specific, interlocking features of Florida's statutory scheme for handling medical malpractice cases. Even assuming the relationship of the FAA to that scheme might at some point become an issue meriting review, a case in which the issues had been aired and addressed below would be a vastly superior choice for consideration by this Court. Not only is the instant case a poor vehicle, but Petitioners have failed to show a conflict amongst the lower courts or any other reason that warrants merits review by this Court.

Finally, there is no reason for this Court to grant the petition, vacate the decision below, and remand for reconsideration in light of this Court's recent decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). Petitioners already presented that decision to the Supreme Court of Florida in the form of a motion to recall the mandate, which was denied. In any event, assuming the FAA applies, *Kindred* did not announce a new rule of law applicable to this case, and the Supreme Court of

Florida's decision does not run afoul of *Kindred* or this Court's prior FAA decisions.

STATEMENT OF THE CASE

A. Proceedings below.

In the state trial court, the Fifth District Court of Appeal of Florida, and their appellate briefs and oral argument before the Supreme Court of Florida, Petitioners never once argued that the FAA applied to their arbitration agreements.

The first of Petitioners' three cases to be decided was *Crespo v. Hernandez*, 151 So. 3d 495 (Fla. Dist. Ct. App. 2014). App. 24-25. Relying on *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013), *cert. denied*, 134 S. Ct. 683 (2013), the Fifth District Court of Appeal held that the arbitration agreement in that case violated Florida public policy because it selectively incorporated some, but not all, of the provisions of the Florida Medical Malpractice Act. *Id.* at 496. Although *Franks* specifically discussed and rejected FAA preemption, 116 So. 3d at 1249-51, the Petitioners did not argue FAA preemption in their briefs to either the district court of appeal or the Florida Supreme Court. This omission is reflected in the opinions of both courts, neither of which mention the FAA or preemption. *Hernandez v. Crespo*, 211 So. 3d 19, 19-27 (Fla. 2016); *Crespo*, 151 So. 3d at 496; App. 1-18, 25. Not even the dissenting opinion written by Justice Canady, nor the concurring opinion, mention the FAA or preemption. *Hernandez*, 211 So. 3d at 28 (Pariente, J., concurring); *id.* at 28-29 (Canady, J., dissenting); App. 18-23. It was not until a motion for rehearing – after the Supreme Court of Florida had already issued its opinion – that

the *Crespo* Petitioners first attempted to assert a FAA preemption argument. App. 54-61.

In the Petitioners' other two cases, the Fifth District Court of Appeal cited its decision in *Crespo* as grounds for declining to compel arbitration under the agreements. *A.K. v. Orlando Health, Inc.*, 186 So. 3d 626 (Fla. Dist. Ct. App. 2016); *Women's Care Fla., LLC v. A.G.*, 196 So. 3d 574 (Fla. Dist. Ct. App. 2016); App. 35-36, 44-45. Petitioners in these two cases *never* raised any FAA preemption arguments in any court. The Supreme Court of Florida did not separately consider the merits of the second and third cases, and instead declined to exercise jurisdiction based on its resolution of *Crespo.* App. 33, 42. Because the Supreme Court of Florida never reviewed *A.K.* or *A.G.*, Petitioners are actually asking this Court, as to these two cases, to issue writs of certiorari to the Fifth District Court of Appeal, which has never been presented with the FAA preemption argument now raised. *See, e.g., Graham v. Florida*, 560 U.S. 48, 58 (2010) (directing the writ of certiorari to a Florida district court of appeal when the Supreme Court of Florida denied discretionary review); *see also Graham v. Florida*, 556 U.S. 1220 (2009).

After the petition for certiorari was filed in this Court, the *Crespo* petitioners filed in the Supreme Court of Florida a motion to recall the mandate based on this Court's decision in *Kindred*, 137 S. Ct. at 1421, which was issued after the *Crespo* opinion. Resp't App. 15-24. Respondents opposed on the ground that *Kindred* did not alter the outcome of *Crespo*. Resp't App. 26-33. On a 4-2 vote, the Supreme Court of Florida denied the motion. Resp't App. 41.

B. The arbitration agreements and the Florida law they incorporate.

In paragraph 5 of the parties' arbitration agreements, the parties "agree[d] and recognize[d] that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties and/or claimant(s) in all respects," with one exception. App. 4-5; Pet. 6-7. Chapter 766 is commonly referred to as the Florida Medical Malpractice Act, and it has multiple provisions concerning arbitration and presuit dispute resolution. *See Franks*, 116 So. 3d at 1241-42; *e.g.,* Fla. Stat. §§ 766.106, 766.207 (2011). Additionally, in paragraph 8 of the agreements, the parties expressly agreed to be bound by the Florida Arbitration Code, which is found at Florida Statutes, Chapter 682. App. 6.

Paragraphs 5 and 8 provide in pertinent part:

> 5. ARBITRATION PROCEDURES. The parties agree and recognize that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties and/or claimant(s) in all respects except that at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate under Florida Statutes, 766.106 or 766.207, the parties and/or claimant(s) shall resolve any claim through arbitration pursuant to this Agreement ….
>
> 8. APPLICABLE LAW. Except as herein provided, the arbitration shall be conducted and governed by the provisions of the *Florida Arbitration Code*, Florida Statutes, Section

> 682.01 et seq. … In conducting the arbitration under Florida Statutes, Section 682.01 et seq., all substantive provisions of Florida law governing medical malpractice claims and damages related thereto, including but not limited to, Florida's Wrongful Death Act, the standard of care for medical providers, caps on damages under Florida Statutes 766.118, the applicable statute of limitations and repose as well as the application of collateral sources and setoff shall be applied. …

App. 4-6 (emphasis added).

The agreements make no mention of the FAA. App. 3-9. Nor do the agreements evidence how the transactions in question – Florida obstetricians providing medical care to pregnant Florida women – involve interstate commerce. *Id.*

Given that the agreements expressly adopt and incorporate the presuit dispute-resolution and arbitration provisions of Florida's Medical Malpractice Act and Arbitration Code, we explain the pertinent provisions of these two Florida laws.

1. The Florida Medical Malpractice Act.

The Florida Medical Malpractice Act sets forth detailed dispute-resolution procedures that must be followed before a medical malpractice claim is initiated. First, a claimant must conduct a presuit investigation. Fla. Stat. §§ 766.201(2)(a), 766.203(2) (2011). During the investigation, the claimant typically must request her medical records from the defendant doctor. *See* Fla. Stat. § 766.204 (2011). Then, the claimant must provide those records to an expert, who, in turn, must provide

a verified written opinion corroborating that reasonable grounds exist to believe the defendant doctor was negligent. *Id.*; Fla. Stat. §§ 766.106(2)(a), 766.203(2) (2011). After conducting this investigation, and "prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant" of her intent to file suit. Fla. Stat. § 766.106(2)(a) (2011). A claim is subject to dismissal if this procedure is not followed. *See Williams v. Campagnulo*, 588 So. 2d 982, 983 (Fla. 1991) (dismissal affirmed where presuit notice was not timely given); *Kukral v. Mekras*, 679 So. 2d 278, 283-84 (Fla. 1996) (failure to timely provide corroborating expert opinion is fatal).

The claimant must then allow the defendant doctor ninety days to conduct a review of the claim before filing suit. Fla. Stat. § 766.106(3)(a) (2011). The parties are also required to engage in informal discovery during this presuit period. Fla. Stat. § 766.106(6)(a) (2011). A claim may be dismissed where a claimant fails to provide presuit discovery. *See Robinson v. Scott*, 974 So. 2d 1090, 1093 (Fla. Dist. Ct. App. 2007). After conducting his or her own investigation, the doctor may reject the claim, make a settlement offer, or offer to arbitrate under the Medical Malpractice Act, in which case "liability is deemed admitted and arbitration will be held only on the issue of damages." Fla. Stat. § 766.106(3)(b) (2011). If a claimant rejects a physician's offer to arbitrate, non-economic damages in any subsequent lawsuit are capped and only 80% of lost wages are awarded. Fla. Stat. § 766.209(4) (2011).

Section 766.207, Florida Statutes, sets forth the Medical Malpractice Act's arbitration rules and procedures. Those rules provide significant incentives

for patients to forgo their jury trial rights and have damages determined in arbitration. Those incentives include:

- the admission by physicians of liability, Fla. Stat. §766.106(3)(b) (2011);
- the right to have independent arbitrators, Fla. Stat. §766.207(5) (2011);
- requiring physicians to pay the arbitration costs, Fla. Stat. § 766.207(7)(g) (2011);
- requiring physicians to pay interest on all accrued damages, Fla. Stat. § 766.207(7)(e) (2011);
- requiring physicians to pay the claimant's attorney's fees up to 15% of the award, Fla. Stat. § 766.207(7)(f) (2011); and
- making all defendant physicians jointly and severally liable for the award, Fla. Stat. § 766.207(7)(h) (2011).

2. The Florida Arbitration Code.

The agreements require that "arbitration shall be conducted and governed by the provisions of the Florida Arbitration Code" – not the FAA. App. 6. There are significant differences between the FAA and the Florida Arbitration Code, including:

- Under the Florida code, a judge determines issues as to the making of an arbitration provision; under the FAA, a jury resolves the issues. *Compare* Fla. Stat. § 682.03(1) (2011) *with* 9 U.S.C. § 4.

- The Florida code has a section specifying that the arbitrators may hear the evidence even if a party fails to attend arbitration, and that the parties are entitled to be heard, to present evidence, and cross-examine witnesses. Fla. Stat. § 682.06 (2011).

- The Florida code permits depositions to be taken of witnesses who cannot be subpoenaed or are unable to attend in person. Fla. Stat. § 682.08(2) (2011).

- The witness fees are less under the Florida code than under the FAA. *Compare* Fla. Stat. §§ 92.142, 682.08(4) (2011) *with* 9 U.S.C. § 7, 28 U.S.C. § 1821.

- Under the Florida code, the court may order the arbitration award to be made within a fixed time. Fla. Stat. § 682.09(2) (2011).

- Under the Florida code, there is no time limit for a party to apply to the court to confirm the arbitration award; under the FAA, a party has only one year to apply to the court for confirmation, and may apply only if the parties' agreement specified that a judgment of the court shall be entered. *Compare* Fla. Stat. § 682.12 (2011) *with* 9 U.S.C. § 9.

- Under the Florida code, a party may apply to the arbitrators within twenty days of delivery of the award to modify or correct the award if there is a miscalculation or the award is imperfect as a matter of form, Fla. Stat. § 682.10 (2011); the FAA has no similar provision.

- Under the Florida code, the time for moving to vacate an award is ninety days after delivery of the award, or in the case of corruption, fraud, or other undue influence, within ninety days after such grounds are known or should have been known; the FAA establishes a firm three-month deadline with no extension for the grounds enumerated in the Florida code. *Compare* Fla. Stat. § 682.13(2) (2011) *with* 9 U.S.C. § 12.

- Under the Florida code, the court may award the costs associated with confirming, modifying, or correcting an award. Fla. Stat. § 682.15 (2011).

- Under the FAA, a party may appeal an order vacating an award; under the Florida code, a party may only appeal an order vacating an award that does not direct rehearing. *Compare* 9 U.S.C. § 16(a)(1)(E) *with* Fla. Stat. § 682.20(1)(e) (2011).

REASONS FOR DENYING THE PETITION

I. The petition should be denied, and the FAA does not apply, because Petitioners failed to timely and properly raise any federal issue in the state courts.

Petitioners' failure to timely and properly raise the FAA preemption argument in the state courts means that this case does not properly present any FAA issue. This failure provides three independent grounds for this Court to deny the petition. First, this Court lacks jurisdiction under 28 U.S.C. § 1257. *See* Section I.A., *infra*. Second, as a matter of prudence, this Court should not decide matters not properly raised in the state courts. *See* Section I.B., *infra*. Third, an

independent and adequate state-law ground supports the judgments of the state courts. *See* Section I.C., *infra*.

A. This Court lacks jurisdiction because, in the state courts, Petitioners did not draw the validity of Florida's Medical Malpractice Act into question on federal grounds.

This Court lacks jurisdiction to review Petitioners' newly-minted FAA preemption argument. This Court's jurisdiction is limited to the express grants of power set forth in the Constitution and federal statutes. *See Karcher v. May*, 484 U.S. 72, 77 (1987). The only basis for certiorari jurisdiction asserted by Petitioners is 28 U.S.C. § 1257(a). Pet. 2. That statute permits this Court to review by certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had … where the validity of a statute of any State *is drawn into question on the ground of its being repugnant to the Constitution*, treaties, *or laws of the United States*, or where any title, right, privilege, or immunity *is specially set up or claimed under the … statutes of … the United States*." 28 U.S.C. § 1257(a) (emphasis added).

Accordingly, when the federal issue that is the subject of the certiorari petition was neither argued nor decided in the state courts below, this Court is without jurisdiction. *See Howell v. Mississippi*, 543 U.S. 440, 445 (2005) (addressing the "long line of cases clearly stating that the presentation requirement is jurisdictional" but also recognizing the "handful" of exceptions finding the rule prudential); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) ("With

'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992) (same); *Southland Corp. v. Keating*, 465 U.S. 1, 9 (1984) (finding no jurisdiction under predecessor statute where federal issue was not argued below); *Webb v. Webb*, 451 U.S. 493, 501-02 (1981) ("Because petitioner failed to raise her federal claim in the state proceedings and the [state supreme court] failed to rule on a federal issue, we conclude that we are without jurisdiction in this case."); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) ("we have no jurisdiction to consider whether the [federal law] preempted the [state law], for it does not affirmatively appear that that issue was decided below."); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here."); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (finding that if federal question was not presented to state courts "in such a manner that it was necessarily decided," this Court has "no power to consider it").

