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 A Writ Of Certiorari To The Florida Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioners refer the Court to the corporate disclosure statement set out in their Petition for Writ of Certiorari.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This petition presents an important and timely question concerning preemption under the FAA: whether "public policy" can be used by states to first dictate that onerous terms and conditions be included in all arbitration agreements, and then to invalidate otherwise binding arbitration agreements simply because they do not contain each and every one of these state-imposed terms. By refusing to enforce the underlying arbitration agreements as written by resort to public policy, the decisions below violate the FAA and this Court's precedent despite their attempt to creatively circumvent such authority.

Respondents do not dispute the importance of this issue, and also implicitly recognize that private medical malpractice arbitration agreements in Florida that do not exactly mirror the statutory terms and conditions are henceforth invalid, if Petitioners' position on the practical impact of the decisions below is borne out to be true. Rather, Respondents question the timeliness of Petitioners' arguments below, and raise several other factual and procedural points that Respondents believe should cause this Court to decline jurisdiction. To the contrary, this petition presents an appropriate vehicle for resolving this question, as the federal preemption argument was timely raised at the first opportunity, and there are no other obstacles to this Court's review.

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ARGUMENT

A. The issue of federal preemption was timely and properly raised below.

Prior to the issuance of the Florida Supreme Court's opinion below in *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016), Petitioners could not have reasonably anticipated that the court would do exactly what it said it would not do three years earlier in *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013): interpret the MMA and state public policy in such a way as to cause preemption under the FAA. Following this overly broad interpretation of the MMA, well beyond the bounds of what the *Franks* decision should have dictated, Petitioners raised the prospect that the Florida Supreme Court's application of public policy was preempted by the FAA in their motion for rehearing, which was the first opportunity for them to have done so. Petitioners' actions were timely and procedurally proper, and vest this Court with jurisdiction to hear this case under 28 U.S.C. § 1257(a).

Where a state court acts in an unanticipated way such that the first real opportunity to make an argument based on federal law is in a motion for rehearing, the issue is not waived and this Court's review is not barred. This Court has held that petitioners have "adequately raised the federal question" arising from a state court's departure from an earlier ruling when petitioners assert it in a motion for rehearing, under circumstances where it was not until after the court's opinion that petitioners "could have reasonably expected

that the validity of the earlier . . . decision would be questioned." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980); *see also Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935); *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367 (1932).

In *Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930), the disputed issues revolved around the proper method to assess a statutory tax against an insurance company's assets. After the lower court had excluded United States bonds from taxation altogether, the Missouri Supreme Court took jurisdiction and interpreted the relevant statute to impose a tax on such federal bonds. *See id.* at 318-19. The insurance company "made a motion for rehearing" asserting that the tax statute "as construed" by the Missouri Supreme Court violated the U.S. Constitution by imposing a tax on federal bonds. *Id.* at 319.

This Court accepted jurisdiction even though the federal question had been raised below for the first time in the motion for rehearing, holding that the insurance company invoked federal law "at the first opportunity" because it "could not earlier have assailed the [statutory] section as violative of the Constitution and laws of the United States." *Id.* at 320. Because there was "nothing in the language of the [statutory] section to suggest" the interpretation given to it by the Missouri Supreme Court, the petitioner was not "bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds." *Id.*

The same outcome as in *Gehner* should apply here. In 2013, the Florida Supreme Court in *Franks* carefully limited the scope of its opinion to avoid federal preemption, noting that "our decision here is fact-specific pertaining only to the particular agreement before us," and that the decision complied with the FAA because it did not "prohibit all arbitration agreements under the MMA" and did not "impede the general enforceability of agreements to arbitrate." 116 So. 3d at 1249-51. Instead, the *Franks* court invalidated ***only*** those private arbitration agreements that sought to "enjoy [some] benefits of the arbitration provisions under the statutory scheme" without "adopt[ing] all of its provisions." *Id.* at 1248. In other words, the *Franks* opinion acknowledged that public policy only invalidated those arbitration agreements that attempted to "pick and choose" among the statutory terms as a substitute for the procedures in the MMA, and that any further extension of the rule announced in *Franks* would necessarily run afoul of the FAA.

Petitioners reasonably relied on the Florida Supreme Court's pronouncement that *Franks* represented the outer reaches of MMA and public policy control over the contents of private medical malpractice arbitration agreements. Petitioners could not have anticipated that the Florida Supreme Court would impose a breathtakingly broad expansion of *Franks* that invalidates every single agreement in Florida that does not incorporate all of the statutory terms and conditions, even agreements like those executed by

Petitioners and Respondents here that operate entirely separate and apart from the MMA.

In this respect, it was the decision below that *itself* triggered federal preemption, by unexpectedly construing the MMA and state public policy so expansively. This Court has contemplated the availability of review under such circumstances if a motion for rehearing raising the federal issue is filed, observing that "where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 712 n.4 (2010).

