No.

In the Supreme Court of the United States

KINDRED HOSPITALS EAST, LLC D.B.A. KINDRED HOSPITAL OCALA,

Petitioner,

v.

ESTATE OF MARIANNE KLEMISH, AND FRANK KLEMISH,

Respondents.

On Petition for a Writ of Certiorari to the Florida Fifth District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). That provision requires States to place "arbitration agreements on an equal plane with other contracts" and prohibits "singling out those contracts for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1426-27 (2017).

The Florida courts refused to enforce the parties' contractual arbitration agreement in this case because its terms do not incorporate Florida's *statutory* scheme for voluntary arbitration of malpractice claims. That scheme requires, among other things, that health care providers concede liability and arbitrate only the amount of damages.

The question presented is:

Whether the FAA preempts a state-law rule that conditions the enforceability of a contractual agreement to arbitrate on the inclusion of specified terms that include a concession of liability.

RULE 14.1(B) STATEMENT

The other parties to the proceeding in the Florida Fifth District Court of Appeal were (1) Alex Villacastin, M.D.; (2) West Florida Medical Associates, P.A.; (3) Rathnasabathy Sivasekaran, M.D.; (4) Sanjay A. Patel, M.D.; (5) Javier Benito Cairo-Lavado, M.D.; (6) SKS Medical PLLC; and (7) Monroe Regional Health System, Inc. None of these parties remains in the case.

RULE 29.6 STATEMENT

The parent corporation of Kindred Hospitals East, LLC, is Kindred Healthcare Operating, Inc. The parent corporation of Kindred Healthcare Operating, Inc. is Kindred Healthcare, Inc. Kindred Healthcare, Inc. is a publicly traded corporation with no parent corporation.

BlackRock, Inc. (NYSE:BLK) is the only publicly traded company that owns 10% or more of the stock of Kindred Healthcare, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kindred Hospitals East, LLC ("Kindred") respectfully petitions for a writ of certiorari to review the judgment of the Florida Fifth District Court of Appeal in this case.

OPINIONS BELOW

The opinion of the Florida Fifth District Court of Appeal (App., *infra*, 1a-8a) is reported at 216 So.3d 14.

The May 5, 2017 order of the Supreme Court of Florida declining to accept jurisdiction (App., *infra*, 9a-10a) is unreported but is available at 2017 WL 2210392. The June 20, 2017 order of the Supreme Court of Florida denying Kindred's motion to reinstate the appeal (App., *infra*, 11a) is unreported but is available at 2017 WL 2644699. The June 24, 2015 order of the Florida Circuit Court granting Kindred's motion to compel arbitration (App., *infra*, 38a-41a) is unreported.

JURISDICTION

The judgment of the Florida Fifth District Court of Appeal was entered on July 15, 2016. App., *infra*, 1a. The order of the Florida Supreme Court denying jurisdiction was entered on May 5, 2017. App., *infra*, 9a. That court denied Kindred's motion to reinstate the appeal on June 20, 2017. App., *infra*, 11a. On July 27, 2017, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including September 1, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause of the Constitution, art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. Section 766.207 of the Florida Medical Malpractice Act, Fla. Stat. § 766.207, provides in pertinent part:

> (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.
>
> * * *

> (7) Arbitration pursuant to this section * * * 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:
>
> (b) Noneconomic damages shall be limited to a maximum of $250,000 per incident * * *.
>
> * * *
>
> (d) Punitive damages shall not be awarded.
>
> * * *
>
> (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.

STATEMENT

This case arises from the Florida Fifth District Court of Appeal's refusal to enforce an agreement to arbitrate claims for medical malpractice. The court held that a *contractual* arbitration agreement be-

tween a health care provider and a patient is unenforceable unless the agreement mirrors the *statutory* scheme outlined in the Florida Medical Malpractice Act for voluntary arbitration of medical malpractice claims. Under the Florida court's holding, health care providers and their patients cannot agree upon the terms that will govern arbitration. Instead, Florida will refuse to enforce contractual arbitration agreements that do not incorporate the statutory scheme—one that requires the provider to concede liability and thereby surrender all substantive defenses on the merits, and obligates the patient to agree to limits on noneconomic damages and a ban on punitive damages.

This "arbitration-specific" rule stands in stark contrast to this Court's repeated instruction that the FAA preempts state-law rules that "singl[e] out" arbitration contracts—whether "fac[ially]" or "covertly"—"for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017); see also *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-69 (2015); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

Needless to say, Florida does not generally prescribe terms that contracts must contain in order to be enforceable under Florida law. Imposing this special requirement for arbitration agreements plainly violates the FAA.

The Florida court's decision is also impossible to reconcile with the "'principal purpose' of the FAA," which this Court has repeatedly stated is to "'ensure that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 563 U.S. at 344

(alterations omitted; quoting *Volt Info. Scis., Inc.* v. *Bd. of Trs.*, 489 U.S. 468, 479 (1989)); see also *Casarotto*, 517 U.S. at 688; *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). Reflecting the principle that arbitration is a matter of contract, this Court has held on numerous occasions that the FAA affords parties broad discretion "to structure their arbitration agreements as they see fit." *Mastrobuono*, 514 U.S. at 683; see also *Concepcion*, 563 U.S. at 344, 351; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010).

The decision below not only eviscerates that discretion, but in the process requires terms that are inconsistent with "arbitration as envisioned by the FAA." *Concepcion*, 563 U.S. at 351. By conditioning arbitration on (among other things) the provider's complete surrender of liability—mandating acceptance of essentially a no-fault compensation scheme—the decision below "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

If the ruling below is permitted to stand, then every contractual agreement to arbitrate health care disputes in Florida would be unenforceable. Equally troubling, it could inspire other state courts to exhibit the same cavalier disregard of this Court's decisions and to effectively nullify countless arbitration agreements by mandating the inclusion of contract terms incompatible with arbitration.

This Court's review is therefore essential. And given the failure of the Florida courts in this context to heed this Court's repeated pronouncements that the FAA prevents states from singling out arbitra-

tion agreements for disfavored treatment or subjecting them to "uncommon barriers" (*Kindred Nursing Centers*, 137 S. Ct. at 1427), the Court may wish to consider summary reversal or vacatur for reconsideration in light of *Kindred Nursing Centers*.

A. The Florida Medical Malpractice Act.

The Florida legislature enacted the Medical Malpractice Act ("MMA"), Fla. Stat. § 766.201 *et seq.*, in 2003 in response to a "medical malpractice insurance crisis" in the State. *Franks* v. *Bowers*, 116 So.3d 1240, 1247 (Fla. 2013). Specifically, the legislature found that "'[m]edical malpractice liability insurance premiums have increased dramatically in recent years, resulting in increased unavailability of malpractice insurance for some physicians.'" *Ibid.* (quoting Fla. Stat. § 766.201(1)(a)).

To alleviate the cost and unavailability of insurance, the legislature enacted a "plan for prompt resolution of negligence claims" that "consist[s] of two separate components, presuit investigation and arbitration." Fla. Stat. § 766.201(2). The presuit investigation requirements are "mandatory" for both patients and providers "and shall apply to all medical negligence claims and defenses" (*id.*)—whether raised in court or in arbitration. See also Fla. Stat. §§ 766.106, 766.203 (detailing the presuit notice and investigation requirements).

The MMA also creates a "voluntary," post-dispute arbitration process that the parties may adopt at the close of the presuit investigation. Fla. Stat. §§ 766.201(2), 766.207. Under that process, "the parties may elect to have *damages* determined by an arbitration panel." Fla. Stat. § 766.207(2) (emphasis added). In other words, when a provider elects this

process, "liability is deemed admitted" by the provider, "and arbitration will be held only on the issue of damages." Fla. Stat. § 766.106(3)(b)(3). The provider likewise concedes to being jointly and severally liable with each defendant who submits to arbitration (Fla. Stat. § 766.207(7)(h)), and agrees to pay the claimant's reasonable attorney's fees (*id.* § 766.207(7)(f)) and "all the costs of the arbitration proceeding" (*id.* § 766.207(g)).

In return for its concession of liability and agreement to pay the patient's fees and costs, the provider may not be subject to an award of punitive damages in the statutory arbitration proceedings (*id.* § 766.207(7)(d)), and the patient's noneconomic damages are "limited to a maximum of $250,000 per incident" (*id.* § 766.207(7)(b)), which is less than the amount that a patient may be able to recover in court. Compare Fla. Stat. § 766.118(2) (limiting noneconomic damages for malpractice claims to $500,000, or $1 million if the malpractice results in "catastrophic injury," a "permanent vegetative state," or "death").[1]

B. Factual Background.

This case arises out of Marianne Klemish's hospitalization in early 2012 at Kindred Hospital Ocala, a hospital operated by petitioner Kindred Hospitals East, LLC ("Kindred"). App., *infra*, 2a-4a. Shortly after she was admitted to the hospital for therapy and post-surgical care, Ms. Klemish signed a separate arbitration agreement entitled "ALTERNATIVE

[1] A divided Florida Supreme Court recently held that the statutory caps on noneconomic damages set forth in Fla. Stat. § 766.118 violate the Florida Constitution. *North Broward Hosp. Dist.* v. *Kalitan*, 219 So.3d 49 (Fla. 2017).

DISPUTE RESOLUTION AGREEMENT AND AMENDMENT TO ADMISSION AGREEMENT." *Id.* at 2a, 42a.

This arbitration agreement provided that any disputes arising out of or relating to "the medical treatment or care of Patient at Kindred Hospital Ocala" would be resolved in arbitration. App., *infra*, 42a.[2] It also explained at the outset that "[s]igning this agreement is not a precondition to the furnishing of services by Kindred Long-Term Acute Care Hospitals." *Ibid.*

The arbitration agreement refers to the MMA in two respects. *First*, it incorporates the statute's mandatory presuit investigation and notice requirements that apply to all malpractice claims under Florida law, regardless of the forum in which they are brought (*see* page 6, *supra*):

> 5. Pre-Request Procedures. Notwithstanding anything in this Agreement to the contrary, in connection with any claim for medical malpractice as defined in Florida Statutes Section 766.106, or any similar successor law, or any claim or Request involving medical negligence, the Parties shall comply with the presuit investigation and presuit notification requirements * * * prior to filing a Request for ADR, unless the Parties agree to waive the presuit requirements.

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[2] The arbitration agreement also makes clear that it is binding on "all persons whose claim is derived through or on behalf of Patient, including, without limitation, any parent, spouse, child, guardian, executor, administrator, personal representative, or heir of Patient." App., *infra*, 48a-49a.

App, *infra*, 46a.

Second, the arbitration agreement offers the parties the option—if a dispute arises—of mutually electing to use the MMA's voluntary statutory arbitration process instead of arbitration under the contract's terms:

> 6. Arbitration of Damages. If prior to the filing of a Request for ADR either Party offers to have Patient's damages determined by arbitration in accordance with Chapter 766, Florida Statutes, and the other Party accepts such offer, the Parties shall arbitrate damages in accordance with Chapter 766, Florida Statutes, and the other terms and conditions of this Agreement *shall not apply* to such claim.

App., *infra*, 46a (emphasis added).

In this case, it is undisputed that the parties have not chosen to arbitrate under the statutory scheme.

C. Proceedings Below.

Marianne Klemish and respondent Frank Klemish brought suit against petitioner (along with several other medical entities), asserting medical malpractice in connection with injuries she allegedly suffered during her hospitalization. App., *infra*, 4a.[3] Kindred moved to dismiss or stay the claims against

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[3] While this case was pending before the Florida Supreme Court, the parties notified the court that Marianne Klemish had passed away, and her estate was substituted as a party. That estate is a respondent here.

it, seeking to enforce the arbitration agreement between it and Ms. Klemish. *Ibid.*

1. The state trial court granted Kindred's motion, holding that the parties entered into a "valid arbitration agreement" that was not unconscionable. App., *infra*, 39a.

The Klemishes appealed to the Fifth District Court of Appeal. As in the trial court, the parties did not dispute that an arbitration agreement was formed, nor did they dispute that the Klemishes' claims fell within the scope of Ms. Klemish's arbitration agreement. Rather, the Klemishes contended that the arbitration agreement was void as a matter of Florida public policy under the Florida Supreme Court's decision in *Franks* v. *Bowers*, 116 So.3d 1240 (Fla. 2013), *cert. denied*, 134 S. Ct. 683 (2013).