The ambiguity over whether the "not pressed or passed upon below" rule is jurisdictional or prudential arises from the history contained in *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983), where the Court explained the long line of precedent finding the requirement jurisdictional, but also citing two cases that treat the requirement as prudential. *See Howell*, 543 U.S. at 445. The only two cases cited in *Gates*, 462 U.S. at 219, for the prudential position are outliers in this Court's jurisprudence, with persuasive dissenting opinions. In

Vachon v. New Hampshire, 414 U.S. 478, 483 (1974), Justice Rehnquist, joined by two other Justices, dissented, opining that "[s]ince the [state supreme court] was not presented with a federal constitutional challenge to the sufficiency of the evidence, resolution of this question by the Court is inconsistent with the congressional limitation on our jurisdiction to review the final judgment of the highest court of a State." And in *Terminiello v. Chicago*, 337 U.S. 1, 10 (1949), Justice Frankfurter dissented, opining that the Court has "no authority to meddle with [a state court] judgment unless some claim under the Constitution or the laws of the United States has been made before the State court whose judgment we are reviewing and unless the claim has been denied by that court." These dissents comport with the great weight of this Court's jurisprudence, discussed *supra* at 12-13, holding that the presentation requirement is jurisdictional.

Indeed, this Court's own rules indicate the failure to properly raise the federal claim in the state court is a jurisdictional bar. This Court's rules mandate that, in cases arising from state courts, a petitioner specify in the petition "the stage in the proceedings, *both in the court of first instance and in the appellate courts*, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, *with specific reference to the places in the record where the matter appears*…." Sup. Ct. R. 14.1(g)(i) (emphasis added). This information is required "to show that the federal question was timely and properly raised *and that this Court has jurisdiction* to review the judgment on a writ of certiorari." *Id.*

(emphasis added). The same requirement is not imposed in cases arising out of the federal system. Sup. Ct. R. 14.1(g)(ii).

Petitioners did not, and could not, comply with this rule because they did not timely and properly raise an FAA preemption argument in the Florida trial courts, the Fifth District Court of Appeal, or the Supreme Court of Florida. The Petitioners in *A.K.* and *A.G.*, in which the Florida Supreme Court denied review, *never* raised an FAA argument. And as reflected in the petition, the Petitioners who were defendants in *Crespo first* raised the question of FAA preemption *after* the Supreme Court of Florida had issued its opinion. Pet. 9; App. 52-70. Raising a question for the first time on rehearing does not satisfy this Court's requirement that the state courts be presented with the federal question "at the time and in the manner required by state law." *Webb*, 451 U.S. at 501; Resp't App. 12-13; *see* Section I.C, *infra*.

Additionally, neither the majority, concurring, nor dissenting opinions from the Supreme Court of Florida addressed the question of FAA preemption. *See Hernandez*, 211 So. 3d at 19-29. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Adams*, 520 U.S. at 86 (citation omitted). Petitioners bear "the burden of defeating this assumption by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Id*. Petitioners cannot meet this showing.

From as early on as the trial court, the arguments concerning the enforceability of the agreements turned

on the interpretation of the Supreme Court of Florida's opinion in *Franks*. 116 So. 3d at 1240; App. 27, 48-49. *Franks* contains a section explaining why the FAA does not preclude the holding on those specific facts. *Id.* at 1249-51. Despite this express notice that the FAA arguably might have some application on these facts, Petitioners never raised an FAA preemption argument in the trial court or the Fifth District Court of Appeal. In fact, had they intended to argue that the FAA preempted the Medical Malpractice Act, they would have been required under Florida law to file a notice of constitutional question, and serve such notice on the Attorney General or local state attorney to allow the State to defend the constitutionality of the Medical Malpractice Act. *See* Fla. R. Civ. P. 1.071. Petitioners failed to so do.

Petitioners suggest, without affirmatively stating, that they had no reason to raise the FAA preemption argument until after the Supreme Court of Florida's decision because it was "unexpectedly broad and sweeping" and invalidated "all private medical malpractice arbitration agreements in Florida that did not exactly mirror the terms and conditions of" the Medical Malpractice Act. Pet. 9. This characterization of the opinion is inaccurate, and Petitioner's suggestion is erroneous. The Fifth District Court of Appeal expressly held that the agreement "at issue violates the public policy pronounced by the Legislature in the Medical Malpractice Act […] by failing to adopt the necessary statutory provisions." *Crespo*, 151 So. 3d at 496. This is the same holding and reasoning about which Petitioners now complain.

If, in fact, the intermediate appellate court's holding was a surprise (which Respondents dispute based on the Supreme Court of Florida's holding in *Franks*, 116 So. 3d at 1248), the *Crespo* Petitioners could have tried to argue FAA preemption in their appellate briefs filed in the Supreme Court of Florida *before* that court issued its decision. Similarly, although the Fifth District Court of Appeal issued its *Crespo* opinion prior to the filing of briefs in *A.K.* and *A.G.*, those Petitioners failed to alert the intermediate appellate court about any potential FAA preemption problem they perceived. Thus, all Petitioners failed to timely and properly raise the FAA in the Florida courts, and did not set their sights on the federal statute until far too late under Florida's issue-preservation rules. *See* Section I.C., *infra*.

When the *Crespo* Petitioners belatedly raised the FAA argument on rehearing, the Supreme Court of Florida summarily denied the motion, again without any mention of FAA preemption. App. 30; Pet. 9. On these facts, Petitioners cannot show that they properly presented the FAA preemption argument to the Florida courts. This Court lacks jurisdiction. *See Adams*, 520 U.S. at 87 ("Petitioners having thus failed to carry their burden of showing that the claim they raise here was properly presented to the [state supreme court], we will not reach the question presented.").

B. Even if the presentation rule is prudential, this Court should not pass upon issues raised for the first time here.

This Court recently affirmed its precedent that it is "'a court of review, not of first review.'" *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (citation omitted). Thus, where a state high court has not considered a contention, this Court will generally not reach it, even in a case in which it otherwise has jurisdiction. *Id.; see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (noting this Court "generally do[es] not address arguments that were not the basis for the decision below"); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.").

"In addition to the question of jurisdiction arising under the statute controlling [the Court's] power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for" declining to decide questions in the first instance. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). First, "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams,* 520 U.S. at 90 (quotation omitted). When properly presented with the issue, the state courts may construe the statute in a way that avoids the federal problem, or "the issue may be blocked by an adequate state ground." *Cardinale*, 394 U.S. at 438*; see also Gates*, 462 U.S. at 221-222; *Webb*, 451 U.S. at 501. As explained in

section I.C., *infra*, an adequate and independent state law ground – Petitioners' failure to preserve the federal issue in Florida courts – exists for affirming the decision.

Second, when an issue is not raised below, the "record is very likely to be inadequate, since it was certainly not compiled with those questions in mind." *Cardinale*, 394 U.S. at 438. As explained in Section II.B., *infra*, that very consideration precludes review here, because, as a result of their failure to invoke the FAA in a timely fashion, Petitioners have presented no argument or evidence suggesting that the agreements involve interstate commerce, and thus, have not shown that the FAA even applies. Moreover, reviewing Petitioners' unpreserved preemption argument denies this Court the benefit of "a reasoned opinion on the merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

In short, even if this Court concludes that 28 U.S.C. § 1257 is a prudential rule, it still should not review the decision below because accepting review "would be contrary to the sound justifications" for declining to consider an issue that the state courts never had an opportunity to decide. *Gates*, 462 U.S. at 222. Indeed, in circumstances such as those here, the Court "almost unfailingly" refuses "to consider any federal-law challenge to a state-court decision. *Howell*, 543 U.S. at 443 (quoting *Adams*, 520 U.S. at 86).

C. The decisions below rest on independent and adequate state-law grounds.

The Supreme Court of Florida's unelaborated order denying the *Crespo* Petitioners' motion for rehearing did not decide a federal question and rescue Petitioners from their failure to raise the question before the court's decision. Nor did any of the opinions or orders of the Fifth District Court of Appeal or the state trial courts decide a federal question, as Petitioners never presented any federal question to those lower courts. The petition therefore suffers from an additional jurisdictional deficiency: the judgments below are supported by an adequate and independent state law ground that is independent of the federal question—Florida's issue-preservation laws. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* Regardless of whether the state law ground is substantive or procedural, this "court has no power to review a state law determination that is sufficient to support the judgment." *Id.*; *see also Moore v. Texas*, 122 S. Ct. 2350, 2352 (2002).

Under Florida law, except in the case of fundamental error,[1] a party may not raise an issue for

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[1] "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993). A party's failure to raise federal preemption in the trial court does not render the trial court's decision fundamentally erroneous. *See First American Bank & Trust v. Windjammer Time Sharing Resort, Inc.*, 483 So. 2d 732,

the first time on appeal. *See Rosado v. DaimlerChrysler Fin. Servs. Trust*, 112 So. 3d 1165, 1171 (Fla. 2013); *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005). Florida's issue-preservation law requires that "an issue be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbour*, 112 914 So. 2d at 928 (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)). Furthermore, any argument not raised by Petitioners in their initial brief is deemed abandoned. *See Chamberlain v. State*, 881 So. 2d 1087, 1103 (Fla. 2004). And, as Respondents argued to the Supreme Court of Florida, Florida Rule of Appellate Procedure 9.330 forbids parties from raising new issues on a motion for rehearing. Resp't App. 12; *see also Cleveland v. State,* 887 So. 2d 362, 364 (Fla. Dist. Ct. App. 2004) (recognizing impropriety of raising new arguments in a motion for rehearing).

Petitioners failed to present the FAA preemption issue in the trial court, or in their first briefs before either the intermediate appellate court or the Supreme Court of Florida. In short, they failed to comply with Florida's long-standing preservation rules. When some of the Petitioners finally did raise the preemption argument, they did so in direct contravention of Florida's procedural rules. One of the salient reasons that this Court requires federal issues to be presented first in the state courts is so "that if there are independent and adequate state grounds that would

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737 (Fla. Dist. Ct. App. 1986). Petitioners never argued fundamental error in their motion for rehearing before the Supreme Court of Florida. App. 52-61.

pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Webb*, 451 U.S. at 500. Petitioners never provided the Florida courts with this opportunity, and accordingly, cannot demonstrate that the "failure of the [Florida courts] to reach the federal issue was not grounded on an application" of its preservation rules. *Id.* at 498 n. 4. Accordingly, the Court lacks jurisdiction.

II. The FAA does not apply, and the petition should thus be denied, because the parties' contracts agreed to apply Florida's arbitration laws, not the FAA.

A. The FAA does not apply when the parties to a contract specifically choose, and agree to follow, a state's arbitration laws.

A long-standing rule of law in arbitration cases is that the FAA does *not* preempt state laws where the parties contract to be bound by the state laws. *See Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468, 470 (1989) ("application of the California statute is not pre-empted by the [FAA] in a case *where the parties have agreed that their arbitration agreement will be governed by the law of California*.") (Emphasis added.) The parties' agreements do not just state that Florida law in general would apply. They do far more. They specifically name two Florida arbitration and dispute-resolution codes (the Medical Malpractice Act and the Florida Arbitration Code) that would apply and govern the resolution of disputes between the parties, and they never mention the FAA at all. App. 3-9. Because Petitioners selected these *Florida* codes to govern the

arbitration agreements, they cannot now argue that a *federal* code, the FAA, preempts those state codes or that the FAA applies to the agreements. *Id.* Because "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations," the FAA cannot preempt contractually-selected state law. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011); *Volt*, 489 U.S. at 470.

B. Petitioners benefitted from their express selection of Florida arbitration laws rather than the FAA in their form agreements.

By expressly adopting the Florida Medical Malpractice Act and Florida Arbitration Code (rather than the FAA) to resolve any dispute with Respondents, Petitioners realized benefits that they would not have obtained in an arbitration agreement governed by the FAA. For example, as set forth *supra* at 7-8, the Medical Malpractice Act places a great number of burdens on claimants before they may file a claim, including providing presuit notice to Petitioners, obtaining verification from another medical professional that reasonable grounds exist to believe malpractice was committed, participating in informal discovery, and delaying litigation for ninety days to allow Petitioners to investigate the claim. *See* Fla. Stat. §§ 766.106, 766.201, 766.203 (2011). A patient who fails to comply with these pre-suit requirements will have her case dismissed. *E.g., Williams*, 588 So. 2d at 983. This is not true of general agreements to arbitrate governed by the FAA. Respondents, in fact, complied with the Medical Malpractice Act presuit requirements. App. 2, Pet. 7.

When Petitioners required their patients to sign the form agreements, they apparently perceived that they would benefit from incorporating the procedural rules set forth in the Florida Arbitration Code. While there are a great number of differences between the FAA and the Florida code, *see supra* at 9-11, some of the more significant benefits to Petitioners under the Florida code include: if there is a dispute as to the making of the agreement, the issue is determined by a judge rather than a jury; lesser witness fees; the arbitrators can modify the award if it contains minor defects rather than having to resort to the courts; and more limited appellate rights for Respondents if the court vacates the award. *See* Fla. Stat. §§ 682.03, 682.08, 682.10, 682.20(1)(e) (2011).

Thus, in drafting the agreements, Petitioners chose significant presuit and arbitral benefits afforded to them by Florida's arbitration laws, rather than any benefits that might flow from following the FAA's rules. It was not until the Supreme Court of Florida determined, as a matter of state public policy, that Petitioners could not cherry-pick which portions of the Medical Malpractice Act to follow, that Petitioners claimed the protections of the FAA. But, as this Court explained in *Volt*, the FAA does not preempt state laws that the parties contractually agreed to follow. 489 U.S. at 470.

C. The Supreme Court of Florida properly held Petitioners to their contractual adoption of Florida's arbitration laws.

Despite invoking the Medical Malpractice Act and its physician-favorable provisions, the agreements do not accept the patient-favorable provisions that apply

during arbitration under the Medical Malpractice Act. App. 34-35. Rather, the agreements insert a series of provisions that conflict with the Medical Malpractice Act. *See Hernandez*, 211 So. 3d at 26-27; App. 14-16. These conflicting provisions created a tension in the agreements that the Supreme Court of Florida, as a matter of state law, had to resolve.

The Supreme Court of Florida resolved the internal inconsistency by determining that, if parties agree to abide by Florida's Medical Malpractice Act, then they must agree to *all* the Act's provisions. *Hernandez*, 211 So. 3d at 26-27; App. 14-17. Petitioners, however, misconstrue the opinion. They argue that, under the decision, all medical providers must arbitrate under the Medical Malpractice Act or not arbitrate at all. Pet. 3-4. This interpretation of the opinion is incorrect. To repeat, the Supreme Court of Florida merely held that *if medical providers expressly agree in their arbitration agreement to follow the Medical Malpractice Act*, then, as a matter of state law, they must follow all of the Act. *Hernandez*, 211 So. 3d at 26-27; App. 14-17. Medical providers could just as easily agree to arbitration contracts that do not incorporate the Medical Malpractice Act, in which case they are free to select the procedures and rules under which they arbitrate.