The cases cited by Respondents, Opp. 12-17, are inapposite as such cases did not involve this exception for unanticipated federal issues raised by the state supreme court's opinion itself and addressed at the earliest opportunity in a motion for rehearing, as occurred here. Respondents fail to mention such decisions, and are simply incorrect in asserting that "[r]aising a question for the first time on rehearing" categorically bars this Court's review in all cases. Opp. 15.

Indeed, as Respondents themselves acknowledge, Opp. 13-14, this Court has accepted jurisdiction and ruled on federal issues that were ***never*** raised in the state courts below, indicating that, under the right circumstances, the "rule" that such issues must be raised and presented below is merely prudential, and

not jurisdictional. *See Vachon v. New Hampshire*, 414 U.S. 478, 479-82 (1974); *Terminiello v. City of Chicago*, 337 U.S. 1, 10 (1949). If jurisdiction is "required in the interests of justice," this Court has not hesitated to accept jurisdiction based on a federal claim even though that claim "was never raised in the state court, nor did the state court ever render a decision on the issue." *Wood v. Georgia*, 450 U.S. 261, 265 n.5 & 277 (1981) (citing *Vachon*). Such prudential considerations in favor of accepting review are even stronger in cases, like this one, in which the federal claim was "raised, but not passed upon," on petition for rehearing in the state supreme court. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

Prudence militates in favor of accepting certiorari jurisdiction in this particular case. Left to stand, the Florida Supreme Court's decision below will invalidate the vast majority of medical malpractice arbitration agreements in the State of Florida, and will require all physicians from this point forward to admit liability as an onerous precondition to the right to arbitrate. Contrary to Respondents' assertions, Opp. 19, and as set forth in Section B.2, *infra*, the arbitration agreements at issue involve interstate commerce and are subject to the FAA. Likewise, the Florida Supreme Court was given the opportunity to "consider" and issue a "reasoned opinion" on this federal issue in response to Petitioners' motion for rehearing, Opp. 18-19, but declined to do so.

The fact that the Florida Supreme Court easily could have (but chose not to) address the federal preemption issue on rehearing undermines Respondents' argument that the independent and adequate state-law ground of alleged lack of preservation bars review. Opp. 20-21. Florida courts have the power and authority to consider an argument first raised on a motion for rehearing when to do so would be in the interest of justice and for matters that are "fundamental and jurisdictional," and "which vitally affect[ ] the essential rights" of a party. *O'Steen v. State*, 111 So. 725, 729 (Fla. 1926). Where there are "extraordinary circumstances" impacting on "fundamental principles governing the administration of justice," Florida's courts have addressed such matters if they are raised for the first time in a motion for rehearing. *Regan v. ITT Indus. Credit Co.*, 469 So. 2d 1387, 1390 n.3 (Fla. 1st DCA 1984); *see also Delmonico v. State*, 155 So. 2d 368, 369 (Fla. 1963); *Fender v. State*, 980 So. 2d 516, 517 (Fla. 4th DCA 2007).

Petitioners' motion for rehearing involved federal preemption issues of a fundamental nature, and therefore there was nothing that would have prevented the Florida Supreme Court from considering the merits of those arguments, had it been so inclined. As a result, there was no issue-preservation bar applicable below, and this Court need not (and should not) decline jurisdiction on this basis.

B. There are no other impediments or obstacles to this Court's review.

Respondents raise several additional purported bases for declining certiorari jurisdiction. Opp. 22-34. None of these arguments have merit.

1. The Florida Supreme Court did not enforce the arbitration agreement as written.

Contrary to Respondents' assertions, Opp. 22-26, the Florida Supreme Court refused to enforce the parties' contract as written by mandating that the MMA's scheme apply, despite provisions in the agreement implementing a non-statutory arbitration process after the statutory presuit phase had concluded of its own accord. It is this new inability of health care professionals to craft arbitration agreements that differ from the statutory scheme, even if that contractual arbitration is intended to operate entirely separate from and after the natural expiration of the statutory presuit phase of the MMA, that the Florida Supreme Court's decision below has wrought.

Respondents simply ignore this fundamental and prejudicial aspect of the opinion below in their attempt to imply that it satisfies the FAA and complies with this Court's precedent. It is irrelevant for purposes of this petition that the Florida Arbitration Code applied to the private arbitration that would have occurred after the parties had mutually declined to participate in the voluntary statutory arbitration. What is relevant, and violative of the FAA, is that it is now impossible

for Petitioners to even attempt to implement extra-statutory private arbitration, regardless of the procedures to be used.

