IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

NINA R. STRAUSBERG,

Respondent,

vs. No. 33,331

LAUREL HEALTHCARE PROVIDERS, LLC,
ARBOR BROOK, LLC, d/b/a ARBOR BROOK
HEALTHCARE, LISA S. NOYA BURNETT, M.D.,
and THE FOUR HUMOURS HEALTHCARE, LLC,

Petitioners.

AARP'S *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT

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STATEMENTS OF INTEREST

AARP is a nonpartisan, nonprofit organization dedicated to addressing the needs and interests of people age fifty and older. Through education, advocacy, and service, AARP seeks to enhance the quality of life for all by promoting independence, dignity, and purpose. As the country's largest membership organization, AARP advocates for access to affordable healthcare and for controlling costs without compromising quality. AARP supports the establishment and enforcement of laws and policies designed to protect the rights of nursing facility residents to obtain redress when they have been victims of neglect or abuse.

AARP has filed *amicus* briefs in numerous federal and state cases around the country challenging the enforceability of arbitration clauses in long-term care and other consumer and employment contracts, including in *Cordova v. World Fin. Corp.*, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901, and *Corum v. Roswell Senior Living, LLC,* 2010-NMCA-105, 149 N.M. 287, 248 P.3d 329 (2010), *cert. denied*, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146. These briefs addressed the importance of maintaining access to the civil justice system and ensuring that consumers can avail themselves of the full range of enforcement mechanisms that Congress and state legislatures enacted for their benefit.

SUMMARY OF THE ARGUMENT

People being admitted into a nursing facility are in the midst of a health-related crisis brought on by a precipitous decrease in health, rapid increase in disability, or the death or illness of a caregiver. Because the nursing facility has dramatically superior bargaining power and capacity to maintain evidence demonstrating that a nursing facility admission contract was entered into appropriately, the Court of Appeals correctly placed the burden of proof on the nursing facility to prove that a challenged contract is not unconscionable. *See Strausberg v. Laurel Healthcare Providers*, *LLC*, 2012-NMCA-006, ¶ 8, ___ N.M. ___, 269 P.3d 914, 921 (2011). Despite regulatory and statutory obligations that set out minimum standards for care, non-compliance with these obligations by nursing facilities is rampant. In 2007, for example, more than 91% of nursing facilities nationwide were cited for violations of federal health and safety standards. Dept. of Health & Human Servs., Office of Inspector Gen., OEI-02-08-00140, *Trends in Nursing Home Deficiencies and Complaints* 1, 6 (2008), *available at* http://oig.hhs.gov/oei/reports/oei-02-08-00140.pdf. Given the failure of regulatory enforcement to be able to adequately protect to protect nursing facility residents' rights, preventing improper waiver of the opportunity to vindicate those rights in court is essential. The *Strausberg* rule achieves this protection in a manner consistent with the Federal Arbitration Act because it does

not categorically deny nursing facilities the right to enforce arbitration agreements with their residents but simply puts the burden on the nursing facility to show challenged agreements are not unconscionable. *See* 9 U.S.C. § 2 (2006); *Strausberg*, 269 P.3d 914 at 921.

ARGUMENT

I. PLACING THE BURDEN ON NURSING FACILITIES TO PROVE THAT A CHALLENGED ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE PROTECTS THE RIGHTS OF VULNERABLE RESIDENTS WHO HAVE GROSSLY LESS BARGAINING POWER.

The Court of Appeals in *Strausberg* properly found that "when a nursing home relies upon an arbitration agreement signed by a patient as a condition for admission to the nursing facility, and the patient contends that the arbitration agreement is unconscionable, the nursing home has the burden of proving that the arbitration agreement is not unconscionable." *Strausberg*, 269 P.3d 914 at 921.

A. Nursing Facilities Have Grossly Superior Bargaining Power and Control the Evidence Related to the Contract's Formation.

Nursing facilities enter into contractual admissions relationships with residents on a regular basis. In 2010, 5564 people were served by New Mexico's 71 nursing facilities. *New Mexico Nursing Facilities*, State HealthFacts.org, http://www.statehealthfacts.org/profileind.jsp?cat=8&sub=97&rgn=33 (last visited Mar. 28, 2012); Medicare.gov, http://www.medicare.gov/NHCompare (follow

"Find and Compare Nursing Homes" hyperlink; then select "Find a Nursing Home with a State," enter "New Mexico," and follow "Continue" hyperlink) (last visited Mar. 28, 2012). On the other hand, people, like Ms. Strausberg, who are seeking admission to a nursing facility have probably never before have seen a nursing facility contract, let alone read the arbitration provisions contained therein. *See Strausberg*, 269 P.3d at 916-17, 920.