The decision below is consistent with this Court's holding in *Volt*, 489 U.S. at 468. There, the parties entered into an arbitration agreement that specified that it "would be governed by the law of the place where the project is located [California]." *Id.* at 472 (internal quotations omitted). Following a contract dispute, one party moved under a California statute to stay the arbitration pending resolution of related

litigation. *Id.* at 471. When asked to decide whether the FAA preempted the California statute, the Court ruled that the FAA merely required that arbitration agreements be placed on equal footing with other contracts. *Id.* at 478. Thus, where "parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Id*. at 479.

In line with *Volt*, the Supreme Court of Florida held the parties to their agreement, which adopted and incorporated Florida's arbitration laws, including the arbitration provisions of the Medical Malpractice Act. The court simply clarified that, as a matter of state law and public policy, if the parties are going to operate within the terms of the Medical Malpractice Act, they must submit to all of its requirements, not cherry-pick only the favorable provisions. *Hernandez*, 211 So. 3d at 26-27; App. 14-17. Because Petitioners agreed in their form arbitration agreements to select Florida's arbitration laws (not the FAA), they cannot ask this Court to use the FAA to invalidate the Supreme Court of Florida's interpretation of those state laws.

III. The FAA does not apply, and the petition should therefore be denied, because Petitioners made no showing below that the agreements evidence transactions involving interstate commerce.

Petitioners assume that the FAA covers the agreements. Putting aside that the agreements expressly adopt Florida arbitration laws (not the FAA), this assumption is wrong for the additional reason that the FAA applies only to "contract[s] evidencing a transaction involving commerce." 9 U.S.C. § 2. The

agreements here govern transactions between Florida pregnant women and their Florida obstetricians; these transactions are purely intrastate and personal. *See* Section III.A., *infra*. In addition, Petitioners presented no argument or evidence to the Florida courts demonstrating that the agreements affected interstate commerce. *See* Section III.B., *infra*.

A. The agreements do not evidence transactions involving interstate commerce.

To be included within the coverage of the FAA, an arbitration provision must be contained in a contract evidencing a transaction involving commerce. *See* 9 U.S.C. § 2; *e.g., Volt*, 489 U.S. at 471. As pertinent here, "commerce" means "commerce among the several States…." 9 U.S.C. § 1. This Court has interpreted these provisions as extending the FAA's application to what Congress may regulate under the Commerce Clause of Article I of the Constitution. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995).

Here, the transactions governed by the agreements – the relationship between Florida obstetricians and their Florida patients – were intrastate transactions. App. 2-9; Pet. 5. Although Congress can regulate activities that substantially affect interstate commerce, *U.S. v. Lopez*, 514 U.S. 549, 559 (1995), this standard should not be expanded to bring within its scope a purely intrastate and personal relationship between a doctor and a patient. To do so would make the "substantial effects" test a "rootless and malleable standard at odds with the constitutional design." *Am. Trucking Assns., Inc. v. City of Los Angeles, Cal.*, 133 S.

Ct. 2096, 2017 (2013) (Stevens, J., concurring) (citations omitted).

Rather, the "Constitution requires a distinction between what is truly national and what is truly local." *U.S. v. Morrison*, 529 U.S. 598, 617-18 (2000). The

> "scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively *obliterate the distinction between what is national and what is local* and create a completely centralized government.'"

Id. at 608 (quoting *Lopez*, 514 U.S. at 557) (emphasis added). The regulation of health matters "is primarily, and historically, a matter of local concern." *Hillsborough Cty., Fla. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 720 (1985).

While the power to regulate activities affecting interstate commerce may be expansive, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578–79 (2012), it goes too far to allow Congress, under the Commerce Clause, to regulate the personal, intrastate relationship between a pregnant woman and her obstetrician and the duties of care and professional competence that attach to that relationship. *See U.S. v. Oregon State Med. Ass'n*, 343 U.S. 326, 338 (1952) (district court did not err in finding that the sale of medical services within a given state is not commerce); *Lopez*, 514 U.S. at 590 (Thomas, J., concurring) ("The Founding Fathers confirmed that most areas of life

(even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government.").

Indeed, the Commerce Clause was not intended to give Congress authority to regulate commerce "which is carried on between man and man in a State." *Lopez*, 514 U.S. at 553 (quotation omitted). That is precisely the case here, where Florida physicians rendered obstetrical services in Florida to Florida patients. Thus, as a matter of law, the agreements do not evidence a transaction involving interstate commerce and are outside of the scope of the FAA. *See* 9 U.S.C. § 2; *see also KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011) (noting that the FAA applies to agreements to "arbitrate that fall within [its] scope and coverage").

B. Petitioners neither pleaded nor proved that the agreements affect interstate commerce.

At a minimum, Petitioners' failure to invoke the FAA in the trial court, and their consequent failure either to allege or establish the commerce nexus that is the predicate for its application, precludes this Court from finding that the agreements affect interstate commerce. Whether a contract covers a transaction having a substantial effect on interstate commerce is a factual determination that must be made in the trial court. *See Katzenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (parties developed a factual record that a substantial portion of food served in restaurant had moved in interstate commerce).

As a result of Petitioners' failure to raise FAA preemption below, the record contains neither evidence nor findings of fact that the agreements applied to transactions in interstate commerce as opposed to the intrastate provision of obstetrical services. The absence of any factual findings that the agreements related to transactions involving interstate commerce precludes this Court from determining that the FAA even applies. *See Wright v. New Jersey*, 469 U.S. 1146, 1153 n.8 (1985) (this Court cannot make factual findings in the first instance).

This Court reached the identical conclusion in *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 199 (1956). There, a New York resident entered into an employment contract with a New York corporation, in New York. Even though the employee moved to Vermont to perform under the agreement, there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." *Id.* at 199, 200-01. In the absence of such a showing, this Court held that the FAA was inapplicable. *Id.* at 200-01. The same result must obtain here: in the absence of any factual record showing that the obstetrical agreement between Florida doctors and their Florida patients governs an activity affecting commerce, this Court cannot conclude that the FAA applies to the agreements.

IV. The petition should be denied because, as Justice Thomas has opined, the FAA does not apply in state courts.

Although the FAA was enacted in 1925, the first time this Court declared it to be a substantive law applicable to the states was in 1984. *See Southland Corp.*, 465 U.S. at 11. Justice O'Connor, joined by Justice Rehnquist, dissented in *Southland*, persuasively opining that "Congress viewed the FAA as a procedural statute, applicable only in federal courts." *Id.* at 25 (O'Connor, J., dissenting). Indeed, in 1925, it was well-established that "'the enforcement of arbitration contracts [was] within the law of procedure as distinguished from substantive law.'" *Id.* at 26 (O'Connor, J., dissenting) (citation omitted).

Drawing on Justice O'Connor's dissent, Justice Thomas has consistently and repeatedly dissented from this Court's FAA decisions, arising out of state courts, on the ground that the FAA does not apply to proceedings in state courts. *E.g., Kindred*, 137 S. Ct. at 1429-30 (2017) (Thomas, J., dissenting); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting); *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting). In *Allied-Bruce*, 513 U.S at 287–88, Justice Scalia also joined in Justice Thomas's dissent, agreeing that *Southland* (in which he had joined the majority opinion), "clearly misconstrued the Federal Arbitration Act." *Id.* at 284 (Scalia, J., dissenting). Justice Thomas further expanded on Justice O'Connor's reasoning in *Allied-Bruce*, writing that an "arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of

disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance." *Id.* at 288. Thus, where "a contractual provision deals purely with matters of judicial procedure, one might well conclude that questions about whether and how it will be enforced also relate to procedure." *Id.* Because Congress cannot regulate state courts' modes of procedure, the FAA cannot be applicable in state courts. *Id*. at 287-88.

Although a majority of this Court has declined to overrule *Southland*, the logic for doing so is compelling. If certiorari is granted, Respondents will expressly ask this Court to overrule *Southland* and adopt Justice Thomas's dissenting opinions. Even assuming the majority were to adhere to its view that the FAA applies in state courts, Justice Thomas's recent dissenting opinions make clear that he will continue to vote for merits dispositions that reflect his "view that the [FAA] does not apply to proceedings in state courts." *Kindred*, 137 S. Ct. at 1429. Justice Thomas's adherence to that view increases the likelihood that, even if the Court were to view this case as properly presenting some FAA preemption issue, no resolution of that issue would command a majority of the Court. The resulting likelihood of an indecisive resolution is yet another reason why the Court should deny the petition.

V. This case would be a poor vehicle for resolving whether the FAA preempts Florida's malpractice and arbitration laws, and in any event, such an issue does not merit resolution by this Court.

This case would be a poor vehicle for attempting to address the relationship between the FAA and state malpractice and arbitration laws. By drafting an agreement that incorporated *state* arbitration laws, and then failing to present any FAA arguments to the state courts, Petitioners created a case that could not be more poorly suited to the clean presentation of a federal-law issue. In the future, other Florida litigants may avoid these deficiencies and challenge on federal grounds the Supreme Court of Florida's interpretation of Florida's arbitration laws, or litigants raising similar issues as to laws of other states may present a fully fleshed-out FAA argument. Then, the state or lower federal courts will be presented with fully developed arguments on the federal question, and, ultimately, this Court may receive the benefit of a carefully considered decision from a lower appellate court based on a well-developed record. But this Court should not act on this case, given all of the deficiencies in Petitioners' presentation of the issue and the serious threshold questions as to whether the FAA is even applicable.

Additionally, even if the FAA applied, and Petitioners had preserved an FAA argument, the question whether the FAA preempts features specific to Florida's malpractice and arbitration laws would not merit review. Petitioners cite no decisions at any level holding that the FAA allows medical providers to

selectively excuse themselves from state laws governing malpractice claims by drafting arbitration agreements that incorporate only those parts of the laws that they favor. In particular, even though the Supreme Court of Florida addressed the relationship between the FAA and Florida malpractice and arbitration laws more than four years ago, *see Franks*, 116 So. 3d at 1249–50, Petitioners do not cite a single federal appellate or state supreme court decision from any jurisdiction that disagrees with, criticizes, or questions that ruling—because there are no such decisions. Absent any division of authority over the FAA preemption question, it remains as unworthy of review as it was when this Court denied review in *Franks* in 2013. 134 S. Ct. 683.

Given the proliferation of state laws addressing dispute resolution in medical malpractice cases, there may be opportunities for related issues to arise in many jurisdictions if medical providers seek to rely on the FAA to escape provisions of the laws they dislike. Conversely, it may be that differences among state laws are such that the issue Petitioners seek to present is limited to Florida and lacks any broader significance. In any event, if a division of authority over FAA preemption eventually arises, an issue meriting review by this Court may present itself. Until then, however, it would be premature for this Court to step in and, potentially, thwart innovative state efforts to address ongoing debates over the best means of addressing malpractice claims.

VI. This Court should not grant, vacate, and remand for reconsideration in light of *Kindred*.

This Court should not grant the petition, vacate the decision below, and remand for reconsideration (GVR) in light of the recent decision in *Kindred*. 137 S. Ct. at 1421. In an appropriate case, a GVR order "conserves the scarce resources of this Court" and "assists the court below by flagging a particular issue that it does not appear to have fully considered." *Lawrence v. Charter*, 516 U.S. 604, 606 (1996); *see also Stutson v. U.S.*, 516 U.S. 193, 197 (1996) (reasoning that a GVR order allows a lower court "to consider potentially relevant decisions and arguments that were not previously before it."). But a GVR order is only beneficial where it is reasonably probable "that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 606.

A GVR order is not appropriate here because the Supreme Court of Florida has already had the opportunity to reconsider its decision in light of *Kindred*, and because *Kindred* would not change the outcome of the decision below. The *Crespo* Petitioners moved the Supreme Court of Florida to recall its mandate and conform its decision to *Kindred*. Resp't App. 15-25. Respondents filed an opposition, explaining why the decision below is not in conflict with *Kindred*, and also pointing out that Petitioners did not preserve the FAA preemption argument. Resp't App. 26-40. The Supreme Court of Florida denied the motion to recall mandate. Resp't App. 41. Because the Supreme Court of Florida did have the opportunity to consider the

impact of *Kindred*, this Court should not direct the Supreme Court of Florida to expend its time considering it a second time.

Moreover, assuming that the FAA applies and Petitioners did not waive their preemption argument, this Court specifically stated in *Kindred* that it was not announcing new law. *See id.* at 1428 n.2; Resp't App. 29. The Court also noted, "[w]e do not suggest that a state court is precluded from announcing a new, generally applicable rule of law in an arbitration case. We simply reiterate here what we have said many times before – that the rule must in fact apply generally, rather than single out arbitration." *Id.* Because the Supreme Court of Florida invalidated Petitioners' agreement on public policy grounds, just as Florida courts have invalidated numerous non-arbitration agreements, the decision would not be in conflict with *Kindred* even if it were based on the FAA rather than on the court's reconciliation of Florida's malpractice and arbitration law. Resp't App. 33; *e.g., Am. Cas. Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957, 958 (Fla. 1989) (holding that a construction contract waiving a statutory bond requirement enacted for the public's benefit is void as against public policy). In light of *Kindred*'s general affirmance of FAA law, with which the decision below is consistent, there is no reasonable probability that the court would reverse itself if directed to *again* consider the impact of *Kindred* on its holding.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 22, 2017

APPENDIX

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APPENDIX 1

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-67
L.T. Case No. 5D14-0759

[Filed January 25, 2017]

EILEEN HERNANDEZ, M.D. AND WOMEN'S CARE FLORIDA, LLC D/B/A PARTNERS IN WOMEN'S HEALTHCARE, Petitioners,	)
v.	)
LUALHATI CRESPO and JOSE CRESPO, Respondents.	)

RESPONDENTS' RESPONSE OPPOSING PETITIONERS' MOTION FOR REHEARING

Nothing in this Court's Opinion runs afoul of the Federal Arbitration Act or the state or federal constitutions. In addition, Petitioners' rehearing arguments were never raised previously in this litigation, and thus they have been waived. Accordingly, the Court should deny the motion for rehearing.