It bears emphasizing that the parties' arbitration agreement does not "cherry-pick" favorable portions of the MMA's scheme. Opp. 24-25. Instead, it recognizes that participation in the MMA's presuit phase, which includes the voluntary arbitration provision, is mandatory in every medical malpractice case by law, and therefore cannot be avoided. It states that the parties "agree and recognize" that the MMA "shall apply . . . ***in all respects***," but that if "at the conclusion of the pre-suit screening period and provided there is no mutual agreement to arbitrate" under the MMA, ***only then*** did the parties agree to "resolve any claim through arbitration pursuant to this Agreement." App. 4. It is this aspect of the parties' agreement that the Florida Supreme Court disregarded and invalidated, contrary to settled law.

By utterly failing to enforce the parties' arbitration agreement as written, the lower court's decision is inconsistent with *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), *Volt Information Sciences., Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985), to name but a few. As a result, this Court's review is vital to ensure the enforceability of private arbitration agreements. For these same reasons, Respondents' argument that this case is somehow a "poor

vehicle" to resolve these important issues rings hollow. Opp. 33-34.

2. The arbitration agreement undeniably involves interstate commerce.

While admitting that the activities deemed to be affecting interstate commerce for purposes of the FAA are indeed "expansive," Respondents nonetheless argue that the arbitration agreements here do not implicate interstate commerce because, when looked at in isolation, they involve a Florida patient and a Florida physician. Opp. 26-30. However, Respondents have focused too narrowly.

The phrase "affecting commerce" in the FAA "indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). "To give effect to [its] purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). Significantly, this Court has clarified that "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003).

Here, the aggregate economic activity related to the arbitration agreements used by Women's Care

Florida is substantial, and represents a general practice of medicine subject to federal control. The arbitration agreements at issue here relate to patient care across all of central Florida, at numerous Women's Care Florida facilities. Pet. 5. In the aggregate, this amounts to the provision of care to countless Floridians at numerous facilities, all of which need goods and medical supplies that undoubtedly arrive in part from interstate commerce.

This Court has determined that health care facilities, involving the provision of medical services for a fee, are among the kinds of activities that are *de facto* subject to federal control under the Commerce Clause. *See, e.g.*, *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 327-29 (1991) (hospital's basic activities such as the purchase of medicines and acceptance of insurance establish interstate commerce); *Brookdale Sr. Living, Inc. v. Stacy*, 27 F. Supp. 3d 776, 791-92 (E.D. Ky. 2014) (citing *Alafabco* as support for the proposition that "[i]t is beyond dispute" that a nursing home arbitration agreement "falls within the scope of the FAA" because the general activity "of providing health care – even if contained to an intrastate market in this individual case – is without a doubt the kind of activity that in the aggregate is subject to federal control under the Commerce Clause").

3. Long-established authority from this Court dictates that the FAA applies in state courts.

This Court first established in 1984 that the FAA applied to state courts. *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Since that time, this Court has flatly rejected several requests to overrule *Southland* on this point. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 353 n.2 (2008) (holding that "[t]he FAA's displacement of conflicting state law . . . has been repeatedly reaffirmed" and rejecting an "invitation to overrule *Southland*"); *Allied-Bruce*, 513 U.S. at 838-39 ("Nothing significant has changed in the 10 years subsequent to Southland . . . [and] we find it inappropriate to reconsider what is by now well-established law.").

There is nothing about this "well-established law," or Justice Thomas's continuing dissenting opinions thereto, that should cause this Court to avoid accepting certiorari review and intervening to ensure that Florida follows this Court's precedent on FAA preemption. Opp. 31-32. Indeed, this Court just last term had no qualms about taking this exact action in *Kindred Nursing*, and there is no reason the same result should not occur here.

C. There is no impediment to issuing a grant, vacate and remand order, should this Court deem such action proper.

Petitioners have asked this Court to grant their petition in order to review the decision below and reverse the decisions below as fundamentally inconsistent with

the FAA and this Court's precedent. As set out above, Petitioners believe that this petition presents an appropriate vehicle for addressing this important issue, which if left to stand will invalidate nearly all contractual arbitration agreements between a patient and a physician as void as against public policy. However, to the extent that this Court deems it advisable to grant the petition for purposes of vacating the decision below and remanding (GVR) to the Florida Supreme Court for reconsideration in light of this Court's recent *Kindred Nursing* opinion, there are no impediments to such action.

Respondents argue that a GVR order is inappropriate because the Florida Supreme Court denied a motion to recall its mandate in the underlying case on the basis of *Kindred Nursing*, filed by Petitioners below. Opp. 35-36. However, this Court has previously entered GVR orders under identical circumstances. *See Lords Landing Village Condo. Counsel of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 895-96 (1997); *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 914 (1996); and *Huddleston v. Dwyer*, 322 U.S. 232, 235 (1944).

CONCLUSION

For all of these reasons, as well as those contained in the Petition for Certiorari, this Court should grant the petition.

Respectfully submitted,

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