In *Franks*, unlike here, the provider incorporated into its arbitration agreement the $250,000 cap on noneconomic damages that applies only in statutory arbitration proceedings under the MMA. See *id.* at 1243, 1248; see also page 7, *supra*. The *Franks* court held that Florida public policy prohibits providers from taking only the benefits of the statutory arbitration scheme without the concomitant burdens: "we find that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions." *Franks*, 116 So.3d at 1248.

The *Franks* court further held that its conclusion was not preempted by the FAA because its decision was "fact-specific" and "pertain[ed] only to the particular agreement before us and does not prohibit all arbitration agreements under the MMA." *Id.* at 1250. The court specifically cautioned that its holding

"does not impede the general enforceability of agreements to arbitrate." *Id.* at 1251.

2. The Fifth District Court of Appeal reversed the trial court's order compelling arbitration. App., *infra*, 1a-8a. Relying on a prior one-paragraph per curiam opinion, see *Crespo* v. *Hernandez*, 151 So.3d 495 (Fla. 5th Dist. Ct. App. 2014), the court here held that because Kindred had "incorporated the MMA's presuit requirements" in "paragraph 5 of the parties' arbitration agreement," Kindred "was required to incorporate *all* of the MMA's arbitration provisions in order for the arbitration agreement to be valid." App., *infra*, 6a (emphasis added).

The court certified, however, that its opinion, and its prior opinion in *Crespo*, "conflict[s] with the decision of the Second District Court of Appeal in *Santiago* v. *Baker*, 135 So.3d 569 (Fla. 2d DCA 2014)." App., *infra*, 8a. In *Santiago*, the Second District Court of Appeal had held that *Franks* must be limited to its facts and does not categorically "prohibit[] parties from arbitrating their claims by private agreement outside the statutory scheme." 135 So.3d at 571.

3. Kindred timely sought review by the Florida Supreme Court, citing the certified conflict among Florida's intermediate appellate courts. See Fla. Const. art. V, § 3(b)(4) (providing the Florida Supreme Court with discretionary jurisdiction to review "any decision of a district court of appeal * * * that is certified by it to be in direct conflict with a decision of another district court of appeal").

The Florida Supreme Court stayed this case pending its disposition in *Crespo*. In December 2016, the Florida Supreme Court, by a vote of 5-2, affirmed

the Fifth District's denial of arbitration in *Crespo* and "disapprove[d] the Second District's decision in *Santiago*." *Hernandez* v. *Crespo*, 211 So.3d 19, 27 (Fla. 2016). Without mentioning the FAA, the court extended *Franks* to conclude that any agreement to arbitrate malpractice claims must mirror the "balance of statutory incentives" under the MMA: "We find that arbitration agreements which change the cost, award, and fairness incentives of the MMA statutory provisions contravene the Legislature's intent and are therefore void as against public policy." *Id.* at 27. The court concluded that the arbitration agreement in *Crespo* failed that standard "in six major places," including by not "conced[ing] Petitioners' liability"; not "having Petitioners assume most of the costs of arbitration"; and "not requir[ing] joint and several liability of defendants." *Id.* at 26-27.[4]

After deciding *Crespo*, the Florida Supreme Court issued an order in this case directing Kindred to show cause why *Crespo* is not controlling and why the court should not decline jurisdiction on that basis. App., *infra*, 12a. Kindred explained that the arbitration agreement in this case does not selectively incorporate the MMA's statutory arbitration scheme in the one-sided manner found problematic in *Franks*.

Kindred further argued that if *Crespo* extended *Franks* to the point that "no alternative contractual arbitration process is available in a Florida medical malpractice dispute," then that "result would violate the Federal Arbitration Act." App., *infra*, 26a-27a

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[4] A consolidated petition for a writ of certiorari in *Crespo* (and two other cases summarily decided on the basis of *Crespo*) is pending before this Court. See No. 16-1458.

(citing, *inter alia*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996); *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); and *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011)). Relatedly, Kindred asked the court in the alternative to hold the dispute "in abeyance until the U.S. Supreme Court determines the case of *Kindred Nursing Centers Limited Partnership* v. *Clark*, * * * which will decide a controlling issue in this case (i.e., whether federal law preempts state laws that impose special requirements on arbitration agreements * * *)." *Id.* at 28a.

The Florida Supreme Court, by a vote of 4-3, declined to exercise jurisdiction in this case, relying wholly on *Crespo*. App., *infra*, 9a. Justices Canady, Polston, and Lawson dissented, stating that they "would grant jurisdiction." *Ibid*.[5]

This Court issued its decision in *Kindred Nursing Centers* ten days after the Florida court's denial of review. Kindred moved the Florida Supreme Court to reinstate its appeal. App., *infra*, 31a-37a. Kindred explained that *Crespo* and the decision below are "in conflict with the U.S. Supreme Court's recent decision in *Kindred Nursing*," because they set forth a rule of "state law which 'singles out arbitration for disfavored treatment'" in violation of the FAA. *Id.* at 32a-33a.

The Florida Supreme Court summarily denied the motion by the same 4-3 vote. App., *infra*, 11a.

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[5] Justices Canady and Polston were the two dissenting justices in *Crespo*. Justice Lawson joined the Florida Supreme Court after *Crespo* was decided.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's clear and repeated holdings that the FAA preempts state-law rules that discriminate against arbitration agreements or interfere impermissibly with the fundamental attributes of arbitration, one of which is the discretion of the parties to structure their arbitration contracts. Just last term, in another case involving a Kindred entity, the Court emphatically reiterated that the FAA "requires courts to place arbitration agreements 'on equal footing with all other contracts.'" *Kindred Nursing Ctrs.*, 137 S. Ct. at 1424 (quoting *Imburgia*, 136 S. Ct. at 468); see also *Casarotto*, 517 U.S. at 686-87; *Perry*, 482 U.S. at 492 n.9.

By mandating that private arbitration agreements contain the precise terms included in a statutory scheme for voluntary arbitration, and refusing to enforce those agreements that fail to contain such terms, the decision below violated this mandate because no such rule applies to contracts generally.

Moreover, the terms imposed by the decision below render agreements to arbitrate medical malpractice claims meaningless in Florida. If the contract must mirror the statutory arbitration procedures for arbitrating the question of damages, as the Florida courts now require, then a contract is irrelevant because the parties could have invoked the same statutory process without the prior agreement. Moreover, no rational provider would agree to the prescribed terms—such as an admission of liability—before a dispute arises or the provider even sees the patient.

The result of the decision below is therefore to prevent patients and providers from entering into

pre-dispute arbitration agreements altogether—a result completely antithetical to the "liberal federal policy favoring arbitration agreements" embodied by the FAA, which trumps "any state substantive or procedural policies to the contrary." *Concepcion*, 563 U.S. at 346 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also *Imburgia*, 136 S. Ct. at 468 ("The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.").

The decision below is yet another in a long line of state court decisions ignoring or seeking to evade this Court's precedents on arbitration. See, *e.g.*, *Kindred*, 137 S. Ct. 1421; *Imburgia*, 136 S. Ct. 463; *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 568 U.S. 17 (2012) (per curiam); *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530 (2012) (per curiam). Review and reversal or vacatur of the decision below is warranted to preserve the integrity of this Court's precedents.

A. The Decision Below Conflicts With The FAA And Violates This Court's Precedents.

The public policy rule announced by the Florida courts—that contracts to arbitrate medical malpractice claims must mirror the terms of the voluntary arbitration process contained in Florida's medical malpractice act—cannot be squared with the FAA.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal

federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted). As this Court has recognized, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 563 U.S. at 342 (quoting *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and *enforceable as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 492 n.9 (quoting 9 U.S.C. § 2). This principle means that "Congress precluded States from singling out arbitration provisions for suspect status" (*Casarotto*, 517 U.S. at 687) or from invalidating arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339; see also *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426; *Imburgia*, 136 S. Ct. at 469; *Perry*, 482 U.S. at 492 n.9. Nor may States apply generally applicable state-law doctrines "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341; see also *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (explaining that the FAA "preempts any state rule discriminating" either facially or covertly against arbitration).[6]

[6] It is immaterial that the discriminatory rule here derives from public policy rather than the statute itself; the FAA preempts any "state law, whether of legislative *or judicial* origin," that

The decision by the Florida Fifth District Court of Appeal does just what the FAA prohibits.

1. "Courts may not * * * invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Casarotto*, 517 U.S. at 687 (emphasis in original). Thus, a State may not "condition[] the enforceability of arbitration agreements on compliance with" procedural or substantive requirements "not applicable to contracts generally." *Id*.

The requirements of the MMA's statutory arbitration process—which by their very nature are applicable only to arbitration—are state-law rules that do not generally apply to all contracts. Such an across-the-board rule is unimaginable; the whole point of contract law is to allow for the private ordering of affairs by parties to a contract.

Florida's special public policy rule demanding adherence to the MMA's statutory scheme for voluntary arbitration therefore may not be the basis for refusing to enforce a contractual arbitration agreement. After all, a rule that allowed States to render certain provisions in arbitration agreements unenforceable merely by prescribing a mandatory list of terms for arbitration agreements "would make it trivially easy for States to undermine the Act." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1428.

The court below justified superimposing the MMA's arbitration requirements on contractual arbitration agreements—including the mandate that a health care provider admit liability—by relying on state "public policy" grounds. App., *infra*, 2a. But this Court has repeatedly held that "States cannot re-

disfavors arbitration. *Perry*, 482 U.S. at 492 n.9 (emphasis added); see *Casarotto*, 517 U.S. at 687 n.3.

quire a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion*, 563 U.S. at 351; see also *Imburgia*, 136 S. Ct. at 468 (state-law rules must be "consistent with the Federal Arbitration Act"); *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013).

In addition, this public policy rationale is not "a ground * * * 'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions." *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984). This Court held in *Imburgia*, for example, that the FAA preempted the California Court of Appeal's interpretation of the parties' contract because "nothing in the [state court's] reasoning suggest[ed]" that a court in that state "would reach the same interpretation * * * in any context other than arbitration." 136 S. Ct. at 470-71. Likewise, nothing in the decision below (or in *Crespo*) suggests that Florida would condition the enforceability of contract provisions in other areas on the inclusion of prescribed terms remotely analogous to those in the Florida MMA's voluntary arbitration scheme—such as a concession of liability.[7]

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[7] Indeed, the Florida courts' public policy rationale is dubious on its own terms. As the dissenting justices in *Crespo* pointed out, there is an "astonishing irony" in a "line of judicial reasoning that condemns as invalid a voluntary agreement designed to limit the expense of medical malpractice litigation" by invoking "the purpose of a statute expressly designed to limit the expense of medical malpractice litigation." 211 So.3d at 29 (Canady, J., dissenting). Rather, the rule adopted by the Florida courts appears to reflect the type of hostility to arbitration as a means of dispute resolution that this Court has repeatedly declared out of bounds under the FAA. See, *e.g.*, *14 Penn Plaza*

Moreover, by mandating that private arbitration contracts incorporate the statutory arbitration scheme, the decision below runs afoul of the FAA's "'principal purpose'" of "'ensur[ing] that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 563 U.S. at 344 (alterations omitted; quoting *Volt Info. Scis.*, 489 U.S. at 479); see also *Casarotto*, 517 U.S. at 688; *First Options*, 514 U.S. at 947; *Mastrobuono*, 514 U.S. at 53-54.

To be sure, courts are empowered under Section 2 of the FAA to assess whether the terms in private arbitration agreements comport with generally applicable contract law—such as ordinary standards of unconscionability. But the FAA forbids courts from doing what the Florida courts have done here: simply refuse to enforce an agreement to arbitrate medical malpractice claims that deviates in any material way from the statutory arbitration scheme. That turns the Supremacy Clause on its head: States may not use arbitration-specific rules or policy rationales to circumvent the FAA's mandate that arbitration agreements generally be enforced according to their terms.