ARGUMENT

I. The Federal Arbitration Act does not preempt the Florida Medical Malpractice Act or this Court's opinion.

Petitioners' newly-minted argument – that the Federal Arbitration Act (FAA) preempts this Court's interpretation of the Medical Malpractice Act (MMA) – is meritless. In a form agreement drafted by one of the Petitioners, Petitioners expressly agreed to be bound by the Florida MMA and the Florida Arbitration Code. (Appx. 34-35.) The Court correctly concluded that, notwithstanding the Florida Arbitration Code, medical providers who contractually agree to be bound by the MMA must accept all the MMA's terms, not merely cherry-pick those terms favorable to providers. (Op. 11-15.) The Opinion does not compel every medical malpractice arbitration agreement be arbitrated under the MMA rules. (*Contra* Mot. 3-4.)

A. Petitioners agreed the Florida MMA would govern their arbitration agreement.

The Agreement provides, in pertinent part:

> 5. ARBITRATION PROCEDURES. The parties agree and recognize that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the parties and/or claimant(s) in all respects except that at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate under Florida Statutes, 766.105 or 766.207, the parties and/or

> claimant(s) shall resolve any claim through arbitration pursuant to this Agreement ….
>
> 8. APPLICABLE LAW. Except as herein provided, the arbitration shall be conducted and governed by the provisions of the Florida Arbitration Code, Florida Statutes, Section 682.01 et seq. … In conducting the arbitration under Florida Statutes, Section 682.01 et seq., all substantive provisions of Florida law governing medical malpractice claims and damages related thereto, including but not limited to, Florida's Wrongful Death Act, the standard of care for medical providers, caps on damages under Florida Statutes 766.118, the applicable statute of limitations and repose as well as the application of collateral sources and setoff shall be applied. ….

(Appx. 34-35.)

Thus, the Agreement: (i) expressly adopts the MMA and the Florida Arbitration Code and (ii) does not mention the Federal Arbitration Act. (Appx. 34-36.) When parties agree to be bound by state law, the FAA does not preempt that state law. *See Volt Info Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 470 (1989) ("application of the California statute is not pre-empted by the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.,* in a case where the parties have agreed that their arbitration agreement will be governed by the law of California.") (Emphasis added). This is because "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333, 351 (2011).[1] Here, the parties agreed to be governed by the MMA. (Appx. 34-35.) Nevertheless, the Agreement also inserted a series of provisions that conflict with the MMA. (*See* Op. 13-14.) These conflicting provisions created a tension in the Agreement that this Court, as a matter of state law, had to resolve. Ordinarily, under the FAA, deference is given to a state court's interpretation of an arbitration agreement. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).

This Court resolved the internal inconsistency in the Agreement by determining that, if parties agree to abide by Florida's MMA, then they must agree to <u>all</u> the MMA's provisions. (Op. 11-15.) Petitioners, however, misconstrue this Court's Opinion. They argue on rehearing that, under this Court's Opinion, all medical providers must arbitrate under the MMA or not arbitrate at all. (Mot. 3-4.) This is incorrect. To repeat, the Court merely held that <u>if medical providers expressly agree in their arbitration agreement to follow the MMA</u>, then, as a matter of state law, they must follow all of the MMA. (Op. 11-15.) Medical providers could just as easily agree to arbitration contracts that do not incorporate the MMA, in which case they are free to select the procedures and rules under which they arbitrate.

Because the Opinion allows parties to set their own procedures for medical malpractice arbitration, it does not run afoul of the FAA. Stated another way, the Opinion does not require "a procedure that is

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[1] Justice Scalia in *Concepcion*'s majority opinion expressly cited *Volt* with approval. 563 U.S. at 344.

inconsistent with the FAA," or that is "an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343, 351, 352. Nor does the Opinion disregard the U.S. Supreme Court's command that courts may not rely on the unique nature of arbitration agreements as a basis for invalidating them. *See id.* at 341.

In fact, the Court's holding is consistent with the Supreme Court's decision in *Volt*, 489 U.S. at 468. There, the parties entered into an arbitration agreement that specified that it "would be governed by the law of the place where the project is located [California]." *Id.* at 472 (internal quotations omitted). Following a contract dispute, one party moved under a California statute to stay the arbitration pending resolution of related litigation. *Id.* at 471. When asked to decide whether the FAA preempted the California statute, the Court ruled that the FAA merely required that arbitration agreements be placed on equal footing with other contracts. *Id.* at 478. Thus, where "parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Id*. at 479.

In line with *Volt*, this Court held the parties to their agreement, which adopted and incorporated the MMA. The Court simply clarified that, as a matter of state law and public policy, if the parties are going to operate within the terms of the MMA, they must submit to all of the MMA requirements, and they may not cherry-pick only the favorable provisions. (Op. 11-15.) The question, then, is whether the Opinion "places arbitration contracts 'on equal footing with all other

contracts.'" *DIRECTV, Inc.*, 136 S.Ct. at 468. The answer is "yes." This Court has struck non-arbitration contracts as being void against public policy when the contract terms conflict with statutes enacted for the benefit of the public. *See Am. Cas. Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957, 958 (Fla. 1989) (party to a non-arbitration contract cannot waive statutory requirement enacted for the public's benefit); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971) (finding void an insurance contract that attempted to limit uninsured motorist coverage required by statute).

In summary, the Opinion and this Court's interpretation of the MMA is not preempted by the FFA.

B. Respondents preserve for review in the U.S. Supreme Court the argument that the FAA does not apply to state court proceedings.

Although enacted in 1925, the first time the Supreme Court declared the FAA to be a substantive law applicable to the states was in 1984. *See Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). Justice O'Connor, joined by Justice Rehnquist, dissented in *Southland*, persuasively opining that "Congress viewed the FAA as a procedural statute, applicable only in federal courts." *Id.* at 25 (O'Connor, J., dissenting). Indeed, in 1925, it was well-established that "'the enforcement of arbitration contracts [was] within the law of procedure as distinguished from substantive law.'" *Id.* at 26 (O'Connor, J., dissenting) (quoting Committee on Commerce, Trade and Commercial Law,

The United States Arbitration Law and its Application, 11 A.B.A.J. 153, 156 (1925)).

Drawing on Justice O'Connor's dissent, Justice Thomas has consistently and repeatedly dissented from FAA decisions on the grounds that the FAA "does not apply to proceedings in state courts." *See, e.g., Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting). In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 287–88 (1995), Justice Scalia also joined in Justice Thomas's dissent, agreeing that *Southland* (in which he joined the majority opinion), "clearly misconstrued the Federal Arbitration Act." *Id.* at 284 (Scalia, J., dissenting). Justice Thomas further expanded on Justice O'Connor's reasoning in *Allied-Bruce*, writing that an "arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance." *Id.* at 288. Thus, where "a contractual provision deals purely with matters of judicial procedure, one might well conclude that questions about whether and how it will be enforced also relate to procedure." *Id.* Because it is settled law that Congress cannot regulate state courts' modes of procedure, the FAA cannot be applicable in state courts. *Id*. at 287-88.

Although a majority of the Supreme Court has declined to overrule *Southland*, the logic for doing so is compelling. Respondents preserve the argument that the FAA does not apply to this state court proceeding in the event Petitioners ultimately seek review of the Opinion in the U.S. Supreme Court.

II. The Court's interpretation of the MMA does not unconstitutionally impair contracts.

Contrary to Petitioners' assertions, the Court's Opinion does not "invalidate every contractual agreement in a medical malpractice case that does not incorporate every single substantive provision of the MMA." (Mot. 11; *see supra* at 3-4.) Accordingly, the premise underlying Petitioners' impairment of contracts argument is flawed. Moreover, under the three-step Contract Clause analysis specified by the U.S. Supreme Court, this Court's Opinion does not unconstitutionally impair Floridians' right to contract.

In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), the U.S. Supreme Court articulated the analysis necessary to resolve Contract Clause claims. First, a court must determine "'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Id.* at 411. Second, "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as remedying of a broad and general social or economic problem." *Id.* at 411-12 (internal citation omitted). Finally, if a "legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* at 412 (citation omitted).

Petitioners cannot meet the threshold inquiry of whether a state law has impaired a contractual relationship for two reasons: (1) the Agreement is not

a valid contract; and (2) the MMA is not a subsequent law, but existed at the time the parties entered the Agreement.

First, the Contract Clause will not be read to preclude impairment of a contract unless a valid contract exists. "In order for this constitutional restriction to come into play, there must be a lawful contract." *R.A.M. of S. Fla., Inc. v. WCI Comm., Inc.*, 869 So. 2d 1210, 1219 n.3 (Fla. 2d DCA 2004). In *R.A.M.*, then-Judge Canady explained that contracts that run afoul of public policy designed for the public welfare are void and unenforceable. *Id.* When a contract is void as against public policy, there is "no obligation of contract to impair." *Id.* Thus, because the Agreement here is void as against public policy, this Court's Opinion cannot impair the Agreement.

Second, the Contract Clause applies only where a subsequent law impairs the value of a contract. *See Scott v. Williams,* 107 So. 3d 379, 385 (Fla. 2013); *Cohn v. Grand Condo. Ass'n, Inc.*, 62 So. 3d 1120, 1122 (Fla. 2011); *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1080 (Fla. 1978); *Springer v. Colburn*, 162 So. 2d 513, 515 (Fla. 1964). Thus, the Legislature may not change the terms of a parties' contract through retroactive application of new laws without the courts applying Contract Clause scrutiny. *See General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992); *Cohn*, 62 So. 3d at 1121-22. But the Legislature may exercise its police powers prospectively without any Contract Clause implications. *See Yamaha Parts Distribs. Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975). Here, the MMA, along with its statement of public policy, was enacted well before the parties signed the Agreement.

See 2003 Fla. Sess. Law Serv. Ch. 2003-416 (enacting current version of the MMA); Appx. 118 (Agreement signed in 2011). Accordingly, because the MMA and its statements of public policy existed well before the parties signed the Agreement, it is not a subsequent law that triggers Contract Clause scrutiny.

For either of these reasons, standing alone, Petitioners cannot satisfy the threshold step of the Contract Clause analysis.

Even if Petitioners were to satisfy the first prong of the Contract Clause inquiry (which they cannot), the State has a "significant and legitimate public purpose behind the regulation." *Energy Reserves*, 459 U.S. at 411-12. The Court accepted the Legislature's statement in the preamble to the MMA that a medical malpractice crisis in Florida constitutes an overpowering public necessity. (Op. 9 (citing *Franks*, 116 So. 3d at 1247).) "To achieve the explicit purpose of remedying the medical malpractice insurance crisis, the Legislature specifically created the MMA statutory scheme." (Op. 9.) That scheme includes a comprehensive set of dispute-resolution procedures, including pre-suit notice and incentives to participate in MMA arbitration. *See* §§ 766.201, 766.203-.211, Fla. Stat. (2011). The Legislature deemed both components of the MMA necessary to alleviating the medical malpractice crisis, believing these measures would reduce attorneys' fees, litigation costs, and delay. (Op. 11; § 766.201, Fla. Stat. (2011).)

Because the State has a legitimate public purpose behind the MMA, under the third-prong of the *Energy Reserves* inquiry, the Court must determine whether the adjustment of the contractual terms "[is based]

upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves Group*, 459 U.S. at 412*; see also Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1979) (recognizing a "balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective."). Petitioners claim that the Opinion is counterintuitive because it impairs contractual agreements that allegedly would further the MMA's objectives of reducing fees, litigation costs, and delay. (Mot. 13.) Because of the alleged irony, Petitioners claim the Opinion represents an unreasonable, and unconstitutional, intrusion into the parties' bargain. (Mot. 14.)

However, the Agreement at issue does not further the MMA objectives because it does not include the MMA arbitration requirements – such as the admission of liability and controlled arbitrator costs – that reduce costs and delay. *See* § 766.207(2),(6), Fla. Stat. (2011). Rather, the Agreement requires patients to go through the costly and time-consuming pre-suit process and then proceed to a costly and time-consuming arbitration. *See* Appx. 62-63. By cherry-picking the expensive and lengthy dispute-resolutions that are favorable to medical providers under the MMA, but requiring patients to arbitrate outside of the patient-favorable MMA terms by their unilateral decision to reject MMA arbitration, the Agreement runs afoul of the State's legitimate interest in reducing fees, costs,

and delay in medical malpractice litigation. Thus, by holding that where a medical malpractice agreement incorporates the MMA, it must adopt all of the MMA terms, the Court appropriately upheld the public policy behind the MMA in the least restrictive means.

III. The Court should decline to consider new issues not previously raised on appeal.

In addition to the reasons argued *supra*, the Court should deny the rehearing motion because Petitioners did not previously raise these arguments in this Court, the Fifth District Court of Appeal, or the trial court. *See* Rule 9.330(a) ("A motion for rehearing . . . shall not present issues not previously raised in the proceeding." (emphasis added)). Petitioners' argument – that the issues "could not reasonably have been fully anticipated until following the Opinion's issuance" (Mot. 15) – is meritless. Petitioners were, or should have been, on notice of these arguments during the litigation.

Specifically, from as early on as the trial court, the arguments concerning the enforceability of the arbitration agreement turned on the parties' interpretation of *Franks*, 116 So. 3d at 1240. (Appx. 39, 101-10.) *Franks* contains a section explaining why the FAA does not preclude the finding expressed therein. *Id.* at 1249-51. Yet, despite this express notice that the FAA may have some application to these facts, Petitioners never raised the issue in the trial court, the Fifth District Court of Appeal, or this Court. Respondents even pointed out Petitioners' lack of reliance on the FAA in their brief before this Court. (*See* Resp. Ans. Br. at 27 n.7.)

Petitioners' failure to invoke the FAA in the trial court should preclude reliance on it now because they failed to develop a factual record to support the application of the FAA. "To be included within the coverage of the [FAA], an arbitration provision must be contained in a 'contract evidencing a transaction involving commerce,' 9 U.S.C. § 2." *E.g., Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984). This interstate-commerce determination is a factual one that must be made in the trial court. *See id.* at 109. Petitioners failed to establish any facts in the record suggesting that the Agreement applied to a transaction in interstate commerce as opposed to the provision of medical services by Florida physicians to their Florida patient. The absence of any factual findings by the trial court that the Agreement related to a transaction in interstate commerce precludes this Court from determining that the FAA even applies. *Id.*; *see also Features Props., LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. 1st DCA 2011) (appellate court cannot make factual findings in the first instance).

Similarly, because the entire appeal involved the question of the enforceability of an arbitration contract, Petitioners should have been aware that the case potentially impacted their constitutional rights to freely contract. Their failure to raise these issues cannot be excused; raising new issues for the first time on rehearing is improper. *See, e.g., Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th DCA 2004) (recognizing impropriety of raising new arguments in a petition for rehearing). Accordingly, this Court should decline to consider the new issues raised by Petitioners in their motion for rehearing.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Petitioners' motion for rehearing.

Respectfully submitted,

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[*Certificate of Service Omitted in Printing of this Appendix*.]

APPENDIX 2

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-67
L.T. Case No. 5D14-0759

[Filed July 3, 2017]

EILEEN HERNANDEZ, M.D. and WOMEN'S CARE FLORIDA, LLC d/b/a PARTNERS IN WOMEN'S HEALTHCARE, Petitioners,	)
v.	)
LUALHATI CRESPO and JOSE CRESPO, Respondents.	)

PETITIONERS' MOTION TO RECALL THE MANDATE

Petitioners, EILEEN HERNADEZ, M.D. and WOMEN'S CARE FLORIDA, LLC d/b/a PARTNERS IN WOMEN'S HEALTHCARE, respectfully move this Court to recall its mandate to conform the Court's disposition of this case with the United States Supreme Court's recent decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017).[1]

[1] A copy of the *Kindred Nursing* decision is attached to this motion.

INTRODUCTION

In this case, the Court effectively held that all contractual arbitration agreements between a patient and a physician are void as against public policy unless they include each and every substantive aspect of the voluntary binding arbitration provisions found in the Medical Malpractice Act (MMA), Florida Statutes, Chapter 766. *See Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016). However, in *Kindred Nursing*, the U.S. Supreme Court emphasized that courts cannot single out arbitration agreements for "disfavored treatment" or "selectively refus[e] to enforce [arbitration] agreements once properly made." 137 S. Ct. at 1428. It is respectfully submitted that this Court's opinion inexorably conflicts with *Kindred Nursing*, a defect which this Court has the power to correct under Section 43.44 of the Florida Statutes by recalling its mandate and conforming its decision to binding U.S. Supreme Court precedent.

BACKGROUND

This case involves the issue of whether or not an arbitration agreement entered into between Mrs. Crespo and Women's Care Florida is enforceable. The arbitration agreement indicated that it would only apply "at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate under Florida Statutes, 766.106 or 766.207." *Hernandez*, 211 So. 3d at 22. The agreement thus specified that "any demand for arbitration shall not be made until the conclusion of the pre-suit screening period under Florida Statutes, Chapter 766." *Id.* The substantive and procedural terms of the arbitration agreement executed by Women's Care Florida and Mrs.

Crespo differed in several respects from the statutory arbitration provisions contained in the MMA, and in particular did not require Women's Care Florida to concede liability. *See id.* at 26-27.

In *Hernandez*, this Court found the agreement to be void as against public policy. *Id.* at 27. Specifically, this Court held that all arbitration agreements in Florida between patients and physicians "which change the cost, award and fairness incentives of the MMA statutory provisions" are "void as against public policy." *Id.* As a practical matter, following this Court's decision, patients and physicians in Florida cannot craft arbitration agreements that differ in any substantive way from the statutory scheme, even if they are written so as to apply only after the pre-suit period under the MMA has passed.

Petitioners filed a motion for rehearing, taking the position that this Court's expansive application of state public policy to invalidate the Women's Care Florida arbitration agreement led to an inexorable conflict with the Federal Arbitration Act (FAA), resulting in federal preemption. In particular, petitioners argued that the *Hernandez* opinion violated the central purpose behind the FAA of ensuring "the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). On February 27, 2017, this Court ultimately denied petitioners' motion without comment or elaboration. This Court's mandate then issued on March 24, 2017.

On May 15, 2017, the U.S. Supreme Court issued its decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). In

Kindred Nursing, the Kentucky Supreme Court had invalidated an arbitration agreement based on the application of a common law rule, and claimed that its holding avoided FAA preemption because it purportedly did not "single out arbitration agreements." *Id.* at 1426. The U.S. Supreme Court disagreed and found the application of Kentucky public policy to be preempted. *See id.* at 1426-27. The Court found preemption because Kentucky's rule undermined arbitration agreements in contravention of the FAA by discriminating against such agreements and refusing to enforce the terms of such agreements as written. *See id.*[2]

ARGUMENT

A. This Court has the authority to recall its mandate.

Section 43.44 of the Florida Statutes, effective as of January 1, 2014, states that "[a]n appellate court may, as the circumstances and justice of the case may require, reconsider, revise, reform, or modify its own opinions and orders for the purpose of making the same accord with law and justice." § 43.44, Fla. Stat. (2013).

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[2] In addition to seeking a recall of the mandate through this motion, petitioners have also filed a petition for a writ of certiorari with the United States Supreme Court on the basis that this Court's opinion in *Hernandez* is preempted by the FAA and U.S. Supreme Court precedent, including the recent *Kindred Nursing* decision. *See* U.S. Supreme Court Case No. 16-1458. The response to the petition will be filed in August, and then the parties will await the U.S. Supreme Court's determination on jurisdiction in the autumn. However, there is no reason why this Court cannot proactively address the FAA preemption issue by granting this motion.

The statute clarifies that "an appellate court may recall its own mandate for the purpose of allowing it to exercise such jurisdiction and power in a proper case." *Id.* The deadline for recalling a mandate is "120 days after it has been issued." *Id.*; *see also* Fla. R. Jud. Admin. 2.205(b)(5) ("If, within 120 days after a mandate has been issued, the court directs that a mandate be recalled, then the clerk shall recall the mandate."). This Court has confirmed that the new statute "allows an appellate court to recall its own mandate within 120 days after the mandate has been issued." *In re Amendments to Florida Rules of Judicial Admin. & Florida Rules of Appellate Procedure*, 125 So. 3d 743 (Fla. 2013).

The mandate in this case issued on March 24, 2017. The 120-day period for action by this Court ends on July 24, 2017. Thus, while this motion is timely based on Section 43.44, this Court must act promptly in recalling the mandate to ensure the proper administration of justice.

B. <u>"Law and justice" support recalling this Court's mandate.</u>

This Court's opinion in *Hernandez* no longer "accord[s] with law and justice" following the U.S. Supreme Court's decision in *Kindred Nursing*, with which *Hernandez* is in direct conflict. *Kindred Nursing* emphasized that courts cannot invalidate otherwise valid arbitration agreements based on the mere fact that "an agreement to arbitrate is at issue." 137 S. Ct. at 1426.

The U.S. Supreme Court condemned the discriminatory application of state law to undermine

arbitration agreements in contravention of the FAA, which is at odds with the FAA's mandate that "parties are generally free to structure their arbitration agreements as they see fit." *Id.*; *see also Volt*, 489 U.S. at 479. The Court in *Kindred Nursing* further stressed that the FAA creates an "equal-treatment principle" that not only prevents courts from invalidating arbitration agreements based on legal rules that "apply only to arbitration…," but also based on any rule that "covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining feature of arbitration agreements." 137 S. Ct. at 1426. In other words, any attempt to single out arbitration agreements for disfavored treatment is preempted by the FAA under *Kindred Nursing*.

Respectfully, the *Hernandez* decision represents the very kind of discrimination against arbitral contracts that *Kindred Nursing* forbids, bringing the two decisions into conflict and necessitating recall of the mandate in this case. Mrs. Crespo agreed that all disputes arising out of the medical care provided by Women's Care Florida would be subject to binding arbitration under the terms and conditions set forth in the parties' agreement, ***after*** the statutory presuit period had ended ***and*** conditioned on the parties' declination of the statutory voluntary presuit arbitration. But this Court nonetheless declined to enforce the agreement as written, holding that ***any*** medical malpractice arbitration agreement that differed in any substantive way from the statutory scheme, even one explicitly made applicable only after the statutory scheme had expired, violated public policy and was void and invalid.

This application of state public policy unmistakably violated the U.S. Supreme Court's exhortation that courts cannot "selectively refus[e] to enforce [arbitration] agreements once properly made," *Kindred Nursing*, 137 S. Ct. at 1428. Moreover, this Court held that ***all*** arbitration agreements "which change the cost, award and fairness incentives of the MMA statutory provisions" are void and invalid. *Hernandez*, 211 S. 3d at 27. As elucidated in *Kindred Nursing*, this runs directly contrary to the FAA, which consistently preempts judicial rules which nullify otherwise valid arbitration agreements based on grounds that derive their sole bases from the fact that "an agreement to arbitrate is at issue." *Kindred Nursing*, 137 S. Ct. at 1426.

After *Hernandez* it is hard to imagine ***any*** private arbitration agreement in a medical malpractice case that could possibly be crafted that would not be voided if it varied in even the slightest way from the MMA's scheme. Indeed, even an arbitration agreement entered into between a physician and a patient after the statutory presuit phase had already concluded would be null and void under *Hernandez*. In essence, medical malpractice defendants are now required to admit liability as a precondition to enjoying the right to enter into private arbitration agreements with their patients, which represents a discriminatory attack against such agreements. As a result, this Court in *Hernandez* has "single[d] out arbitration agreements for disfavored treatment," in violation of the FAA and U.S. Supreme Court precedent. *Kindred Nursing*, 137 S. Ct. at 1427.

The recent *Kindred Nursing* opinion issued by the U.S. Supreme Court confirms that *Hernandez* runs

afoul of the FAA and is preempted, as petitioners argued in their motion for rehearing.[3] As set out in that motion, this Court's broad interpretation of the MMA in *Hernandez* cannot coexist with the FAA and U.S. Supreme Court precedent, and is therefore preempted under federal law. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (vacating decision by West Virginia Supreme Court which declined to enforce arbitration agreement between nursing home and patient's family members "as a matter of public policy under West Virginia law"); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 351 (2011) (invalidating a state judicial rule that "interfere[d] with fundamental attributes of arbitration and thus creates a schemed inconsistent with the FAA," and concluding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"); *Volt*, 489 U.S. at 479 (holding that "parties are generally free to structure their arbitration agreements as they see fit" and must be able to "specify by contract the rules under which [their] arbitration will be conducted"); *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 221 (1985) (holding that courts must "rigorously enforce"

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[3] This Court's earlier denial of petitioners' motion for rehearing does not impact the merits of recalling the mandate under Section 43.44. First, the order denying rehearing is silent as to the basis of that denial, and therefore could have been based on grounds other than the merits of the FAA preemption argument. Second, at the time petitioners' motion was denied, this Court did not have the benefit of the *Kindred Nursing* decision, which as described is on point and directly conflicts with the *Hernandez* opinion, providing compelling support for altering the opinion that was not as apparent at the rehearing stage.

arbitration agreements according to their terms). The *Kindred Nursing* decision reinforces that "law and justice" require the recall of the mandate to allow this Court to revise its opinion so as to conform to this controlling federal law.[4]

Allowing the *Hernandez* opinion to stand when it unmistakably conflicts the U.S. Supreme Court's recent decision in *Kindred Nursing* does not "accord with law and justice." § 43.44, Fla. Stat. (2013). This Court should recall the mandate to correct its application of public policy so that it remains in compliance with FAA mandates, and conforms to *Kindred Nursing*. This is a "proper case" under Section 43.44 for the court to exercise its power and authority to recall its mandate to make it consistent with controlling law from a higher court. *See, e.g.*, *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965) (citing "clear example" to recall mandate in light of "an intervening decision by a higher court contrary to the decision reached"); *Jerry v. State*, 174 So. 2d 772, 773 (Fla. 2d DCA 1965) (concluding it was "necessary that the mandate be recalled and set aside" to "conform the rulings of the court in this case" to a "recent decision" of a higher court and issue a new opinion "as may be proper under the circumstances").

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[4] Petitioners are aware that this Court denied a motion to reinstate an appeal involving very similar issues following the issuance of *Kindred Nursing*, after this Court had previously declined jurisdiction based on *Hernandez*. *See Kindred Hospitals East, LLC v. Estate of Marianne Klemish*, Florida Supreme Court Case No. SC16-1353. However, the legal standards applied to reinstating a dismissed appeal and recalling a mandate are completely different, rendering this Court's decision to deny reinstating the appeal in *Klemish* inapplicable to the issues addressed in this motion.

CONCLUSION

Based on the foregoing reasons and authority, Petitioners respectfully request that this Court (1) recall its mandate in this case, (2) "reconsider, revise, reform or modify" its disposition in this case, (3) issue a revised opinion following *Kindred Nursing* and other binding federal precedent on FAA preemption, and (4) direct the trial court to order dismissal of the underlying litigation in favor of binding arbitration under the parties' contractual agreement. Petitioners remind the Court that the 120-day period in which to recall the mandate will expire on July 24, 2017, and respectfully ask the Court to grant the motion prior to the expiration of that period.

Respectfully submitted,

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[*Certificate of Service Omitted in Printing of this Appendix*.]

APPENDIX 3

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-67
L.T. Case No. 5D14-0759

[Filed July 10, 2017]

EILEEN HERNANDEZ, M.D. AND WOMEN'S CARE FLORIDA, LLC D/B/A PARTNERS IN WOMEN'S HEALTHCARE, Petitioners,	)
v.	)
LUALHATI CRESPO and JOSE CRESPO, Respondents.	)

RESPONDENTS' RESPONSE OPPOSING PETITIONERS' MOTION TO RECALL THE MANDATE

Nothing in this Court's Opinion runs afoul of the Federal Arbitration Act (FAA) or the U.S. Supreme Court's recent decision in *Kindred Nursing Homes Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). Indeed, the FAA is not discussed in this Court's Opinion because Petitioners never argued the FAA in this Court or any lower court until after the Opinion was issued; this belated argument was clearly untimely

and insufficient to preserve any FAA claim. Moreover, the FAA does not apply to the arbitration agreement here. Accordingly, the Court should deny Petitioners' motion to recall the mandate.