As this Court has stated, "[t]he point of affording parties discretion in designing arbitration procedures is to allow for efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 344-45. And this Court has repeatedly recognized that the FAA affords parties broad discretion "to structure their arbitration agreements as they see

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LLC v. *Pyett*, 556 U.S. 247, 266 (2009); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 231-32 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

fit." *Mastrobuono*, 514 U.S. at 683; see also *Concepcion*, 563 U.S. at 344, 351; *Stolt-Nielsen*, 559 U.S. at 683. The decision below removes that discretion altogether, prescribing in detail the terms that the parties must include in their agreement. The FAA forbids States from prescribing contractual arbitration agreements in that manner.

2. The decision below also departs from settled FAA principles for a second, related reason: it conditions the enforceability of arbitration agreements on the inclusion of a set of terms that "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

It is apparent why no rational healthcare provider would ever agree at the outset of its relationship with a patient to admit liability and surrender all substantive defenses to any malpractice dispute that might later arise. Yet that is exactly what the decision below requires, "forc[ing] such a decision" (*Concepcion*, 563 U.S. at 351) at the time of contracting in order for the arbitration agreement to be enforceable.

Just as this Court in *Concepcion* found it "hard[] to believe that Congress would have intended to allow state courts to force" defendants to submit to class arbitration, it is "even harder to believe" that Congress would have intended to force defendants to give up their defenses to liability altogether. *Ibid.* The upshot will be that providers simply will not enter into arbitration agreements at all, completely undermining the FAA's "liberal federal policy favoring arbitration agreements" as a means of dispute resolution. *Concepcion*, 563 U.S. at 346 (quoting *Moses H. Cone*, 460 U.S. at 24).

Indeed, the decision below makes it impossible for Kindred or other providers to agree in advance to arbitrate the merits of a patient's malpractice allegations. By precluding the resolution of contested malpractice allegations in arbitration—leaving for the arbitrator only the question of how much money to award the patient—the rule below effectively transforms arbitration from an alternative forum for the adjudication of disputes into a no-fault compensation scheme. That damages-processing mechanism is "not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 563 U.S. at 351.

Certainly the State's conditions are so onerous that no reasonable health care provider will enter into such pre-dispute arbitration agreements. The decision below is therefore at best a stone's throw from a "state law prohibit[ing] outright the arbitration of a particular type of claim"—which is the type of state-law rule that this Court has held is "straightforward[ly]" displaced by the FAA. *Concepcion*, 563 U.S. at 341; accord *Kindred Nursing Centers*, 137 S. Ct. at 1426; *Marmet*, 565 U.S. at 533.

Simply put, the rule announced in the decision below "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" and is therefore "preempted by the FAA." *Concepcion*, 563 U.S. at 352 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

3. Finally, respondents cannot credibly argue that the decision below is simply a benign application of the Florida Supreme Court's decision in *Franks*, in which this Court denied review.

In *Franks*, the provider included in its arbitration agreement a $250,000 cap on noneconomic damages, even though that cap was applicable only to claims in which the parties had agreed (post-dispute) to make use of the MMA's voluntary arbitration process. See 116 So.3d at 1248 ("Under the Financial Agreement, Franks could only receive a maximum of $250,000.").

The Florida Supreme Court explained that "the benefit of the [$250,000] statutory cap on noneconomic damages is solely reserved for a defendant who is conceding liability and participating in arbitration" under the voluntary statutory scheme. *Ibid.* By contrast, patients are "entitled to receive" a "maximum of $1 million" under the MMA if they prevail in court (assuming the statute's general caps on damages were valid). *Ibid.* It was because the arbitration agreement in *Franks* altered the substantive remedy available to an individual plaintiff that the Florida court held that the arbitration agreement before it violated public policy—warranting a narrow departure from the general rule "that parties are free to contract around a state law." *Id.* at 1247.

Here, by contrast, neither the respondents nor the court below identified any way in which arbitration under the parties' agreement in this case diminishes respondents' rights compared to litigation in court. Respondents may pursue in contractual arbitration any and all causes of action and remedies that they would otherwise be able to pursue in court.[8]

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[8] The arbitration agreement of course waives respondents' right to a jury trial—which the agreement made clear (App., *infra*, 44a)—but that defining characteristic of arbitration plainly is

The decision below nonetheless deemed this case analogous to *Franks* because the arbitration agreement incorporates the MMA's presuit notification requirements. App., *infra*, 6a. That analogy is transparently wrong: the MMA's presuit requirements are "mandatory" and apply to *all* medical malpractice claims in Florida. Fla. Stat. §§ 766.106(3)(b)(3), 766.201(2), 766.203(1). Thus, unlike the $250,000 cap on noneconomic damages, the MMA's presuit requirements are not a unique feature of the statutory arbitration scheme; they apply equally to claims filed in court and claims brought under a contractual agreement to arbitrate.[9]

The arbitration provision here allows the parties, at the close of the presuit investigation, either to agree that the patient's malpractice claim is meritorious and arbitrate the amount of the patient's damages under the voluntary statutory scheme, or resolve the contested malpractice claim in arbitration under the terms of the contract rather than in court. If that arrangement violates Florida public policy, as the court below held, then it is hard to imagine how any agreement to arbitrate contested malpractice claims could be enforceable.

The holding below completely eviscerates the Florida Supreme Court's recognition in *Franks* that

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not a permissible basis for refusing to enforce an arbitration agreement. See *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427.

[9] Because the requirement of a presuit investigation is mandatory under the Florida MMA (Fla. Stat. § 766.203(1)), the requirement would apply even if a contractual arbitration provision were silent about that procedure. See *Baptist Med. Ctr. of Beaches, Inc.* v. *Rhodin*, 40 So.3d 112, 115 (Fla. Dist. Ct. App. 2010) ("[T]he mandatory presuit procedures in chapter 766 * * * are a condition precedent to a medical malpractice suit.").

parties generally may "contract around a state law" and that its holding survived FAA preemption because it was fact-specific and "does not prohibit all arbitration agreements under the MMA." 116 So.3d at 1247, 1250. As Kindred pointed out to the Florida Supreme Court, this extension of *Franks* goes well past the FAA's breaking point. App., *infra*, 26a-27a.

Yet by a 4-3 vote, the Florida Supreme Court rejected that argument and refused to hear Kindred's appeal (App., *infra*, 9a), necessarily disagreeing with Kindred's position that the decision below is in conflict with the FAA. The decision by a bare majority of the Florida court to disregard this Court's arbitration precedents should not be allowed to stand.

B. The Decision Below Is Exceptionally Important.

This Court's intervention is warranted for three basic reasons.

1. The enforceability of contractual arbitration agreements between health care providers and patients is one that is certain to arise with great frequency. In particular, Florida is an enormous market for health care, with the fourth largest population overall and the highest percentage of elderly residents of any state. See Kaiser Family Foundation, *The Florida Health Care Landscape* (Nov. 12, 2013), http://www.kff.org/health-reform/fact-sheet/the-florida-health-care-landscape/.

Health care providers in Florida—as elsewhere—frequently agree to resolve disputes via arbitration, seeking the "advantages" of arbitration that this Court has recognized inure to the benefit of businesses and individuals alike—most notably, that it is "'cheaper and faster than litigation.'" *Allied-Bruce*

Terminix Cos. v. *Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)); see also *Concepcion*, 563 U.S. at 345; *14 Penn Plaza*, 556 U.S. at 257 ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). Indeed, the spiraling costs of litigating medical malpractice claims in Florida—and the corresponding increase in malpractice insurance premiums—are precisely what led Florida to enact the MMA in the first place. See page 6, *supra*.

If the decision below is allowed to stand, it will effectively nullify countless arbitration agreements between providers and patients by prescribing terms—such as an admission of liability—that no rational provider would offer. See pages 20-21, *supra*. Accordingly, this Court's intervention is critical to restore the freedom of providers and patients to commit—before a dispute arises—to resolve contested malpractice claims in arbitration rather than through litigation in court.

2. The issue is properly presented in this case. Kindred raised the FAA preemption argument before the Florida Supreme Court in response to that court's order directing Kindred to show cause why the Florida court's decision in *Crespo* was not controlling. But the Florida court denied review by a divided vote—plainly rejecting the argument that federal law preempted the court's ruling based on Florida law. See pages 12-13, *supra*.

The absence of any opinion below addressing the FAA issue is a reason favoring this Court's intervention. Most medical malpractice claims are brought in state court, because the parties are almost always citizens of the same State. Given the Florida Supreme Court's action in this case, lower state courts

will refuse to enforce arbitration agreements and the issue is unlikely to return to the Florida Supreme Court. This Court should not permit state courts to avoid review by *sub silentio* refusals to enforce the FAA.[10]

3. This Court's intervention also will make clear that lower courts may not invalidate arbitration agreements in contravention of the FAA and this Court's precedents.

This Court repeatedly has intervened by granting summary reversals when state courts have ignored or refused to apply controlling precedents interpreting the FAA. As the Court has explained, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 568 U.S. at 17-18.

Thus, for example, in *Marmet*, this Court summarily vacated and remanded a decision of "the Supreme Court of Appeals of West Virginia," which, "by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing th[e] basic principle" that both "[s]tate and federal courts must enforce the Federal Arbitration Act." 565 U.S. at 531; see also *id.*

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[10] The FAA preemption argument had not been raised before the Florida Supreme Court in *Crespo* until a petition for rehearing, which under Florida's rules of appellate procedure may "not present issues not previously raised in the proceeding." Fla. R. App. P. 9.330(a). Accordingly, this case is a better vehicle than *Crespo* for deciding the issue because the federal claim here was raised in the state court, but it was not properly raised in the state courts in *Crespo*.

at 532 ("The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

In *Nitro-Lift*, this Court summarily vacated the Oklahoma Supreme Court's decision refusing to apply this Court's severability doctrine and instead declaring the underlying contract containing the arbitration provision null and void—a decision which blatantly "disregard[ed] this Court's precedents on the FAA." 568 U.S. at 20. The Court further reminded lower courts that "'[i]t is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *Id.* at 21 (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)).

In *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam), this Court summarily vacated the Florida Fourth District Court of Appeal's refusal to compel arbitration as "fail[ing] to give effect to the plain meaning of the [Federal Arbitration] Act and to the holding of *Dean Witter* [*Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985)]."

And in *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam), this Court summarily reversed the Alabama Supreme Court's refusal to apply the FAA based on an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's decision in *Allied-Bruce*, 513 U.S. 265.

Summary intervention is appropriate here—as in *Marmet*, *Nitro-Lift*, *KPMG*, and *Citizens Bank*—but this Court has not hesitated to address state courts'

refusal to adhere to this Court's precedents in other cases as well.

Last Term, this Court reversed in part and vacated in part a decision of the Kentucky Supreme Court that "did exactly what *Concepcion* barred:" adopt an "arbitration-specific" rule that made arbitration agreements harder to form or enforce than other types of contracts. *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427-28. When a state law rule subjects arbitration agreements to "uncommon barriers," the Court explained, that rule cannot "survive the FAA's edict against singling out those contracts for disfavored treatment." *Id.* at 1427.

And the Term before, this Court reversed a decision of the California Court of Appeal adopting a dubious interpretation of an arbitration agreement in an attempt to find the agreement unenforceable. *Imburgia*, 136 S. Ct. at 468-71. This Court was once again compelled to remind the lower courts of their "undisputed obligation" to follow its precedents: "The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Id.* at 468.

The decision below indicates that some state courts have not appreciated their "undisputed obligation." Moreover, if left to stand, the decision below provides a clear template for state legislatures and courts to undermine the FAA by identifying favored mechanisms for arbitration of certain kinds of claims, and then declaring that state public policy prevents private parties from deviating from those mechanisms in their arbitration agreements.

Yet this Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). Those reliance interests on a uniform national policy favoring arbitration (one embodied by the FAA) have only increased over time. If the decision below is not rectified, the effect would be to encourage other courts to further undermine those interests.

* * * *

Given the clear conflict between the decision below and this Court's precedents, the Court may wish to consider summarily reversing the decision below, or in the alternative grant plenary review.