ARGUMENT

I. Introduction

Petitioners' motion is hinged on the faulty premise that this Court "effectively held that all contractual arbitration agreements between a patient and a physician are void as against public policy unless they include each and every substantive aspect of the voluntary binding arbitration provisions found in the Medical Malpractice Act (MMA)." (Mot. 2.) This is incorrect. Here, in a form Agreement drafted by one of the Petitioners, Petitioners expressly agreed to be bound by the Florida MMA and the Florida Arbitration Code. (Appx. 34-35.) The Court correctly concluded that, notwithstanding the Florida Arbitration Code, medical providers who contractually agree to be bound by the MMA must accept all the MMA's terms, not merely cherry-pick those terms favorable to providers. *Hernandez v. Crespo*, 211 So. 3d 19, 26-27 (Fla. 2016), *petition for cert. filed,* (U.S. June 7, 2017) (No. 16-1458). The Opinion does not conflict in any way with the U.S. Supreme Court's recent decision in *Kindred Nursing*, which examined whether the FAA preempted a state rule of law. 137 S. Ct. at 1425. In fact, *Kindred Nursing* does not announce new law on FAA preemption. *Id.* at 1429. Accordingly, Petitioners' motion to recall the mandate is a repeat of the FAA preemption arguments it already made – and this Court rejected – in their motion for rehearing.

II. The Court should not recall its mandate.

Section 43.44, Florida Statutes (2016) permits the Court to recall its mandate for the purpose of making its opinions "accord with law and justice." As explained herein, the Court's Opinion does not conflict with *Kindred Nursing*. Moreover, Petitioners waived any reliance on the FAA by failing to incorporate it into their Agreement and by failing to ever argue the FAA until after this Court issued its Opinion. Accordingly, this Court should not recall its mandate.

III. The U.S. Supreme Court's *Kindred* decision does not announce new law and does not change the outcome in this case.

A. A brief procedural history.

This case involves the question of whether a medical malpractice arbitration agreement is void as against public policy where it incorporates some, but not all, of the MMA provisions. This Court held that "arbitration agreements which purport to incorporate the statutory scheme [of the MMA] but have terms clearly less favorable to one party … contravene the substantial incentives for both claimants and defendants to submit their cases to binding arbitration." 211 So. 3d at 26 (internal quotations omitted). Thus, the agreement was declared void as against public policy. *Id.* at 27.

Petitioners, at the post-Opinion rehearing stage, argued for the first time that the FAA applied and preempted the MMA and this Court's decision. The motion for rehearing was summarily denied with two justices dissenting and Justice Lawson not

participating. *Hernandez v. Crespo*, No. SC15-67, 2017 WL 786846 (Feb. 27, 2017).

B. The *Kindred Nursing* decision does not change this Court's rejection of the FAA preemption argument.

Petitioners base their motion to recall the mandate on the U.S. Supreme Court's decision in *Kindred Nursing*, 137 S. Ct. at 1421. In a 7-1 decision,[1] the U.S. Supreme Court reaffirmed the long-standing principle that a rule of law which singles out arbitration agreements for disfavored treatment violates the FAA. *Id.* at 1425. A court, however, may announce a generally applicable rule of law in an arbitration case. *Id.* at 1428 n.2. This is not a new or ground-breaking opinion. *See id.* at 1429 ("we once again 'reach a conclusion that … falls well within the confines of (and goes no further than) present well-established law.'").

Another long-standing rule of law in arbitration cases is that the FAA does not preempt state laws where the parties agree in the arbitration agreement to be bound by those laws. *See Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). The Agreement here provides, in pertinent part:

> 5. ARBITRATION PROCEDURES. The parties agree and recognize that the provisions of Florida Statutes, Chapter 766, governing medical malpractice claims shall apply to the

[1] Justice Thomas dissented on the view that the FAA does not apply to proceedings in state courts. 137 S. Ct. at 1429. Justice Gorsuch did not participate in the decision.

> parties and/or claimant(s) in all respects except that at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate under Florida Statutes, 766.105 or 766.207, the parties and/or claimant(s) shall resolve any claim through arbitration pursuant to this Agreement ….
>
> 8. APPLICABLE LAW. Except as herein provided, the arbitration shall be conducted and governed by the provisions of the Florida Arbitration Code, Florida Statutes, Section 682.01 et seq. … In conducting the arbitration under Florida Statutes, Section 682.01 et seq., all substantive provisions of Florida law governing medical malpractice claims and damages related thereto, including but not limited to, Florida's Wrongful Death Act, the standard of care for medical providers, caps on damages under Florida Statutes 766.118, the applicable statute of limitations and repose as well as the application of collateral sources and setoff shall be applied. ….

(Appx. 34-35.)

Thus, the Agreement: (i) expressly adopts the MMA and the Florida Arbitration Code and (ii) does not mention the Federal Arbitration Act. (Appx. 34-36.) When parties agree to be bound by state law, the FAA does not preempt that state law. *See Volt*, 489 U.S. at 470 ("application of the California statute is not pre-empted by the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 *et seq.,* in a case where the parties have agreed that their arbitration agreement will be governed by the law of California.") (Emphasis added).

This is because "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).[2] Here, the parties agreed to be governed by the MMA. (Appx. 34-35.) Nevertheless, the Agreement also inserted a series of provisions that conflict with the MMA. *See Hernandez*, 211 So. 3d at 26-27. These conflicting provisions created a tension in the Agreement that this Court, as a matter of state law, had to resolve. Ordinarily, under the FAA, deference is given to a state court's interpretation of an arbitration agreement. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).

This Court resolved the internal inconsistency in the Agreement by determining that, if parties agree to abide by Florida's MMA, then they must agree to <u>all</u> the MMA's provisions. *Hernandez*, 211 So. 3d at 26-27. Petitioners, however, misconstrue this Court's Opinion. They argue that, under this Court's Opinion, all medical providers must arbitrate under the MMA or not arbitrate at all. (Mot. 3, 8.) This is incorrect. To repeat, the Court merely held that <u>if medical providers expressly agree in their arbitration agreement to follow the MMA</u>, then, as a matter of state law, they must follow all of the MMA. *Hernandez*, 211 So. 3d at 26-27. Medical providers could just as easily agree to arbitration contracts that do not incorporate the MMA, in which case they are free to select the procedures and rules under which they arbitrate.

---

[2] Justice Scalia in *Concepcion*'s majority opinion expressly cited *Volt* with approval. 563 U.S. at 344.

Because the Opinion allows parties to set their own procedures for medical malpractice arbitration, it does not run afoul of the FAA. Stated another way, the Opinion does not require "a procedure that is inconsistent with the FAA," or that is "an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343, 351, 352. Nor does the Opinion disregard the U.S. Supreme Court's command that courts may not rely on the unique nature of arbitration agreements as a basis for invalidating them. *See id.* at 341.

In fact, the Court's holding is consistent with the Supreme Court's decision in *Volt*, 489 U.S. at 468. There, the parties entered into an arbitration agreement that specified that it "would be governed by the law of the place where the project is located [California]." *Id.* at 472 (internal quotations omitted). Following a contract dispute, one party moved under a California statute to stay the arbitration pending resolution of related litigation. *Id.* at 471. When asked to decide whether the FAA preempted the California statute, the Court ruled that the FAA merely required that arbitration agreements be placed on equal footing with other contracts. *Id.* at 478. Thus, where "parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." *Id*. at 479.

In line with *Volt*, this Court held the parties to their agreement, which adopted and incorporated the MMA. The Court simply clarified that, as a matter of state law and public policy, if the parties are going to operate within the terms of the MMA, they must submit to all

of the MMA requirements, and they may not cherry-pick only the favorable provisions. *Hernandez*, 211 So. 3d at 26-27. The question, then, is whether the Opinion "places arbitration contracts 'on equal footing with all other contracts.'" *DIRECTV, Inc.*, 136 S.Ct. at 468; *Kindred Nursing*, 137 S. Ct. at 1424. The answer is "yes." This Court has struck non-arbitration contracts as being void against public policy when the contract terms conflict with statutes enacted for the benefit of the public. *See Am. Cas. Co. v. Coastal Caisson Drill Co.*, 542 So. 2d 957, 958 (Fla. 1989) (party to a non-arbitration contract cannot waive statutory requirement enacted for the public's benefit); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. 1971) (finding void an insurance contract that attempted to limit uninsured motorist coverage required by statute).

In summary, the Opinion and this Court's interpretation of the MMA is not in conflict with *Kindred Nursing* and is not preempted by the FAA.

IV. Petitioners waived and did not preserve the FAA preemption argument.

Kindred Nursing is a case about FAA preemption. 137 S. Ct. at 1424-25. In addition to the reasons argued *supra*, the Court should deny the motion to recall the mandate because Petitioners did not preserve any FAA preemption argument. They did not raise a FAA preemption argument before either the Fifth District Court of Appeal or the trial court. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal.") To be preserved, "'an issue must be presented to the lower

court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation.'" *Id.* (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)). At a minimum, Petitioners were required to argue to this Court that the decision of the Fifth District was preempted by the FAA. Petitioners never timely presented a FAA preemption argument.

From as early on as the trial court, the arguments concerning the enforceability of the arbitration agreement turned on the parties' interpretation of *Franks v. Bowers*, 116 So. 3d1240 (Fla. 2013). (Appx. 39, 101-10.) *Franks* contains a section explaining why the FAA does not preclude the finding expressed therein. *Id.* at 1249-51. Yet, despite this express notice that the FAA may have some application to these facts, Petitioners never raised the issue in the trial court, the Fifth District Court of Appeal, or this Court until rehearing. Respondents even pointed out Petitioners' lack of reliance on the FAA in their brief before this Court. (*See* Resp. Ans. Br. at 27 n.7.) Because the FAA preemption argument was not raised, this Court appropriately did not address FAA preemption in its Opinion. *See Hernandez*, 211 So. 3d at 19-28.

Petitioners' failure to raise a FAA preemption argument not only precludes further review by this Court, but will bar review in the U.S. Supreme Court (in which Petitioners have sought certiorari review). Indeed, the U.S. Supreme Court lacks jurisdiction to review issues not decided below. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (where issue was not raised in the trial court or appellate courts, U.S. Supreme Court had "no jurisdiction to consider whether the EPAA preempted the application of the

pass-through prohibition to oil, for it does not affirmatively appear that the issue was decided below."); *Street v. New York*, 394 U.S. 576, 581-82 (1969) (if federal question was not presented to state courts "in such a manner that it was necessarily decided," the U.S. Supreme Court has "no power to consider it."). Only in very rare circumstances, not applicable here, will the Court consider a federal issue that was not addressed by, or properly presented to, the state court that rendered the decision on review. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam).

Accordingly, this Court should not consider Petitioners' FAA preemption argument because that argument was not preserved.

V. **The Agreement does not cover a transaction involving interstate commerce; the FAA does not apply.**

Even if the FAA preemption argument were preserved (which it is not), the FAA does not apply to the Agreement because the Agreement does not substantially affect interstate commerce. "To be included within the coverage of the [FAA], an arbitration provision must be contained in a 'contract evidencing a transaction involving commerce,' 9 U.S.C. § 2." *E.g., Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984). "Commerce" means "commerce *among* the several States …." 9 U.S.C. § 1 (emphasis added). Here, the Agreement was purely intrastate, dealing with the relationship between a group of Florida obstetrical physicians and their Florida patient. (Appx. 34-36.) Although Congress can regulate activities that substantially affect interstate commerce, *U.S. v. Lopez*,

514 U.S. 549, 559 (1995), this standard should not be expanded to bring within its scope purely intrastate and personal relationships between doctors and patients. To do so would make the "substantial effects" test a "rootless and malleable standard at odds with the constitutional design." *Am. Trucking Assns., Inc. v. City of Los Angeles, Cal.*, 133 S. Ct. 2096, 2017 (2013) (Stevens, J., concurring) (citations omitted).

Rather, the "Constitution requires a distinction between what is truly national and what is truly local." *U.S. v. Morrison*, 529 U.S. 598, 617-18 (2000). The

> "scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."

Id. (quoting *Lopez*, 514 U.S. at 557).While the power to regulate activities affecting interstate commerce can be expansive, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578–79 (2012), it is hard to fathom that our Framers intended to give Congress the power to govern the personal, purely intrastate relationship between a pregnant woman and her obstetrician under the Commerce Clause. *See Lopez*, 514 U.S. at 553 (Commerce Clause power was not intended to give Congress authority to regulate commerce "which is carried on between man and man in a State") (quotation omitted). Indeed, the regulation of health matters "is primarily, and historically, a matter of local

concern." *Hillsborough Cty., Fla. v. Auto. Med. Labs., Inc.*, 471 U.S. 707, 720 (1985).

At a minimum, Petitioners' failure to invoke the FAA in the trial court should preclude reliance on it now. First, because none of the pleadings in the lower courts reference interstate commerce, the Court "must assume that the [FAA] is inapplicable." *Warren Bros. Co. v. Cardi Corp.*, 471 F.2d 1304, 1307 n.2 (1st Cir. 1973).

Second, by failing to raise FAA preemption below, Petitioners failed to develop a factual record to support the application of the FAA. Whether a contract covers a transaction having a substantial economic effect on interstate commerce is a factual determination that must be made in the trial court. *See Goodwin*, 730 F.2d at 109; *see also Katenbach v. McClung*, 379 U.S. 294, 296-97 (1964) (factual record developed to find that substantial portion of food served in restaurant had moved in interstate commerce). Petitioners failed to establish any facts in the record suggesting that the Agreement applied to a transaction in interstate commerce as opposed to the provision of obstetrical services by Florida physicians to their Florida patient. The absence of any factual findings by the trial court that the Agreement related to a transaction in interstate commerce precludes this Court from determining that the FAA even applies. *Id.*; *see also Features Props., LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. 1st DCA 2011) (appellate court cannot make factual findings in the first instance).