If the Court believes that neither plenary review nor summary reversal is warranted, it may wish to consider granting the petition and vacating and remanding the decision below in light of *Kindred Nursing Centers*.[11] This Court has taken that course recently in other cases where state courts have failed to adhere to this Court's precedents. See *Schumacher Homes of Circleville, Inc.* v. *Spencer*, 136 S. Ct. 1157 (2016) (remanding in light of *Imburgia*); *Ritz-Carlton Development Co.* v. *Narayan*, 136 S. Ct. 799 (2016) (same).

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[11] The decision below and the Florida Supreme Court's order denying jurisdiction were issued before this Court decided *Kindred Nursing Centers*. Moreover, there is no indication from the Florida Supreme Court's summary denial of Kindred's motion to reinstate the appeal (App, *infra*, 11a) that the court addressed whether the decision below was in accord with *Kindred Nursing Centers*. Indeed, for all of the reasons explained above, it was not.

Finally, should this Court grant the pending petition in *Crespo*, it should hold the case for disposition as appropriate in light of the decision in *Crespo*.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal or vacatur for reconsideration in light of *Kindred Nursing Centers*.

Respectfully submitted.

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SEPTEMBER 2017

APPENDICES

APPENDIX A

District Court of Appeal of Florida,
Fifth District.

Marianne KLEMISH, Individually,
etc., et al, Appellants.
v.
Alex VILLACASTIN, M.D., et al., Appellees.

CASE NO.: SC16-1353
Lower Tribunal No(s):
5D15-2574; 422014CA000781CAAXXX

Opinion filed July 15, 2016

Non–Final Appeal from the Circuit Court for Marion County, Edward L. Scott, Judge.

Attorneys and Law Firms

Jessie L. Harrell and Bryan S. Gowdy, of Creed & Gowdy,P.A., Jacksonville, and Kevin J. Carden, Bounds Law Group, Maitland, for Appellants.

Richard Benjamin Wilkes and David M. Caldevilla, of De La Parte, Gilbert & Bales, Tampa, for Appellee, Kindred Hospitals East, LLC d/b/a Kindred Hospital Ocala.

No attorney for remaining Appellees.

OPINION

PALMER, J.

Frank and Marianne Klemish appeal the trial court's non-final order compelling arbitration of their medical malpractice claims against Kindred Hospitals East, LLC (Hospital).[1] Determining that the ar-

[1] Marianne appears individually and as guardian of her minor daughter, Skyla.

bitration agreement entered into by the parties is void because it violates public policy, we reverse.

Marianne was admitted to the Hospital for therapy and post-surgical care. She signed an arbitration agreement entitled "ALTERNATIVE DISPUTE RESOLUTION AGREEMENT AND AMENDMENT TO ADMISSION AGREEMENT." The agreement provided, in relevant part:

The Parties agree as follows:

….

2. Waiver of Right to a Trial. By entering into this Agreement the Parties agree to resolve any dispute covered by this Agreement using mediation and arbitration, and give up their right to have the dispute decided in a court of law before a judge or jury.

   THE PARTIES UNDERSTAND THAT THE RULES OF PROCEDURE CONTAIN PROVISIONS FOR BOTH MEDIATION AND BINDING ARBITRATION. IF THE PARTIES ARE UNABLE TO REACH SETTLEMENT INFORMALLY, OR THROUGH MEDIATION, THE DISPUTE SHALL PROCEED TO BINDING ARBITRATION. BINDING ARBITRATION MEANS THAT THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL, INCLUDING THEIR RIGHT TO A JURY TRIAL, THEIR RIGHT TO TRIAL BY A JUDGE AND THEIR RIGHT TO APPEAL THE DECISION OF THE ARBITRATOR(S).

….

5. Pre-Request Procedures. Notwithstanding anything in this Agreement to the contrary,

in connection with any claim for medical malpractice as defined in Florida Statutes Section 766.106, or any similar successor law, or any claim or Request involving medical negligence, the Parties shall comply with the presuit investigation and presuit notification requirements under Chapter 766, Florida Statutes, or any similar successor laws (the "Presuit Statutes"), prior to filing a Request for ADR, unless the Parties agree to waive the presuit requirements. For the purposes of this Agreement, all references in the Presuit Statutes to litigation shall be interpreted as applying to any arbitration hereunder. The confidentiality provisions of the Presuit Statutes shall apply to any arbitration under this Agreement.

....

6. Arbitration of Damages. If prior to the filing of a Request for ADR either Party offers to have Patient's damages determined by arbitration in accordance with Chapter 766, Florida Statutes, and the other Party accepts such offer, the Parties shall arbitrate damages in accordance with Chapter 766, Florida Statutes, and the other terms and conditions of this Agreement shall not apply to such claim. If the recipient of such an offer to arbitrate damages rejects the offer, the provisions of this Agreement shall remain in full force and effect and the statutory limitations shall apply to any subsequently filed Request.

....

> 8. Attorneys' Fees and Costs. The Parties will each bear their own attorneys' fees and costs incurred in connection with any claim made under or arising out of this Agreement, except as otherwise permitted by law.

During her stay at the Hospital, Marianne allegedly suffered additional injuries and, as a result, the Klemishes filed this medical malpractice lawsuit against several doctors and entities, including the Hospital. The Hospital, in turn, filed several motions, including a "Motion to Dismiss or to Stay Proceedings Pending Arbitration and Alternative Motion to Dismiss and for More Definite Statement" and a "Motion to Order Arbitration and Stay Discovery." Both motions sought relief based on the parties' arbitration agreement. By written order, the trial court granted the Hospital relief, ordering that the matter proceed to arbitration pursuant to the terms of the parties' arbitration agreement. This appeal followed.

The Klemishes argue that the trial court erred in ordering this matter to arbitration because their arbitration agreement is void as against public policy since it incorporates some, but not all, of the provisions of Florida's Medical Malpractice Act (MMA). We agree.

> "A trial court's decision regarding whether an arbitration agreement or provision is void as against public policy presents 'a pure question of law, subject to de novo review.'" *Fi–Evergreen Woods, LLC v. Estate of Vrastil*, 118 So.3d 859, 862 (Fla. 5th DCA 2013) (quoting *Shotts v. OP Winter Haven, Inc.*, 86 So.3d 456, 471 (Fla. 2011)).

Our Supreme Court has held that public policy prohibits the enforcement of an arbitration provision that incorporates some, but not all, of the MMA's arbitration provisions. *Franks v. Bowers*, 116 So.3d 1240, 1248 (Fla.2013). In *Crespo v. Hernandez*, 151 So.3d 495 (Fla. 5th DCA 2014), *review granted,* 171 So.3d 116 (Fla. 2015), we applied *Franks* in holding that the arbitration agreement in that case violated public policy. In its entirety, the opinion reads:

> The arbitration agreement at issue violates the public policy pronounced by the Legislature in the Medical Malpractice Act, chapter 766, Florida Statutes (2012), by failing to adopt the necessary statutory provisions. *Franks v. Bowers*, 116 So.3d 1240, 1248 (Fla.2013) ("Because the Legislature explicitly found that the MMA was necessary to lower the costs of medical care in this State, we find that any contract that seeks to enjoy the benefits of the arbitration provisions under the statutory scheme must necessarily adopt all of its provisions."). Therefore, we reverse the order rendered by the trial court compelling binding arbitration pursuant to the arbitration agreement under review. We certify conflict with the decision of the Second District Court of Appeal in *Santiago v. Baker,* 135 So.3d 569 (Fla. 2d DCA 2014). We remand this case to the trial court for further proceedings.

Id. at 496.

Relying on *Crespo*, we reached a similar result in *A.K. v. Orlando Health, Inc.*, 186 So.3d 626 (Fla. 5th DCA 2016). The *A.K.* opinion, in its entirety, reads as follows:

> A.K. and W.K., individually and on behalf of their son, N.K., appeal from a nonfinal order compelling contractual arbitration. The arbitration provision in this case is substantially similar to the one we addressed in *Crespo v. Hernandez*, 151 So.3d 495 (Fla. 5th DCA 2014), *review granted*, 171 So.3d 116 (Fla. 2015). As in *Crespo*, we hold that the arbitration agreement at issue here violates the public policy pronounced by the Legislature in the Medical Malpractice Act, chapter 766, Florida Statutes (2012), by failing to adopt the necessary statutory provisions. Accordingly, we reverse the order compelling arbitration and remand to the trial court for further proceedings. We also certify that this decision conflicts with *Santiago v. Baker*, 135 So.3d 569 (Fla. 2d DCA 2014).

Id. We conclude that, based upon our holdings in *Crespo* and *A.K.*, the instant arbitration agreement is unenforceable because it incorporates only some of the provisions of the MMA and, thus, violates public policy.

Here, in paragraph 5 of the parties' arbitration agreement, the Hospital incorporated the MMA's presuit requirements; therefore, under *Crespo* and *A.K.*, the Hospital was required to incorporate all of the MMA's arbitration provisions in order for the arbitration agreement to be valid. The Hospital failed to do so and, thus, the arbitration agreement is invalid. *See also Franks*, 116 So.3d at 1248 ("Because the Legislature explicitly found that the MMA was necessary to lower the costs of medical care in this State, we find that any contract that seeks to enjoy the benefits of the arbitration provisions under the

statutory scheme must necessarily adopt all of its provisions.").

We reject the Hospital's argument that, under the instant agreement's severability clause, any invalid provisions can be severed, and, as a result, the instant matter can proceed to arbitration.[2] If the invalid provisions were severed, the trial court would be required to rewrite the parties' arbitration agreement by inserting the MMA's arbitration provisions. Florida courts do not authorize such action. *See Shotts*, 86 So.3d at 478 ("Based on the foregoing, we conclude that the limitations of remedies provision in the present case that calls for the imposition of the AHLA rules is not severable from the remainder of the agreement. Although the arbitration agreement in this case contains a severability clause, the AHLA provision goes to the very essence of the agreement. If the provision were to be severed, the trial court would be forced to rewrite the agreement and to add an entirely new set of procedural rules and burdens and standards, a job that the trial court is not tasked to do."). *See also Estate of Yetta Novosett v. Arc Vill. II, LLC*, 189 So.3d 895 (Fla. 5th DCA 2016); *Estate of Reinshagen ex rel. Reinshagen v. WRYP ALF, LLC*, 190 So.3d 224 (Fla. 5th DCA 2016).

Accordingly, we reverse the trial court's arbitration order and remand for further proceedings con-

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[2] The severability clause provides:

> If any provision of this Agreement is determined by an arbitrator or a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

sistent with this opinion. As we did in *Crespo* and *A.K.*, we certify conflict with the decision of the Second District Court of Appeal in *Santiago v. Baker*, 135 So.3d 569 (Fla. 2d DCA 2014).

REVERSED AND REMANDED; CONFLICT CERTIFIED.

TORPY and EVANDER, JJ., concur.

APPENDIX B

SUPREME COURT OF FLORIDA

KINDRED HOSPITALS EAST, LLC, ETC
Petitioner(s),
vs.
ESTATE OF MARIANNE KLEMISH, ETC., ET AL.
Respondent(s)

CASE NO.: SC16-1353
Lower Tribunal No(s):
5D15-2574; 422014CA000781CAAXXX

FRIDAY, MAY 5, 2017

Upon review of the responses to this Court's order to show cause dated February 28, 2017, the Court has determined that it should decline to exercise jurisdiction in this case. See *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016). The petition for discretionary review is, therefore, denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

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

CANADY, POLSTON, and LAWSON, JJ., would grant jurisdiction.

A True Copy

Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

Lc

Served:

JESSIE LEIGH HARRELL DAVID M. CALDEVILLA

BRYAN SCOTT GOWDY	RICHARD BENJAMIN WILKES
ERIC PAUL GIBBS	HON. DAVID R. ELLSPERMANN, CLERK
BRIAN D. AGLIANO	HON. EDWARD LEON SCOTT, JUDGE
KEVIN J. CARDEN	HON. JOANNE P. SIMMONS, CLERK

APPENDIX C

SUPREME COURT OF FLORIDA

KINDRED HOSPITALS EAST, LLC, ETC.

Petitioner(s)

vs.

ESTATE OF MARIANNE KLEMISH, ETC., ET AL.

Respondent(s).

TUESDAY, JUNE 20, 2017

CASE NO. SC16-1353

Lower Tribunal No(s):

5D15-2574; 422014CA000781CAAXXX

Petitioner's Motion for Reinstatement of Appeal is hereby denied.

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

CANADY, POLSTON, and LAWSON, JJ., dissent.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

lc
Served:

KEVIN J. CARDEN
DAVID M. CALDEVILLA
BRYAN SCOTT GOWDY
ERIC PAUL GIBBS
BRIAN D. AGLIANO
RICHARD BENJAMIN WILKES
JESSIE LEIGH HARRELL
HON. JOANNE P. SIMMONS, CLERK
HON. EDWARD LEON SCOTT, JUDGE
HON. DAVID R. ELLSPERMANN, CLERK

APPENDIX D

SUPREME COURT OF FLORIDA

KINDRED HOSPITALS EAST, LLC, ETC.

Petitioner(s)

Vs.

ESTATE OF MARIANNE KLEMISH, ETC., ET AL.

Respondent(s)

TUESDAY, FEBRUARY 28, 2017

CASE NO.: SC16-1353

Lower Tribunal No(s).:
5D15-2574; 422014CA000781CAAXXX

Petitioner shall show cause on or before March 15, 2017, why this Court's decision *Hernandez v. Crespo*, 41 Fla. L. Weekly S625 (Fla. Dec. 22, 2016), is not controlling in this case and why the Court should not decline to exercise jurisdiction in this case. Respondent may serve a reply on or before March 27, 2017.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

Lc
Served:

DAVID M. CALDEVILLA
RICHARD B. WILKES
KEVIN J. CARDEN
BRYAN SCOTT GOWDY
JESSIE LEIGH HARRELL
HON. JOANNE P. SIMMONS, CLERK
BRIAN D. AGLIANO
ERIC PAUL GIBBS

APPENDIX E

IN THE FLORIDA SUPREME COURT

KINDRED HOSPITALS EAST, LLC D/B/A KINDRED HOSPITAL OCALA,
Petitioner,

vs.

ESTATE OF MARIANNE KLEMISH, etc., et al.,
Respondents.

Fla. S. Ct. Case No. SC16-1353
Fla. 5th DCA Case No. 5D15-2574
L.T. Case No. 2014-781-CA-G

KINDRED'S RESPONSE TO ORDER TO SHOW CAUSE

The Petitioner, Kindred Hospitals East, LLC, doing business as Kindred Hospital Ocala, ("**Kindred**") respectfully responds to the Court's order to show cause dated February 28, 2017, and states:

Introduction

1. This case involves a request for discretionary review of the Florida Fifth District Court of Appeal's decision which reversed the trial court's order compelling arbitration. *See, Klemish v. Villacastin,* So.3d --, 2016 WL 376898141 (Fla. 5th DCA July 15, 2016).

2. On February 28, 2017, this Court entered an order directing Kindred to show cause why this Court's decision in *Hernandez v. Crespo,* So.3d --, 2016 WL 7406537, 41 Fla. L. Weekly S625 (Fla. Dec. 22, 2016) ("*Hernandez*") is not controlling in this case and why the Court should not decline to exercise jurisdiction in this case.

3. As explained below, Kindred respectfully submits that the parties' arbitration agreement and other facts in this case are materially distinguishable from the arbitration agreement and facts in *Hernandez.* In addition, this Court should also accept jurisdiction in this case to clarify the effect and ramifications of a "void" arbitration agreement. Both this Court in *Hernandez* and the Fifth District Court below have held that arbitration agreements which violate the MMA are "void," as opposed to merely being "voidable." This is important because Kindred has had (and presumably other health care providers across the State of Florida have had) multiple medical malpractice disputes covered by an arbitration agreement like the one in this case--some of which disputes have been resolved and some of which disputes are pending in arbitration. If the arbitration agreements in those other cases are "void" instead of merely being "voidable," that would presumably invalidate the arbitration tribunal's subject matter jurisdiction and any judgments entered in those other cases. Therefore, Kindred requests this Court to accept jurisdiction.

4. Alternatively, Kindred requests this Court to continue to hold this case in abeyance until the U.S. Supreme Court decides the case of *Kindred Nursing Centers Limited Partnership v. Clark,* U.S. Supreme Court Case No. 16-32, which will determine a controlling issue in this case.

Analysis

5. In *Hernandez,* this Court held, "Parties may freely contract around state law where the provisions of such contracts are not void as against public policy because they contravene a statute or legislative intent." *Id.* at *6. Similarly, in *Franks v. Bowers,* 116

So.3d 1240, 1249-1250 (Fla. 2013), this Court held that the Florida Medical Malpractice Act ("MMA") "does not preclude all arbitration—and, in fact encourages arbitration under the specified guidelines—and … our decision here is fact-specific pertaining only to the particular agreement before us and does not prohibit all arbitration agreements under the MMA…." Kindred submits that the parties' arbitration agreement in this case is materially distinguishable from the arbitration agreement which was determined to be void in *Hernandez,* and is instead, the type of arbitration agreement which this Court alluded to in *Hernandez* and *Franks,* which successfully "contract[s] around state law" without contravening the MMA.

6. In *Hernandez,* this Court concluded that the arbitration agreement in that case "diverges from the statutory provisions [of the MMA] for terms more favorable to [the defendants], contravening legislative intent, in six major places: (1) the agreement does not concede [the defendants'] liability; (2) the agreement does not guarantee independent arbitrators or that one arbitrator be an administrative law judge as required by statute; (3) the agreement shares costs equally between the parties rather than having [the defendants] assume most of the costs of arbitration as in the statutory scheme; (4) the agreement does not provide for [the defendants'] payment of interest on damages; (5) the agreement does not require joint and several liability of defendants as the MMA does; and (6) the agreement dispenses with the right to appeal provided by the statute." *Hernandez,* 2016 WL 7406537 at *7 (footnotes omitted). In contrast, the arbitration agreement in the case at bar expressly retains each of these rights and every other provision of the MMA's statutory arbitration process.

7. In the decision below, the Fifth District did not quote the entire arbitration agreement (which is available in the appendix filed below, at A 37-41, 48-52[1]) but did at least quote the follow provisions which it concluded are "relevant":

> The Parties agree as follows:
>
> …
>
> 2. Waiver of Right to a Trial. By entering into this Agreement the Parties agree to resolve any dispute covered by this Agreement using mediation and arbitration, and give up their right to have the dispute decided in a court of law before a judge or jury.
>
> THE PARTIES UNDERSTAND THAT THE RULES OF PROCEDURE CONTAIN PROVISIONS FOR BOTH MEDIATION AND BINDING ARBITRATION. IF THE PARTIES ARE UNABLE TO REACH SETTLEMENT INFORMALLY, OR THROUGH MEDIATION, THE DISPUTE SHALL PROCEED TO BINDING ARBITRATION. BINDING ARBITRATION MEANS THAT THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL, INCLUDING THEIR RIGHT TO A JURY TRIAL, THEIR RIGHT TO TRIAL BY A JUDGE AND THEIR RIGHT TO APPEAL THE DECISION OF THE ARBITRATOR(S).

….

[1] Citations herein to "**A**" refer to the appendix filed in the interlocutory appeal in the Fifth District below.

5. Pre–Request Procedures. Notwithstanding anything in this Agreement to the contrary, in connection with any claim for medical malpractice as defined in Florida Statutes Section 766.106, or any similar successor law, or any claim or Request involving medical negligence, the Parties shall comply with the presuit investigation and presuit notification requirements under Chapter 766, Florida Statutes, or any similar successor laws (the "Presuit Statutes"), prior to filing a Request for ADR, unless the Parties agree to waive the presuit requirements. For the purposes of this Agreement, all references in the Presuit Statutes to litigation shall be interpreted as applying to any arbitration hereunder. The confidentiality provisions of the Presuit Statutes shall apply to any arbitration under this Agreement.

….

6. Arbitration of Damages. If prior to the filing of a Request for ADR either Party offers to have Patient's damages determined by arbitration **in accordance with Chapter 766, Florida Statutes,** and the other Party accepts such offer, **the Parties shall arbitrate damages in accordance with Chapter 766, Florida Statutes, and the other terms and conditions of this Agreement shall not apply to such claim.** If the recipient of such an offer to arbitrate damages rejects the offer, the provisions of this Agreement shall remain in full force and effect **and the statutory limitations shall apply to any subsequently filed Request.**

> ….
>
> 8. Attorneys' Fees and Costs. The Parties will each bear their own attorneys' fees and costs incurred in connection with any claim made under or arising out of this Agreement, **except as otherwise permitted by law.**
>
> ….
>
> [12. Severability.] If any provision of this Agreement is determined by an arbitrator or a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

Klemish, 2016 WL 376898141 at *1 and *3, n. 2 (emphasis added).

8. Thus, the parties' agreement in this case provides an alternative contractual arbitration process, which by its express terms, is completely inapplicable in the event that the parties engage in the MMA's statutory arbitration process. Further, where the MMA's statutory arbitration process is requested but not accepted by the other party, each and every aspect of the statutory consequences are applicable in the contractual arbitration process contemplated by the parties' arbitration agreement. In other words, the arbitration agreement in this case does not alter any legal rights or remedies provided by the MMA--except to substitute the contractual arbitration process for the judicial process if the parties do not agree to invoke the voluntary statutory arbitration process described in the MMA. This is a contractual alteration of rights that does not violate, but in-

stead, furthers the public policy of this state and our nation, which favors the use of arbitration agreements. *See, e.g., Seifert v. U.S. Home Corp.,* 750 So.2d 633, 636 (Fla.1999) (under Florida and federal law, the use of arbitration agreements is generally favored by the courts); *Visiting Nurse Ass'n of Florida, Inc. v. Jupiter Med. Ctr., Inc.,* 154 So. 3d 1115, 1124, n. 8 (Fla. 2014), *cert. den.,* 135 S. Ct. 2052 (2015) (the Federal Arbitration Act "demonstrates a national policy favoring arbitration, and forecloses state legislative attempts to restrict the enforceability of arbitration provisions in agreements"); *Jackson v. Shakespeare Found., Inc.,* 108 So. 3d 587, 593 (Fla. 2013) ("Courts generally favor [arbitration] provisions, and will try to resolve an ambiguity in an arbitration provision in favor of arbitration").

9. The MMA provides for voluntary binding arbitration of damages as an alternative to a jury trial. §766.209(1), Fla. Stat. However, if the parties do not participate in such voluntary binding arbitration, the MMA does not require the claim to proceed to a jury trial. Instead, the MMA clearly states that if neither party requests or agrees to the statutory voluntary binding arbitration process, "the claim shall proceed to trial **or to any available legal alternative...."** **§** 766.209(2), Fla. Stat. (emphasis added). Contractual agreements to arbitrate are clearly such an "available legal alternative" to a trial, and arbitration is favored as a matter of public policy. *See, e.g., Miele v. Prudential-Bache Sec., Inc.,* 656 So. 2d 470, 473 (Fla. 1995) ("Arbitration is an alternative to the court system").[2] In this case, neither party invoked the volun-

[2] *See also, Larry Kent Homes, Inc. v. Empire of Am. FSA,* 474 So.2d 868, 869 (Fla. 5th DCA 1985) ("public policy favors arbitration as an alternative to litigation"), *rev. den.,* 484 So.2d 7

tary arbitration provisions of the MMA. As a result, the Klemishes cannot legitimately suggest that they have been deprived of any of the statutory incentives or benefits that would have been available to them had they done so. Although neither party invoked the MMA's voluntary arbitration process in this case, the parties' arbitration agreement clearly authorized the parties to do so. Under paragraph 6 of the parties' arbitration agreement, if the parties had elected to proceed with the MMA's voluntary arbitration process, all of the arbitration provisions of Chapter 766 would have applied. Alternatively, if the parties did not agree to the MMA's voluntary arbitration process, then the contractual arbitration process described in the parties' arbitration agreement would remain in effect, along with all applicable statutory rights and remedies that would otherwise apply to the Klemishes' claims.