In short, this Court should not recall its mandate in deference to an opinion on FAA preemption because

there is no basis to conclude that the FAA even applies to the parties' Agreement.

VI. The FAA does not apply to state court proceedings.

Although enacted in 1925, the first time the Supreme Court declared the FAA to be a substantive law applicable to the states was in 1984. *See Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). Justice O'Connor, joined by Justice Rehnquist, dissented in *Southland*, persuasively opining that "Congress viewed the FAA as a procedural statute, applicable only in federal courts." *Id.* at 25 (O'Connor, J., dissenting). Indeed, in 1925, it was well-established that "'the enforcement of arbitration contracts [was] within the law of procedure as distinguished from substantive law.'" *Id.* at 26 (O'Connor, J., dissenting) (quoting Committee on Commerce, Trade and Commercial Law, The United States Arbitration Law and its Application, 11 A.B.A.J. 153, 156 (1925)).

Drawing on Justice O'Connor's dissent, Justice Thomas has consistently and repeatedly dissented from FAA decisions on the grounds that the FAA "does not apply to proceedings in state courts." *See, e.g., Kindred Nursing*, 137 S. Ct. at 1429-30 (Thomas, J., dissenting); *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting). In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 287–88 (1995), Justice Scalia also joined in Justice Thomas's dissent, agreeing that *Southland* (in which he joined the majority opinion), "clearly misconstrued the Federal Arbitration Act." *Id.* at 284 (Scalia, J., dissenting). Justice Thomas further expanded on Justice O'Connor's reasoning in *Allied-Bruce*, writing that an "arbitration agreement is a

species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance." *Id.* at 288. Thus, where "a contractual provision deals purely with matters of judicial procedure, one might well conclude that questions about whether and how it will be enforced also relate to procedure." *Id.* Because it is settled law that Congress cannot regulate state courts' modes of procedure, the FAA cannot be applicable in state courts. *Id*. at 287-88.

Although a majority of the Supreme Court has declined to overrule *Southland*, the logic for doing so is compelling. Respondents preserve the argument that the FAA does not apply to this state court proceeding because Petitioners have sought review of the Opinion in the U.S. Supreme Court.

CONCLUSION

This Court should deny Petitioners' motion to recall the mandate.

Respectfully submitted,

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[*Certificate of Service Omitted in Printing of this Appendix*.]

APPENDIX 4

Supreme Court of Florida

CASE NO.: SC15-67
Lower Tribunal No(s).: 5D14-759;
482013CA006610A001OX

[Filed July 20, 2017]

EILEEN HERNANDEZ, M.D., ET AL.
Petitioner(s)

vs.

LUALHATI CRESPO, ET AL.
Respondent(s)

THURSDAY, JULY 20, 2017

Petitioner's "Motion to Recall the Mandate" is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, and QUINCE, JJ., concur.

CANADY and POLSTON, JJ., would grant.

A True Copy
Test:

/s/ [SEAL]
John A. Tomasino
Clerk, Supreme Court

two
Served:

THOMAS EARLE DUKES III
DINAH STEIN
JESSIE LEIGH HARRELL
MARK HICKS
BRYAN SCOTT GOWDY
RUTH C. OSBORNE

HON. PATRICIA A. DOHERTY, JUDGE
WILBERT RHULX VANCOL
CARLOS R. DIEZ-ARGUELLES
HON. TIFFANY MOORE RUSSELL, CLERK
HON. JOANNE P. SIMMONS, CLERK
MARIA DOLORES TEJEDOR

APPENDIX 5

Fla. Stat. § 682.03 (2011)

682.03 Proceedings to compel and to stay arbitration.—

(1) A party to an agreement or provision for arbitration subject to this law claiming the neglect or refusal of another party thereto to comply therewith may make application to the court for an order directing the parties to proceed with arbitration in accordance with the terms thereof. If the court is satisfied that no substantial issue exists as to the making of the agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application.

(2) If an issue referable to arbitration under an agreement or provision for arbitration subject to this law becomes involved in an action or proceeding pending in a court having jurisdiction to hear an application under subsection (1), such application shall be made in said court. Otherwise and subject to s. 682.19, such application may be made in any court of competent jurisdiction.

(3) Any action or proceeding involving an issue subject to arbitration under this law shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only.

When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(4) On application the court may stay an arbitration proceeding commenced or about to be commenced, if it shall find that no agreement or provision for arbitration subject to this law exists between the party making the application and the party causing the arbitration to be had. The court shall summarily hear and determine the issue of the making of the agreement or provision and, according to its determination, shall grant or deny the application.

(5) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

****

Fla. Stat. § 682.06 (2011)

682.06 Hearing.—Unless otherwise provided by the agreement or provision for arbitration:

(1)(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered or certified mail not less than 5 days before the hearing. Appearance at the hearing waives a party's right to such notice. The arbitrators may adjourn their hearing from time to time upon their own motion and shall do so upon the request of any party to the arbitration for good cause shown, provided that no adjournment or postponement of their hearing shall extend beyond the date fixed in the agreement or provision for making the award

unless the parties consent to a later date. An umpire authorized to hear and decide the cause upon failure of the arbitrators to agree upon an award shall, in the course of his or her jurisdiction, have like powers and be subject to like limitations thereon.

(b) The arbitrators, or umpire in the course of his or her jurisdiction, may hear and decide the controversy upon the evidence produced notwithstanding the failure or refusal of a party duly notified of the time and place of the hearing to appear. The court on application may direct the arbitrators, or the umpire in the course of his or her jurisdiction, to proceed promptly with the hearing and making of the award.

(2) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(3) The hearing shall be conducted by all of the arbitrators but a majority may determine any question and render a final award. An umpire authorized to hear and decide the cause upon the failure of the arbitrators to agree upon an award shall sit with the arbitrators throughout their hearing but shall not be counted as a part of their quorum or in the making of their award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator, arbitrators or umpire appointed to act as neutrals may continue with the hearing and determination of the controversy.

****

Fla. Stat. § 682.08 (2011)

682.08 Witnesses, subpoenas, depositions.—

(1) Arbitrators, or an umpire authorized to hear and decide the cause upon failure of the arbitrators to agree upon an award, in the course of her or his jurisdiction, may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party to the arbitration or the arbitrators, or the umpire, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(2) On application of a party to the arbitration and for use as evidence, the arbitrators, or the umpire in the course of her or his jurisdiction, may permit a deposition to be taken, in the manner and upon the terms designated by them or her or him of a witness who cannot be subpoenaed or is unable to attend the hearing.

(3) All provisions of law compelling a person under subpoena to testify are applicable.

(4) Fees for attendance as a witness shall be the same as for a witness in the circuit court.

****

Fla. Stat. § 682.09 (2011)

682.09 Award.—

(1) The award shall be in writing and shall be signed by the arbitrators joining in the award or by the

umpire in the course of his or her jurisdiction. They or he or she shall deliver a copy to each party to the arbitration either personally or by registered or certified mail, or as provided in the agreement or provision.

(2) An award shall be made within the time fixed therefor by the agreement or provision for arbitration or, if not so fixed, within such time as the court may order on application of a party to the arbitration. The parties may, by written agreement, extend the time either before or after the expiration thereof. Any objection that an award was not made within the time required is waived unless the objecting party notifies the arbitrators or umpire in writing of his or her objection prior to the delivery of the award to him or her.

****

Fla. Stat. § 682.10 (2011)

682.10 Change of award by arbitrators or umpire.—On application of a party to the arbitration, or if an application to the court is pending under s. 682.12, s. 682.13 or s. 682.14, on submission to the arbitrators, or to the umpire in the case of an umpire's award, by the court under such conditions as the court may order, the arbitrators or umpire may modify or correct the award upon the grounds stated in s. 682.14(1)(a) and (c) or for the purpose of clarifying the award. The application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the other party to the arbitration, stating that he or she must serve his or her objections thereto, if any, within 10 days from the notice. The

award so modified or corrected is subject to the provisions of ss. 682.12-682.14.

****

Fla. Stat. § 682.12 (2011)

682.12 Confirmation of an award.—Upon application of a party to the arbitration, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in ss. 682.13 and 682.14.

****

Fla. Stat. § 682.13 (2011)

682.13 Vacating an award.—

(1) Upon application of a party, the court shall vacate an award when:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.

(c) The arbitrators or the umpire in the course of her or his jurisdiction exceeded their powers.

(d) The arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the

provisions of s. 682.06, as to prejudice substantially the rights of a party.

(e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under s. 682.03 and unless the party participated in the arbitration hearing without raising the objection.

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(2) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(3) In vacating the award on grounds other than those stated in paragraph (1)(e), the court may order a rehearing before new arbitrators chosen as provided in the agreement or provision for arbitration or by the court in accordance with s. 682.04, or, if the award is vacated on grounds set forth in paragraphs (1)(c) and (d), the court may order a rehearing before the arbitrators or umpire who made the award or their successors appointed in accordance with s. 682.04. The time within which the agreement or provision for arbitration requires the award to be made is applicable to the rehearing and commences from the date of the order therefor.

(4) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

****

Fla. Stat. § 682.15 (2011)

682.15 Judgment or decree on award.—Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

****

Fla. Stat. § 682.20 (2011)

682.20 Appeals.—

(1) An appeal may be taken from:

(a) An order denying an application to compel arbitration made under s. 682.03.

(b) An order granting an application to stay arbitration made under s. 682.03(2)-(4).

(c) An order confirming or denying confirmation of an award.

(d) An order modifying or correcting an award.

(e) An order vacating an award without directing a rehearing.

(f) A judgment or decree entered pursuant to the provisions of this law.

(2) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

****

Fla. Stat. § 766.106 (2011)

766.106 Notice before filing action for medical negligence; presuit screening period; offers for admission of liability and for arbitration; informal discovery; review.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Claim for medical negligence" or "claim for medical malpractice" means a claim, arising out of the rendering of, or the failure to render, medical care or services.

(b) "Self-insurer" means any self-insurer authorized under s. 627.357 or any uninsured prospective defendant.

(c) "Insurer" includes the Joint Underwriting Association.

(2) PRESUIT NOTICE.—

(a) After completion of presuit investigation pursuant to s. 766.203(2) and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant by certified mail, return receipt requested, of intent to initiate litigation for medical negligence. Notice to each prospective defendant must include, if available, a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, copies of all of the

medical records relied upon by the expert in signing the affidavit, and the executed authorization form provided in s. 766.1065.

(b) Following the initiation of a suit alleging medical negligence with a court of competent jurisdiction, and service of the complaint upon a defendant, the claimant shall provide a copy of the complaint to the Department of Health and, if the complaint involves a facility licensed under chapter 395, the Agency for Health Care Administration. The requirement of providing the complaint to the Department of Health or the Agency for Health Care Administration does not impair the claimant's legal rights or ability to seek relief for his or her claim. The Department of Health or the Agency for Health Care Administration shall review each incident that is the subject of the complaint and determine whether it involved conduct by a licensee which is potentially subject to disciplinary action, in which case, for a licensed health care practitioner, the provisions of s. 456.073 apply and, for a licensed facility, the provisions of part I of chapter 395 apply.

(3) PRESUIT INVESTIGATION BY PROSPECTIVE DEFENDANT.—

(a) No suit may be filed for a period of 90 days after notice is mailed to any prospective defendant. During the 90-day period, the prospective defendant or the defendant's insurer or self-insurer shall conduct a review as provided in s. 766.203(3) to determine the liability of the defendant. Each insurer or self-insurer shall have a procedure for the prompt investigation, review, and evaluation of claims during the 90-day period. This procedure shall include one or more of the following:

1. Internal review by a duly qualified claims adjuster;

2. Creation of a panel comprised of an attorney knowledgeable in the prosecution or defense of medical negligence actions, a health care provider trained in the same or similar medical specialty as the prospective defendant, and a duly qualified claims adjuster;

3. A contractual agreement with a state or local professional society of health care providers, which maintains a medical review committee;

4. Any other similar procedure which fairly and promptly evaluates the pending claim.

Each insurer or self-insurer shall investigate the claim in good faith, and both the claimant and prospective defendant shall cooperate with the insurer in good faith. If the insurer requires, a claimant shall appear before a pretrial screening panel or before a medical review committee and shall submit to a physical examination, if required. Unreasonable failure of any party to comply with this section justifies dismissal of claims or defenses. There shall be no civil liability for participation in a pretrial screening procedure if done without intentional fraud.

(b) At or before the end of the 90 days, the prospective defendant or the prospective defendant's insurer or self-insurer shall provide the claimant with a response:

1. Rejecting the claim;

2. Making a settlement offer; or

3. Making an offer to arbitrate in which liability is deemed admitted and arbitration will be held only on the issue of damages. This offer may be made contingent upon a limit of general damages.

(c) The response shall be delivered to the claimant if not represented by counsel or to the claimant's attorney, by certified mail, return receipt requested. Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt shall be deemed a final rejection of the claim for purposes of this section.

(d) Within 30 days of receipt of a response by a prospective defendant, insurer, or self-insurer to a claimant represented by an attorney, the attorney shall advise the claimant in writing of the response, including:

1. The exact nature of the response under paragraph (b).

2. The exact terms of any settlement offer, or admission of liability and offer of arbitration on damages.

3. The legal and financial consequences of acceptance or rejection of any settlement offer, or admission of liability, including the provisions of this section.

4. An evaluation of the time and likelihood of ultimate success at trial on the merits of the claimant's action.

5. An estimation of the costs and attorney's fees of proceeding through trial.

(4) SERVICE OF PRESUIT NOTICE AND TOLLING.—The notice of intent to initiate litigation shall be served within the time limits set forth in s. 95.11. However, during the 90-day period, the statute of limitations is tolled as to all potential defendants. Upon stipulation by the parties, the 90-day period may be extended and the statute of limitations is tolled during any such extension. Upon receiving notice of termination of negotiations in an extended period, the claimant shall have 60 days or the remainder of the period of the statute of limitations, whichever is greater, within which to file suit.