10. In *Hernandez,* this Court identified six problems with the arbitration agreement. First, this Court concluded that "the agreement does not concede [the defendants'] liability[.]" *Id.,* 2016 WL 7406537 at *7, citing §766.207, Fla. Stat.; Franks v. Bowers, 116 So.3d 1240, 1248 (Fla. 2013); *St. Mary's Hosp., Inc. v. Phillipe,* 769 So.2d 961, 970

(Fla. 1986); *Elbadramany v. Stanley,* 490 So.2d 964, 966 (Fla. 5th DCA 1986) ("public policy favors arbitration as an alternative to litigation"); *Complete Interiors, Inc. v. Behan,* 558 So.2d 48, 50 (Fla. 5th DCA 1990) ("Arbitration is an alternative to the court system"); *N Am. Van Lines v. Collyer,* 616 So.2d 177, 178 (Fla. 5th DCA 1993) ("public policy favors arbitration as an alternative to litigation"); *Chandra v. Bradstreet,* 727 So.2d 372, 374 (Fla. 5th DCA 1999) ("Arbitration is an alternative to the court system"); *Gren v. Gren,* 133 So.3d 1066, 1068 (Fla. 4th DCA 2014) ("Courts favor arbitration as an alternative to litigation").

(Fla. 2000). In this case, paragraph 6 of the parties' arbitration agreement clearly states, "If prior to the filing of a Request for ADR either Party offers to have Patient's damages determined by arbitration in accordance with Chapter 766, Florida Statutes, and the other Party accepts such offer, the Parties shall arbitrate damages in accordance with Chapter 766, Florida Statutes, and the other terms and conditions of this Agreement shall not apply to such claim." Accordingly, in this case, all requirements of the Chapter 766 statutory arbitration process apply if the parties agree to participate in voluntary arbitration under the MMA, including any concession of liability required by Section 766.207.

11. In *Hernandez,* this Court next concluded that "the agreement does not guarantee independent arbitrators or that one arbitrator be an administrative law judge" as required by Section 766.207(4)-(5). *Id.* 2016 WL 7406537 at *7. In this case, the Fifth District's decision omits the provisions of paragraph 3 of the parties' arbitration agreement which addresses independent arbitrators. See, *Klemish,* 2016 WL 376898141, at *1 and *3. In any event, paragraph 6 of the parties' arbitration agreement expressly states that all requirements of the Chapter 766 statutory arbitration process shall apply if the parties agree to participate in voluntary arbitration under the MMA, and that includes any requirements imposed by Section 766.207(4)-(5) concerning the number and type of arbitrators.

12. In *Hernandez,* this Court next concluded that "the agreement shares costs equally between the parties rather than having [the defendants] assume most of the costs of arbitration as in the statutory scheme" as required by Section 766.207(7)(f)-(g). *Id.,*

2016 WL 7406537 at *7. Again, if the parties had agreed to participate in the MMA's statutory arbitration process (which they didn't), paragraph 6 of the parties' arbitration agreement clearly required Kindred to comply with all provisions of Chapter 766, including the fees and costs provisions of Section 766.207(7)(f)-(g). Moreover, paragraph 8 of the parties' arbitration agreement also states that the parties "will each bear their own attorneys' fees and costs incurred in connection with any claim made under or arising out of this Agreement, **except as otherwise permitted by law"** (emphasis added). Accordingly, in this case, the parties' arbitration agreement expressly confirms that the Klemishes maintain the right to recover the identical expenses permitted by law.

13. In *Hernandez,* this Court next concluded that "the agreement does not provide for [the defendants'] payment of interest on damages" as required by Section 766.207(7)(e). *Id.,* 2016 WL 7406537 at *7. *See also,* §766.211(2), Fla. Stat.("Commencing 90 days after the award rendered in the arbitration procedure pursuant to s. 766.207, such award shall begin to accrue interest at the rate of 18 percent per year."). Once again, if the parties had agreed to participate in the MMA's statutory arbitration process (which they didn't), paragraph 6 of the parties' arbitration agreement clearly required Kindred to comply with all requirements of Chapter 766, including the interest provisions of Sections 766.207(7)(e) and 766.211(2).

14. In *Hernandez,* this Court next concluded that "the agreement does not require joint and several liability of defendants" as required by Section 766.207(7)(h). *Id.,* 2016 WL 7406537 at *7. Again, if

the parties had agreed to participate in the MMA's statutory arbitration process (which they didn't), paragraph 6 of the parties' arbitration agreement clearly required Kindred to comply with all requirements of Chapter 766, including the joint and several liability provisions of Section 766.207(7)(h).

15. In *Hernandez,* this Court next concluded that "the agreement dispenses with the right to appeal" provided by Section 766.212, Florida Statutes. *Id.,* 2016 WL 7406537 at *7. Once again, if the parties had agreed to participate in the MMA's statutory arbitration process (which they didn't), the parties' arbitration agreement, by its own terms, would become inapplicable and the Klemishes would maintain all appellate rights afforded by Section 766.212.

16. Moreover, if this Court accepts jurisdiction, the record below will demonstrate that the Fifth District's decision omits important portions of the parties' arbitration agreement. For example, the Fifth District's decision does not mention the portions of the arbitration agreement which state that execution of the agreement by the patient is voluntary and optional and is not a precondition to treatment at or admission to Kindred's hospital, and that the patient has the unilateral right to rescind the agreement within 5 business days of executing it (A 37-41, 48-52). Notably, the Kindred arbitration agreement is a separate stand alone document, which is independent from the hospital's admission agreement.

17. The Fifth District's decision also omits portions of the parties' arbitration agreement which expressly confirm that the Klemishes had the absolute right to pursue in the contractual arbitration process any and all potential claims, rights and remedies that would otherwise be available to them in a judi-

cial lawsuit. Despite the omission of those provisions from the Fifth District's decision, the last sentence of paragraph 6 of the parties' arbitration agreement states, "If the recipient of such an offer to arbitrate damages [under Chapter 766] rejects the offer, the provisions of this Agreement shall remain in full force and effect **and the statutory limitations shall apply to any subsequently filed Request**." *Klemish,* 2016 WL 376898141, at *1. And, paragraph 8 of the parties' arbitration agreement confirms that the Klemishes have the right to recover whatever attorneys' and costs are "permitted by law." *Id.* So, even the incomplete portions of the parties' arbitration agreement quoted by the Fifth District's decision confirm that the agreement preserves the Klemishes' statutory rights during the contractual arbitration process. In other words, the only difference between the remedies available to the parties under the their arbitration agreement and the remedies available to the partier under the MMA, is that the parties' arbitration agreement requires the parties' claims and defenses to be determined in an arbitration forum, instead of in court. However, the mere fact that the parties waived their right to have their claims and defenses decided in court is certainly not a valid reason to invalidate an arbitration agreement. "[A]rbitration agreements always necessarily involve forgoing a jury trial to resolve potential disputes[.]" *Fi-Evergreen Woods, LLC v. Estate of Robinson,* 172 So.3d 493, 497 (Fla. 5th DCA 2015). Consequently, if giving up the right to litigate in court was a valid reason to invalidate an arbitration agreement, all arbitration agreements would be unenforceable.

18. In *Franks,* this Court held that the MMA "does not preclude all arbitration—and, in fact encourages arbitration under the specified guidelines—

and ... our decision here is fact-specific pertaining only to the particular agreement before us and does not prohibit all arbitration agreements under the MMA...." *Id.,* 116 So.3d at 1249-1250. Similarly, in *Hernandez,* this Court held, "Parties may freely contract around state law where the provisions of such contracts are not void as against public policy because they contravene a statute or legislative intent." *Id* at *6. The parties' arbitration agreement in this case expressly adopts all of the MMA's provisions governing voluntary arbitration, and if the parties do not elect to pursue the MMA's voluntary arbitration process, the parties' arbitration agreement also preserves the Klemishes' absolute right to pursue in the contractual arbitration process any and all possible causes of action, damages, interest, attorneys' fees, costs, and statutory remedies that they would otherwise be entitled to pursue in court, without limitation.

19. Consequently, this Court should accept jurisdiction and give Kindred the opportunity to demonstrate that the parties' arbitration agreement is not unlawful or contrary to public policy, is enforceable under *Franks* and *Hernandez,* and presents the type of situation described in *Hernandez* where the parties were able to successfully "contract around state law...." If not, then it would appear that this Court has effectively overruled *Franks* and concluded that no alternative contractual arbitration process is available in a Florida medical malpractice dispute. Such a result would violate the Federal Arbitration Act. *See, e.g., Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996) ("Courts may not ... invalidate arbitration agreements under state laws applicable only to arbitration provisions" and under Section 2 of the Federal Arbitration Act, "... Congress precluded

States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"). *See also, DIRECTV, Inc. v. Imburgia,* 136 S. Ct. 463, 468-69 (2015); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011).

20. It is respectfully submitted that the Court should also accept jurisdiction in this case to clarity the effect of a "void" arbitration agreement. Both this Court in *Hernandez* and the Fifth District Court below have held that arbitration agreements which violate the MMA are "void," as opposed to merely being "voidable." This is important because Kindred has had (and presumably other health care providers across the State of Florida have had) multiple medical malpractice disputes covered by an arbitration agreement like the one in this case--some of which disputes have been resolved and some of which disputes are pending in arbitration. If Kindred's arbitration agreement is determined to be "void," does that mean that the arbitration tribunals in those other cases lacked and lack subject matter jurisdiction? Does it mean that any cases currently pending in arbitration tribunals pursuant to Kindred's arbitration agreement must be dismissed for lack of subject matter jurisdiction? Does it mean that any decisions rendered in arbitration tribunals pursuant to Kindred's arbitration agreement are void? *Compare, Damora v. Stresscon Intern., Inc.,* 324 So.2d 80, 81 (Fla. 1975) (contractual provision that parties would arbitrate future disputes in another jurisdiction violated Florida Arbitration Code and rendered agreement to arbitrate "voidable" at instance of either party); *Carter v. State Farm Mut.*

Auto. Ins. Co., 224 So. 2d 802, 805 (Fla. 1st DCA 1969) (if arbitrators committed an error of law contrary to terms of statute and contrary to contractual arbitration clause, such error was one susceptible of correction by appropriate judicial review; and it was not void ab initio, but merely voidable).

21. Finally, if this Court declines to accept jurisdiction in this case, Kindred respectfully requests this Court to continue holding this case in abeyance until the U.S. Supreme Court determines the case of *Kindred Nursing Centers Limited Partnership v. Clark,* U.S. Supreme Court Case No. 16-32, which will decide a controlling issue in this case (i.e., whether federal law preempts state laws that impose special requirements on arbitration agreements which do not place arbitration agreements on equal footing with all other contracts).[3] In that case, the U.S. Supreme Court is reviewing the Kentucky Supreme Court's decision in *Kindred Hospitals Limited Partnership v. Clark,* 2013 WL 593883 (Ky. Feb. 15, 2013). The case is fully briefed and oral argument was conducted before the U.S. Supreme Court on February 22, 2017. Kindred respectfully submits that Florida's MMA is the type of state law which the U.S. Supreme Court has determined in cases such as *Casarotto, Imburgia, Cardegna* and *Concepcion* are preempted by the Federal Arbitration Act.

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[3] The U.S. Supreme Court has held that the Federal Arbitration Act preempts state laws that are restricted to the field of arbitration and do not place arbitration contracts on equal footing with all other contracts. *See, e.g., Casarotto,* 517 U.S. at 687; *Imburgia,* 136 S. Ct. at 468-69; *Cardegna,* 546 U.S. at 443; *Concepcion,* 563 U.S. at 339.

WHEREFORE, Kindred respectfully requests this Honorable Court to accept jurisdiction, or alternatively, to continue holding the case in abeyance until the U.S. Supreme Court determines the case of *Kindred Nursing Centers Limited Partnership v. Clark,* U.S. Supreme Court Case No. 16-32.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, using the Florida E-Portal System, a true and correct copy hereof was **E-filed** with the Clerk of the Court, and **E-served** on Jessie L. Harrell, Esq., and Bryan S. Gowdy, Esq., Creed & Gowdy, P.A., bgowdy@appellate-firm.com; jharrell@appellate-firm.com; filings@appellate-firm.com; Kevin J. Carden, Esq., Bounds Law Group, kevin@boundslawgroup.com; service@boundslawgroup.com; deedee@bounds lawgroup.com; Eric P. Gibbs, Esq., Estes, Ingram, et al., epg@eifg-law.com; lgj@eifg-law.com; and Brian D. Agliano, Esquire, Josepher & Batteese, P.A., rosepher@jbfirm.com; bagliano@jbfirm.com; acurran@jbfirm.com, on this ___ day of _____, 20__.

Respectfully submitted,

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APPENDIX F

IN THE FLORIDA SUPREME COURT

KINDRED HOSPITALS EAST, LLC d/b/a KINDRED HOSPITAL OCALA,

Petitioner,

vs.

ESTATE OF MARIANNE KLEMISH, etc., et al.,

Respondents.

Fla. S. Ct. Case No. SC16-1353
Fla. 5th DCA Case No. 5D15-2574
L.T. Case No. 2014-781-CA-G

KINDRED'S MOTION FOR REINSTATEMENT OF APPEAL

Pursuant to Florida Rule of Appellate Procedure 9.300, the Petitioner, Kindred Hospitals East, LLC, doing business as Kindred Hospital Ocala, ("**Kindred**") moves for reinstatement of its appeal, and states:

1. This case involves a request for discretionary review of the Florida Fifth District Court of Appeal's decision which reversed the trial court's order compelling arbitration. *See*, *Klemish v. Villacastin*, -- So.3d --, 2016 WL 3768981 (Fla. 5th DCA July 15, 2016).

2. Kindred's notice to invoke this Court's jurisdiction was based on two grounds; the Fifth District's decision: (a) certifies conflict with *Santiago v. Baker,* 135 So.3d 569 (Fla. 2d DCA 2014), and (b) also expressly and directly conflicts with decisions of another district court of appeal and/or of the Florida Supreme Court on the same question of law.

3. On February 28, 2017, this Court entered an order directing Kindred to show cause why this Court's decision in *Hernandez v. Crespo*, 211 So.3d 19 (Fla. 2016) is not controlling in this case and why the Court should not decline to exercise jurisdiction in this case.

4. Kindred filed its response to the order to show cause on March 14, 2017. Among other things, that response requested this Court to continue holding the case in abeyance until the U.S. Supreme Court determines the case of *Kindred Nursing Centers Limited Partnership v. Clark*, U.S. Supreme Court Case No. 16-32.

5. On May 5, 2017, this Court entered an order declining to exercise jurisdiction, on a ***4-to-3 vote*** of the Justices.

6. Ten days later, on May 15, 2017, the U.S. Supreme Court issued its decision in *Kindred Nursing Centers Limited Partnership v. Clark*, -- U.S. --, 2017 WL 2039160 (U.S. May 15, 2017). In *Kindred Nursing*, the U.S. Supreme Court squarely holds that any state law which singles out arbitration agreements for disfavored treatment violates the Federal Arbitration Act (*id.* at *2), that a court may not invalidate an arbitration agreement based "on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate

is at issue'" (*id.* at *4), and that the Federal Arbitration Act "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that ... have the defining features of arbitration agreements" (*id*. at *4).

7. It is respectfully submitted that this Court's decision in *Hernandez* is in conflict with the U.S. Supreme Court's recent decision in *Kindred Nursing*. In *Hernandez*, this Court invalidated an arbitration agreement on the grounds that it violated the Florida Medical Malpractice Act because the agreement did not concede the health care provider's liability, did not guarantee independent arbitrators or that one arbitrator would be an administrative law judge, and did not require the health care provider to assume most of the arbitration costs. Thus, in order to pass muster under *Hernandez,* any and all non-statutory arbitration proceedings contemplated by a health care provider's arbitration agreement must be governed by and include all of the same requirements that would otherwise be imposed by an offer to arbitrate and admit liability under the statutory voluntary arbitration proceedings contemplated by the Florida Medical Malpractice Act. In other words, under *Hernandez*, a defendant to a medical malpractice claim seeking to enforce a pre-incident arbitration agreement is required to admit liability, but if that same defendant forgoes its contractual arbitration rights, then it is allowed to contest liability. Kindred submits that this is precisely the type of state law which "singles out arbitration agreements for disfavored treatment," which the U.S. Supreme Court's *Kindred Nursing* decision holds is preempted by and violates the Federal Arbitration Act.

8. Moreover, the U.S. Supreme Court's recent decision in *Kindred Nursing* is consistent with and confirms the correctness of the Second District's decision *Santiago v. Baker,* 135 So.3d 569 (Fla. 2d DCA 2014), and numerous other Florida appellate court decisions, such as *McKenzie Check Advance of Florida, LLC v. Betts*, 112 So.3d 1176 (Fla. 2013) (Federal Arbitration Act preempted invalidation of class action waiver in arbitration agreement); *Citibank* (*S. Dakota*), *N.A. v. Desmond*, 114 So.3d 401, 403 (Fla. 4th DCA 2013) (Federal Arbitration Act preempted state public policy concerns that invalidated class-action waivers in arbitration agreements); *Lloyds Underwriters v. Netterstrom*, 17 So.3d 732, 736 (Fla. 1st DCA 2009)(Federal Arbitration Act generally takes precedence over state laws on arbitration, including state laws that prohibit or limit arbitration); *Lopez v. Ernie Haire Ford, Inc.*, 974 So.2d 517, 518 (Fla. 2d DCA 2008) (Federal Arbitration Act places arbitration agreements on the same footing as other contracts, and preempts any requirements placing extra burdens on arbitration agreements); *Gilman & Ciocia, Inc. v. Wetherald*, 885 So.2d 900, 903 (Fla. 4th DCA 2004) (Federal Arbitration Act supersedes any inconsistent state law, and Florida courts are obligated to enforce valid arbitration agreements within the scope of Federal Arbitration Act, even if such agreements would otherwise be unenforceable under Florida law). Kindred contends that these decisions conflict with the Fifth District's decision below, and that, therefore, this Court should reinstate this appeal and grant Kindred leave to file a jurisdictional brief invoking this Court's discretionary jurisdiction.

9. This Court clearly has authority to reinstate an appeal that was previously dismissed. *See, e.g., Johnson v. Thompkins*, -- So.3d --, 2017 WL 1788030

(Fla. May 5, 2017) (granting motion for reinstatement); *Rudoy v. Rudoy*, -- So.3d -- 2016 WL 7131989 (Fla. Dec. 7, 2016) (granting motion for reinstatement); *Ayala v. State*, -- So.3d --, 2016 WL 3405870 (Fla. June 21, 2016) (granting motion for reinstatement, and ordering parties to file jurisdictional briefs); *Knize v. Guenther*, -- So.3d --, 2016 WL 2347418 (Fla. May 4, 2016) (treating petitioner's motion for reconsideration, motion to vacate, and motion for rehearing as a motion for reinstatement, and granting reinstatement of appeal); *Carrasco v. Florida Dept. of Corr.*, -- So.3d -- 2015 WL 4886092 (Fla. Aug. 17, 2015) (granting motion for reinstatement); *Waters v. State,* 116 So.3d 1264 (Fla. 2013) (granting motion for reinstatement, and ordering parties to file jurisdictional briefs); *White v. Deutsche Bank Nat. Trust Co.*, -- So.3d --, 2013 WL 6839931 (Fla. Dec. 26, 2013) (granting motion for reinstatement); *Harris v. State*, 987 So.2d 1210 (Fla. 2008) (granting motion for reinstatement); *Anderson v. Munoz,* -- So.3d --, 2007 WL 4305660 (Fla. Dec. 10, 2007) (granting motion for reinstatement, and ordering parties to file jurisdictional briefs). *See also*, Fla. R. App. P. 9.020(d) ("At any time in the interests of justice, the court many permit any part of the proceeding to be amended so that it may be disposed of on the merits."); *In re Order of First Dist. Court of Appeal*, 556 So.2d 1114, 1117 (Fla. 1990) (appellate court can order supplemental briefs in any case before it, regardless of the type of brief originally filed); *Neal v. State*, 142 So.3d 883, 887 (Fla. 1st DCA 2014) (appellate court has inherent authority to require supplemental briefs on any issue where confusion or doubt remains).

10. In this case, it has been less than 15 days since the Court entered its May 5th order declining

to exercise jurisdiction (on a ***4-to-3 vote***) and the U.S. Supreme Court's decision in *Kindred Nursing* was entered just a few days ago on May 15th. In addition to the conflicts described above, this case clearly involves an issue of great public importance. Surely, under these circumstances, the interests of justice should be invoked to reinstate Kindred's appeal and to give the parties the opportunity to file jurisdictional briefs.

WHEREFORE, Kindred respectfully requests this Honorable Court to reinstate this appeal and to grant Kindred leave to file a jurisdictional brief

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was **electronically filed** with the Clerk of the Court, and **electronically served** on Jessie L. Harrell, Esquire and Bryan S. Gowdy, Esquire, Creed & Gowdy, P.A., bgowdy@appellate-firm.com; jharrell@appellate-firm.com; filings@appellate-firm.com; Kevin J. Carden, Esquire, Bounds Law Group, kevin@boundslawgroup.com; service@boundslawgroup.com; deedee@boundslawgroup.com; Eric P. Gibbs, Esquire, Estes, Ingram, et al., epg@eifg-law.com; lgj@eifg-law.com; and Brian D. Agliano, Esquire, Josepher & Batteese, P.A., rjosepher@jbfirm.com; bagliano@jbfirm.com; acurran@jbfirm.com, on this 19th day of May 2017.

Respectfully submitted,

/s/ Richard Benjamin Wilkes
RICHARD BENJAMIN WILKES
Florida Bar No. 267163

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COUNSEL FOR KINDRED

APPENDIX G

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARION COUNTY, FLORIDA

MARIANNE KLEMISH, Individually and as Legal Guardian of Skyla Klemish, a Minor, and FRANK KLEMISH,
***Plaintiffs*,**

vs.

ALEX VILLACASTIN, M.D., WEST FLORIDA MEDICAL ASSOCIATES, P.A. d/b/a SUNCOAST PRIMARY CARE SPECIALISTS, and KINDRED HOSPITALS EAST, LLC d/b/a KINDRED HOSPITAL OCALA,
***Defendants*.**

Case No: 2014-781-CA-G

ORDER GRANTING DEFENDANT KINDRED HOSPITALS EAST, LLC d/b/a KINDRED HOSPITAL OCALA'S MOTION TO ORDER ARBITRATION AND STAY DISCOVERY

THIS CAUSE was heard before the Court on Defendant KINDRED HOSPITALS EAST, LLC d/b/a KINDRED HOSPITAL OCALA's (1) Motion to Dismiss Second Amended Complaint or to Stay Proceedings Pending Arbitration and Alternative Motion to Dismiss and for More Definite Statement and (2) Motion to Order Arbitration and Stay Discovery, each

filed on December 12, 2014. Plaintiffs filed responses in opposition on January 16, 2015. Defendant filed a reply on February 2, 2015. The Court, having considered said motions, reviewed the court file, heard oral argument of the parties, and being otherwise duly advised in the premises finds that:

The elements the court considers to determine whether to grant a motion to order arbitration are 1) whether a valid arbitration agreement exists, 2) whether an arbitrable issue exists and 3) whether the right to arbitration was waived. *Shakespeare Found., Inc. v. Jackson*, So. 3d 1194, 1197-198 (Fla. 1st DCA 2011). In the instant case, Plaintiff signed an Alternative Dispute Resolution Agreement and Amendment to Admission Agreement which contained a valid arbitration agreement. The arbitration agreement stated that "Any and all claims or disputes arising out of or in any way relating to this Agreement or the medical treatment or care of [Plaintiff] . . . shall be submitted to alternative dispute resolution..." When the court determines whether a dispute is covered by an arbitration agreement any uncertainty is decided in favor of arbitration. *AT&T Techs., Inc. v. Commc'n Workers of America.*, 475 U.S. 643, 650 (1986).

The Court finds that Plaintiff has not established that the aforementioned agreement is both procedurally and substantively unconscionable. "A court must compel arbitration where an arbitration agreement and an arbitrable issue exists, and the right to arbitrate has not been waived." *Ballen Isles Country Club, Inc. v. Dexter Realty*, 24 So. 3d 649, 652 (Fla. 4th DCA 2009) (citing *Miller & Solomon Gen. Contractors, Inc. v. Brennan's Glass Co.*, 824 So.2d 288, 290 (Fla. 4th DCA 2002) and quoting *Gale*

Group v. Westinghouse Elec. Corp., 683 So.2d 661, 663 (Fla. 5th DCA 1996)).