(5) DISCOVERY AND ADMISSIBILITY.—A statement, discussion, written document, report, or other work product generated by the presuit screening process is not discoverable or admissible in any civil action for any purpose by the opposing party. All participants, including, but not limited to, physicians, investigators, witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process. This subsection does not prevent a physician licensed under chapter 458 or chapter 459 or a dentist licensed under chapter 466 who submits a verified written expert medical opinion from being subject to denial of a license or disciplinary action under s. 458.331(1)(oo), s. 459.015(1)(qq), or s. 466.028(1)(ll).

(6) INFORMAL DISCOVERY.—

(a) Upon receipt by a prospective defendant of a notice of claim, the parties shall make discoverable information available without formal discovery. Failure to do so is grounds for dismissal of claims or defenses ultimately asserted.

(b) Informal discovery may be used by a party to obtain unsworn statements, the production of documents or things, and physical and mental examinations, as follows:

1. Unsworn statements.—Any party may require other parties to appear for the taking of an unsworn statement. Such statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party. A party desiring to take the unsworn statement of any party must give reasonable notice in writing to all parties. The notice must state the time and place for taking the statement and the name and address of the party to be examined. Unless otherwise impractical, the examination of any party must be done at the same time by all other parties. Any party may be represented by counsel at the taking of an unsworn statement. An unsworn statement may be recorded electronically, stenographically, or on videotape. The taking of unsworn statements is subject to the provisions of the Florida Rules of Civil Procedure and may be terminated for abuses.

2. Documents or things.—Any party may request discovery of documents or things. The documents or things must be produced, at the expense of the requesting party, within 20 days after the date of receipt of the request. A party is required to produce discoverable documents or things within that party's possession or control. Medical records shall be produced as provided in s.766.204.

3. Physical and mental examinations.—A prospective defendant may require an injured claimant to appear for examination by an appropriate health

care provider. The prospective defendant shall give reasonable notice in writing to all parties as to the time and place for examination. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants. The practicality of a single examination must be determined by the nature of the claimant's condition, as it relates to the liability of each prospective defendant. Such examination report is available to the parties and their attorneys upon payment of the reasonable cost of reproduction and may be used only for the purpose of presuit screening. Otherwise, such examination report is confidential and exempt from the provisions of s.119.07(1) and s. 24(a), Art. I of the State Constitution.

4. Written questions.—Any party may request answers to written questions, the number of which may not exceed 30, including subparts. A response must be made within 20 days after receipt of the questions.

5. Unsworn statements of treating health care providers.—A prospective defendant or his or her legal representative may also take unsworn statements of the claimant's treating health care providers. The statements must be limited to those areas that are potentially relevant to the claim of personal injury or wrongful death. Subject to the procedural requirements of subparagraph 1., a prospective defendant may take unsworn statements from a claimant's treating physicians. Reasonable notice and opportunity to be heard must be given to the claimant or the claimant's legal representative before taking unsworn statements. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.

(c) Each request for and notice concerning informal presuit discovery pursuant to this section must be in writing, and a copy thereof must be sent to all parties. Such a request or notice must bear a certificate of service identifying the name and address of the person to whom the request or notice is served, the date of the request or notice, and the manner of service thereof.

(d) Copies of any documents produced in response to the request of any party must be served upon all other parties. The party serving the documents or his or her attorney shall identify, in a notice accompanying the documents, the name and address of the parties to whom the documents were served, the date of service, the manner of service, and the identity of the document served.

(7) SANCTIONS.—Failure to cooperate on the part of any party during the presuit investigation may be grounds to strike any claim made, or defense raised, by such party in suit.

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Fla. Stat. § 766.201 (2011)

766.201 Legislative findings and intent.—

(1) The Legislature makes the following findings:

(a) Medical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased medical care costs for most patients and functional unavailability of malpractice insurance for some physicians.

(b) The primary cause of increased medical malpractice liability insurance premiums has been the

substantial increase in loss payments to claimants caused by tremendous increases in the amounts of paid claims.

(c) The average cost of a medical negligence claim has escalated in the past decade to the point where it has become imperative to control such cost in the interests of the public need for quality medical services.

(d) The high cost of medical negligence claims in the state can be substantially alleviated by requiring early determination of the merit of claims, by providing for early arbitration of claims, thereby reducing delay and attorney's fees, and by imposing reasonable limitations on damages, while preserving the right of either party to have its case heard by a jury.

(e) The recovery of 100 percent of economic losses constitutes overcompensation because such recovery fails to recognize that such awards are not subject to taxes on economic damages.

(2) It is the intent of the Legislature to provide a plan for prompt resolution of medical negligence claims. Such plan shall consist of two separate components, presuit investigation and arbitration. Presuit investigation shall be mandatory and shall apply to all medical negligence claims and defenses. Arbitration shall be voluntary and shall be available except as specified.

(a) Presuit investigation shall include:

1. Verifiable requirements that reasonable investigation precede both malpractice claims and defenses in order to eliminate frivolous claims and defenses.

2. Medical corroboration procedures.

(b) Arbitration shall provide:

1. Substantial incentives for both claimants and defendants to submit their cases to binding arbitration, thus reducing attorney's fees, litigation costs, and delay.

2. A conditional limitation on noneconomic damages where the defendant concedes willingness to pay economic damages and reasonable attorney's fees.

3. Limitations on the noneconomic damages components of large awards to provide increased predictability of outcome of the claims resolution process for insurer anticipated losses planning, and to facilitate early resolution of medical negligence claims.

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Fla. Stat. § 766.203 (2011)

766.203 Presuit investigation of medical negligence claims and defenses by prospective parties.—

(1) APPLICATION OF PRESUIT INVESTIGATION.—Presuit investigation of medical negligence claims and defenses pursuant to this section and ss. 766.204-766.206 shall apply to all medical negligence claims and defenses. This shall include:

(a) Rights of action under s. 768.19 and defenses thereto.

(b) Rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28 and defenses thereto.

(2) PRESUIT INVESTIGATION BY CLAIMANT.—Prior to issuing notification of intent to initiate medical negligence litigation pursuant to s. 766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:

(a) Any named defendant in the litigation was negligent in the care or treatment of the claimant; and

(b) Such negligence resulted in injury to the claimant.

Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

(3) PRESUIT INVESTIGATION BY PROSPECTIVE DEFENDANT.—Prior to issuing its response to the claimant's notice of intent to initiate litigation, during the time period for response authorized pursuant to s. 766.106, the prospective defendant or the defendant's insurer or self-insurer shall conduct an investigation as provided in s. 766.106(3) to ascertain whether there are reasonable grounds to believe that:

(a) The defendant was negligent in the care or treatment of the claimant; and

(b) Such negligence resulted in injury to the claimant.

Corroboration of lack of reasonable grounds for medical negligence litigation shall be provided with any response rejecting the claim by the defendant's submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(6), at the time the response rejecting the claim is mailed, which statement shall corroborate reasonable grounds for lack of negligent injury sufficient to support the response denying negligent injury.

(4) PRESUIT MEDICAL EXPERT OPINION.—The medical expert opinions required by this section are subject to discovery. The opinions shall specify whether any previous opinion by the same medical expert has been disqualified and if so the name of the court and the case number in which the ruling was issued.

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Fla. Stat. § 766.204 (2011)

766.204 Availability of medical records for presuit investigation of medical negligence claims and defenses; penalty.—

(1) Copies of any medical record relevant to any litigation of a medical negligence claim or defense shall be provided to a claimant or a defendant, or to the attorney thereof, at a reasonable charge within 10 business days of a request for copies, except that an independent special hospital district with taxing authority which owns two or more hospitals shall have 20 days. It shall not be grounds to refuse copies of such medical records that they are not yet completed or that a medical bill is still owing.

(2) Failure to provide copies of such medical records, or failure to make the charge for copies a reasonable charge, shall constitute evidence of failure of that party to comply with good faith discovery requirements and shall waive the requirement of written medical corroboration by the requesting party.

(3) A hospital shall not be held liable for any civil damages as a result of complying with this section.

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Fla. Stat. § 766.207 (2011)

766.207 Voluntary binding arbitration of medical negligence claims.—

(1) Voluntary binding arbitration pursuant to this section and ss. 766.208-766.212 shall not apply to rights of action involving the state or its agencies or subdivisions, or the officers, employees, or agents thereof, pursuant to s. 768.28.

(2) Upon the completion of presuit investigation with preliminary reasonable grounds for a medical negligence claim intact, the parties may elect to have damages determined by an arbitration panel. Such election may be initiated by either party by serving a request for voluntary binding arbitration of damages within 90 days after service of the claimant's notice of intent to initiate litigation upon the defendant. The evidentiary standards for voluntary binding arbitration of medical negligence claims shall be as provided in ss. 120.569(2)(g) and 120.57(1)(c).

(3) Upon receipt of a party's request for such arbitration, the opposing party may accept the offer of

voluntary binding arbitration within 30 days. However, in no event shall the defendant be required to respond to the request for arbitration sooner than 90 days after service of the notice of intent to initiate litigation under s. 766.106. Such acceptance within the time period provided by this subsection shall be a binding commitment to comply with the decision of the arbitration panel. The liability of any insurer shall be subject to any applicable insurance policy limits.

(4) The arbitration panel shall be composed of three arbitrators, one selected by the claimant, one selected by the defendant, and one an administrative law judge furnished by the Division of Administrative Hearings who shall serve as the chief arbitrator. In the event of multiple plaintiffs or multiple defendants, the arbitrator selected by the side with multiple parties shall be the choice of those parties. If the multiple parties cannot reach agreement as to their arbitrator, each of the multiple parties shall submit a nominee, and the director of the Division of Administrative Hearings shall appoint the arbitrator from among such nominees.

(5) The arbitrators shall be independent of all parties, witnesses, and legal counsel, and no officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.

(6) The rate of compensation for medical negligence claims arbitrators other than the administrative law judge shall be set by the chief judge of the appropriate circuit court by schedule providing for compensation of not less than $250 per day nor more than $750 per day or as agreed by the parties. In setting the schedule, the

chief judge shall consider the prevailing rates charged for the delivery of professional services in the community.

(7) Arbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that damages shall be awarded as provided by general law, including the Wrongful Death Act, subject to the following limitations:

(a) Net economic damages shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.

(b) Noneconomic damages shall be limited to a maximum of $250,000 per incident, and shall be calculated on a percentage basis with respect to capacity to enjoy life, so that a finding that the claimant's injuries resulted in a 50-percent reduction in his or her capacity to enjoy life would warrant an award of not more than $125,000 noneconomic damages.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(9) and shall be offset by future collateral source payments.

(d) Punitive damages shall not be awarded.

(e) The defendant shall be responsible for the payment of interest on all accrued damages with respect to which interest would be awarded at trial.

(f) The defendant shall pay the claimant's reasonable attorney's fees and costs, as determined by the arbitration panel, but in no event more than 15 percent of the award, reduced to present value.

(g) The defendant shall pay all the costs of the arbitration proceeding and the fees of all the arbitrators other than the administrative law judge.

(h) Each defendant who submits to arbitration under this section shall be jointly and severally liable for all damages assessed pursuant to this section.

(i) The defendant's obligation to pay the claimant's damages shall be for the purpose of arbitration under this section only. A defendant's or claimant's offer to arbitrate shall not be used in evidence or in argument during any subsequent litigation of the claim following the rejection thereof.

(j) The fact of making or accepting an offer to arbitrate shall not be admissible as evidence of liability in any collateral or subsequent proceeding on the claim.

(k) Any offer by a claimant to arbitrate must be made to each defendant against whom the claimant has made a claim. Any offer by a defendant to arbitrate must be made to each claimant who has joined in the notice of intent to initiate litigation, as provided in s. 766.106. A defendant who rejects a claimant's offer to arbitrate shall be subject to the provisions of s. 766.209(3). A claimant who rejects a defendant's offer to arbitrate shall be subject to the provisions of s.766.209(4).

(l) The hearing shall be conducted by all of the arbitrators, but a majority may determine any question of fact and render a final decision. The chief arbitrator shall decide all evidentiary matters.

The provisions of this subsection shall not preclude settlement at any time by mutual agreement of the parties.

(8) Any issue between the defendant and the defendant's insurer or self-insurer as to who shall control the defense of the claim and any responsibility for payment of an arbitration award, shall be determined under existing principles of law; provided that the insurer or self-insurer shall not offer to arbitrate or accept a claimant's offer to arbitrate without the written consent of the defendant.

(9) The Division of Administrative Hearings is authorized to promulgate rules to effect the orderly and efficient processing of the arbitration procedures of ss. 766.201-766.212.

(10) Rules promulgated by the Division of Administrative Hearings pursuant to this section, s.120.54, or s. 120.65 may authorize any reasonable sanctions except contempt for violation of the rules of the division or failure to comply with a reasonable order issued by an administrative law judge, which is not under judicial review.

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Fla. Stat. § 766.209 (2011)

766.209 Effects of failure to offer or accept voluntary binding arbitration.—

(1) A proceeding for voluntary binding arbitration is an alternative to jury trial and shall not supersede the right of any party to a jury trial.

(2) If neither party requests or agrees to voluntary binding arbitration, the claim shall proceed to trial or to any available legal alternative such as offer of and demand for judgment under s.768.79 or offer of settlement under s. 45.061.

(3) If the defendant refuses a claimant's offer of voluntary binding arbitration:

(a) The claim shall proceed to trial, and the claimant, upon proving medical negligence, shall be entitled to recover damages subject to the limitations in s. 766.118, prejudgment interest, and reasonable attorney's fees up to 25 percent of the award reduced to present value.

(b) The claimant's award at trial shall be reduced by any damages recovered by the claimant from arbitrating codefendants following arbitration.

(4) If the claimant rejects a defendant's offer to enter voluntary binding arbitration:

(a) The damages awardable at trial shall be limited to net economic damages, plus noneconomic damages not to exceed $350,000 per incident. The Legislature expressly finds that such conditional limit on noneconomic damages is warranted by the claimant's refusal to accept arbitration, and represents an

appropriate balance between the interests of all patients who ultimately pay for medical negligence losses and the interests of those patients who are injured as a result of medical negligence.

(b) Net economic damages reduced to present value shall be awardable, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity, offset by any collateral source payments.

(c) Damages for future economic losses shall be awarded to be paid by periodic payments pursuant to s. 766.202(9), and shall be offset by future collateral source payments.

(5) Jury trial shall proceed in accordance with existing principles of law.