It is therefore **ORDERED and ADJUDGED**: Defendant's Motion to Order Arbitration and Stay Discovery is **hereby granted**. This action as to Defendant KINDRED HOSPITALS EAST, LLC d/b/a KINDRED HOSPITAL OCALA shall be stayed pending arbitration.

IT IS SO ORDERED in chambers, Marion County Judicial Center, Ocala, Florida, on this 24th day of June, 2015.

/s/ Edward L. Scott
Edward L. Scott
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true a d accurate copy of the foregoing has been furnished to the following U.S. Mail this 24th day of June, 2015:

Kevin J. Carden, Esq.
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/s/ Becky Knipe
Becky Knipe
Judicial Assistant

APPENDIX H

Kindred Hospital Ocala
1500 SW 1st Ave, 5th Flr
Ocala, FL 34474-4004

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT AND AMENDMENT TO ADMISSION AGREEMENT

Alternative dispute resolution, including arbitration, is a method of resolving disputes without the substantial time and expense of using the judicial system. Signing this agreement is not a precondition to the furnishing of services by Kindred Long-Term Acute Care Hospitals,

THIS AGREEMENT AND AMENDMENT (this "Agreement") is made and entered into on this 17 day of February, 2012 , by and between KLEMISH, MARIANNE ("Patient') and Kindred Hospital Ocala ("Kindred") (hereinafter, Patient and Kindred are sometimes called the "Parties," and one of the Parties is sometimes called a "Party"), As used in this Agreement the term "Patient" includes the individual identified as Patient in the preceding sentence, his or her guardian or attorney-in-fact, agent, or any person whose claim is derived through or on behalf of Patient.

The Parties agree as follows:

1. Submission of Claims to Alternative Dispute Resolution. Any and all claims or disputes arising out of or in any way relating to this Agreement or the medical treatment or care of Patient at Kindred Hospital Ocala (the "Hospital"), including disputes regarding the interpretation of this Agreement,

whether arising out of state or federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted professional standards of health care or a claim for unpaid hospital charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted to alternative dispute resolution (sometimes hereinafter referred to as "ADR") in accordance with the NAF Mediation Rules and NAF Code of Procedure (hereinafter, collectively, the "NAF Rules of Procedure"), which are incorporated herein reference by and available to Patient upon request from the Hospital's Administrative Offices or directly NAF, 6465 Wayzata Blvd., Minneapolis, MN 55404-0191, (800) 474-2371, facsimile (952) 345-1160, www.adrforum.com. In the event of conflict between the NAF Rules of Procedure and the terms of this Agreement, the NAF Rules of Procedure shall control. Any and all claims or controversies arising out of or in any way relating to the Patient's stay at Kindred or to this Agreement shall be submitted to alternative dispute resolution. This includes, but is not limited to, disputes regarding the interpretation of this Agreement, disputes arising out of State or Federal law, disputes existing or arising in the future, disputes with claims for statutory breaches and damages, compensatory or punitive damages, disputes for abuse and neglect, and disputes sounding in breach of contract, tort, fraud, or breach of statutory duties (including, without limitation, any claim based on violation of patient rights, negligence, medical malpractice, wrongful death, any

other departure from accepted standards of health care or safety or unpaid charges), This Agreement includes claims against the Hospital, its employees, agents, officers, directors, any parent, subsidiary or affiliate of the Hospital, and/or its Medical Director(s) in his capacity as Medical Director. Only disputes that would constitute a true legal cause of action in a court of law may be submitted to the ADR Process. All claims based in whole or in part on the same incident(s), transaction(s), or related course of care or services provided by Hospital to the Patient, shall be mediated or arbitrated in one ADR process. A claim shall be waived and forever discharged if it arose prior to the ADR and is not presented in the ADR hearing. Except as expressly set forth in this Agreement or in the NAF Rules of Procedure, the provisions of the Florida Arbitration Code, Chapter 682, Florida Statutes shall govern the arbitration.

2. Waiver of Right to a Trial. By entering into this Agreement the Parties agree to resolve any dispute covered by this Agreement using mediation and arbitration, and give up their right to have the dispute decided in a court of law before a judge or jury.

THE PARTIES UNDERSTAND THAT THE RULES OF PROCEDURE CONTAIN PROVISIONS FOR BOTH MEDIATION AND BINDING ARBITRATION. IF THE PARTIES ARE UNABLE TO REACH SETTLEMENT INFORMALLY, OR THROUGH MEDIATION, THE DISPUTE SHALL PROCEED TO BINDING ARBITRATION. BINDING ARBITRATION MEANS THAT THE PARTIES ARE WAIVING THEIR RIGHT TO A TRIAL, INCLUDING THEIR RIGHT TO A JURY TRIAL, THEIR RIGHT TO TRIAL BY A JUDGE AND THEIR

RIGHT TO APPEAL THE DECISION OF THE ARBITRATOR(S).

3. Administrator. Any mediation or arbitration conducted pursuant to this Agreement shall be administered by an independent impartial entity that is regularly engaged in providing mediation and arbitration services (the "Administrator"). The Request (defined below) for ADR shall be made in writing and may be submitted to the National Arbitration Forum at the address set forth in Section 1 above by regular mail, certified mail, or overnight delivery. If the Parties choose not to select the National Arbitration Forum or if the National Arbitration Forum is unwilling or unable to serve as the Administrator, the Parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator. If the Parties are unable to agree to an available alternate Administrator, a neutral or neutrals will be appointed in the manner set forth in the Florida Arbitration Code. Regardless of the Administrator/arbitrator selected, the Request shall be submitted according to the process described in this Agreement, and the mediation/arbitration shall be conducted according to the NAF Rules of Procedure.

4. Request. The "Claimant" in the ADR proceeding may be either Kindred or Patient, depending on who files the Request for ADR (the "Request"). The other party or parties against whom the Request is filed will be the "Respondent(s)". The NAF Rules of claims based in whole or in part on the same incident(s), transaction(s), or related course of care or services provided by Kindred to the Patient, shall be mediated or arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to

the Request for ADR and is not presented in the arbitration hearing (the "Hearing"). Claims where the Request is less than $75,000 shall not be subject to mediation and shall proceed directly to arbitration, unless one of the parties request mediation, in which case all parties shall mediate in good faith.

5. Pre-Request Procedures. Notwithstanding anything in this Agreement to the contrary, in connection with any claim for medical malpractice as defined in Florida Statutes Section 766.106, or any similar successor law, or any claim or Request involving medical negligence, the Parties shall comply with the presuit investigation and presuit notification requirements under Chapter 766, Florida Statutes, or any similar successor laws (the "Presuit Statutes"), prior to filing a Request for ADR, unless the Parties agree to waive the presuit requirements. For the purposes of this Agreement, all references in the Presuit Statutes to litigation shall be interpreted as applying to any arbitration hereunder. The confidentiality provisions of the Presuit Statutes shall apply to any arbitration under this Agreement.

6. Arbitration of Damages. If prior to the filing of a Request for ADR either Party offers to have Patient's damages determined by arbitration in accordance with Chapter 766, Florida Statutes, and the other Party accepts such offer, the Parties shall arbitrate damages in accordance with Chapter 766, Florida Statutes, and the other terms and conditions of this Agreement shall not apply to such claim. If the recipient of such an offer to arbitrate damages rejects the offer, the provisions of this Agreement shall remain in full force and effect and the statutory limitations shall apply to any subsequently filed Request.

7. Discovery. Discovery may be initiated immediately after the Request for ADR is filed. The Parties shag have the right to engage in discovery consistent with the Florida Rules of Civil Procedure, subject to any restrictions contained in applicable statutes, rules and regulations, including but not limited to, the actions relating to health care providers, the NAF Rules of Procedure and also subject to the Supplemental Disclosures for Kindred Mediations ("Supplemental Disclosures"). A copy of the Supplemental Disclosures governing allowable discovery may be obtained from the Hospital's Administrative offices or from NAF at the address or website listed in paragraph 1 of this Agreement. The admissibility of evidence at the arbitration hearing shall be determined in accordance with the Florida Rules of Evidence, subject to any restrictions contained in applicable statutes, rules and regulations, including, but not limited to, the actions relating to health care providers as well as any restrictions contained in this Agreement or the NAF Rules of Procedure.

8. Attorneys' Fees and Costs, The Parties will each bear their own attorneys' fees and costs incurred in connection with any claim made under or arising out of this Agreement, except as otherwise permitted by law.

9. Amendment to Hospital Admission Agreement; Survival. This Agreement amends the Conditions to Admission or any other document or agreement executed by Patient for admission to the Hospital (the "Admission Agreement"). By signing this Agreement below, the Parties incorporate the terms of this Agreement into, and make the terms hereof a part of, the Admission Agreement. The terms of this Agreement shall survive the expiration or termina-

tion of the Admission Agreement as well as any discharge of Patient from the Hospital.

10. Rescission of Agreement, This Agreement may be cancelled by the patient by delivering written notice of revocation to the Hospital not later than 5:00 p.m. local time on the fifth (5th) business day after signing this Agreement.

11. Confidentiality. All ADR sessions and proceedings, including without limitation, all information and testimony disclosed, provided or given during discovery, shall be kept confidential, except that the Parties may disclose such information (i) to their attorneys, accountants, financial advisors and other experts and consultants, provided that such parties agree to keep the information confidential, (ii) to the extent required by subpoena, court order or to comply with applicable law, including without limitation, the notice requirements of Florida Statutes Section 766.106(2)(b), or any similar successor law, or (iii) to the extent required to enforce an award.

12. Severability. If any provision of this Agreement is determined by an arbitrator or a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

13. Binding Effect. This Agreement shall inure to the benefit of and bind the Parties, their successors and assigns, including the agents, employees, servants, officers, directors and any parent or subsidiary of Kindred, and all persons whose claim is derived through or on behalf of Patient, including, without limitation, any parent, spouse, child, guardian, exec-

utor, administrator, personal representative, or heir of Patient.

14. Captions and Headings. The captions and headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement. Whenever used herein, the singular number shall include the plural, the plural singular, and the use of any gender shall include all genders.

15. Electronic Storage of ADR Agreement. The parties agree and stipulate that the original of the ADR Agreement, including the signature page, may be scanned and stored in a computer database. The parties agree that any printout may be used for any purpose just as if it were the original, including proof of the content of the original writing.

16. Patient's Understanding of Agreement. By signing this Agreement, Patient acknowledges that he/she understands the following: (i) Patient has the right to seek legal counsel concerning this Agreement; (ii) the execution of this Agreement by Patient is voluntary and optional and is not a precondition to treatment at or admission to the Hospital; (iii) Patient may rescind this Agreement in the manner described above within five (5) business days of execution of this Agreement; and (iv) nothing in this Agreement shall prevent Patient or any other person from reporting alleged violations of law to the appropriate administrative, regulatory or law enforcement agency.

ALTERNATIVE DISPUTE RESOLUTION AGREEMENT
AND AMENDMENT TO ADMISSION AGREEMENT

THIS IS INTENDED TO BE A LEGALLY BINDING AGREEMENT
IF NOT FULLY UNDERSTOOD, SEEK THE ADVICE OF AN ATTORNEY

The Parties, intending to be legally bound, have signed this Agreement on the dates set forth below. If signed by a Legal Representative, the representative certifies that the Facility may reasonably rely upon the validity and authority of the representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the patient.

PATIENT:

KLEMISH, MARIANNE
Name of Patient

/s/ Marianne Klemish
Signature of Patient/Legal Representative Legal Representative indicate capacity (i.e., guardian, attorney-in-fact, spouse, son, daughter, etc.)

Date: 2/22/12

KINDRED:

Kindred Hospital Ocala
Hospital Name and Number

By: /s/ Lasham Davis
Signature of Kindred's Authorized Agent

Printed Name and Title of Kindred's Authorized Agent

Kindred Hospital – Ocala Florida – 4508
Name and Number of Hospital

Date: 2/22/12