Decisions regarding admission into a nursing facility are "emotionally-charged, stress-laden event[s]," typically made in the midst of a crisis brought on by an abrupt increase in disability level, precipitous deterioration in health, or the deterioration in health (or death) of a spouse or caregiver. *See Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 101(1996) (citing Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 255, 258 (1990)); Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 New Eng. J. Crim. & Civ. Confinement 1, 3 (1998) (explaining that an older person's move to a nursing facility often follows a period of acute hospitalization when she or her family cannot manage home care demands). The process of admitting a person to a nursing facility involves many and varied decisions about the stay, including but not limited to: who is financially responsible for costs; whether the individual's primary care doctor will continue to treat the individual in the facility; the rules of

the facility; visiting hours; rehabilitation services that are available; transportation for appointments; whether laundry services are covered; and myriad of other important aspects of daily life for the resident and her family. The potential resident is focused on these critical issues, as well as their own health at the time that they are presented with the arbitration agreement.

Given the disparity in bargaining power and knowledge during the admission process between the nursing facility and the resident, it is important to ensure that the agreements between the nursing facility and its residents are not unconscionable. It is difficult for residents and their families, faced with the crises accompanying admission to a nursing facility, to make informed decisions about the numerous provisions contained in an admissions contract—especially provisions requiring nursing facility residents to waive the right to access the courts and to a trial by jury for future disputes. The need to find a long-term care placement arises quickly and often is unplanned, leaving little time to investigate options or to wait for an opening at a facility of one's choice. Denese A. Vlosky, et al., *"Say-so" As a Predictor of Nursing Home Readiness*, 93 J. Fam. & Consumer Sci. 59 (2001).

Time pressure significantly impairs the ability to seek and carefully consider alternatives, and the critical need for services almost always overshadows any other consideration. In the 1980s, the federal government changed the way

hospitals are paid for their Medicare patients; since that change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health & Aging 145, 148 (2000) (internal quotation marks omitted). One danger is that the hospitalization itself debilitates patients and the assessment of the type of care and facility they need after discharge is made before they have fully recovered and are able to make informed decisions on these critical issues.[1] *Id.* at 150-51. Consequently, the hospital patient is often unable to review the contract and contemplate the meaning and ramifications of its provisions, particularly those that have nothing to do with care and related services and costs. *See id; see also* Laura M. Owings and Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 Tenn. B.J. 20, 22-23 (2007).

Because nursing facilities routinely enter into admission agreements containing arbitration provisions, they have or should have systems for documenting the circumstances around which each agreement was entered. The new resident is not a position to record her state of mind or understanding of the contract that she has just executed during crisis. For that reason and others, the Court of Appeals justly placed the burden on the facility to prove that the contract

[1] Potential residents and their family members panic when they feel there is insufficient time to consider different facilities and they may choose a facility they would not have chosen if they had more time to weigh their options. *Navigating the Hazards*, *supra*, note 3, at 150.

was entered into appropriately when the resident later challenged the contract as unconscionable.

B. An Unconscionable Contract Can Result in the Improper Forfeiture of Constitutional Rights.

New nursing facility residents and their families, urgent to get help for themselves or their loved ones, routinely sign arbitration agreements placed in front of them, and only learn later that the contract included provisions requiring the resident and his family to forego the use of the court system to resolve a wide range of future disputes that, all too often, involve abuse, assault, malnutrition, neglect, or even death. Owings & Geller, *supra*. People seeking admission to a long-term care facility are focusing on the quality and range of services available, and perhaps the costs, but are not thinking about possible future disputes. *See* Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263, 280 (2004) ("[a]dmitting a loved one to a nursing home is an overwhelming and stressful undertaking for families . . . . If families give any thought to the admissions agreement they are signing, they probably do not consider whether it contains a mandatory arbitration agreement").

The arbitration agreements that arise out of what are inherently and grossly unequal bargains are having a dramatic effect on the rights of nursing facility

residents, decreasing restitution for an increasing number of reported abuses, as the Wall Street Journal highlighted:

> Nursing-home patients and their families are increasingly giving up their right to sue over disputes about care, including those involving deaths, as the homes write binding arbitration into their standard contracts. The clause can have profound implications. Nursing homes' average costs to settle cases have begun dropping, according to an industry study, even as claims of poor treatment are on the rise.

Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits—Big Payouts Fade As Arbitration Rises; Ms. Hight Falls Ill*, Wall St. J., Apr. 11, 2008, at A1.[2]

Thus, the crisis that surrounds nursing facility admission often overwhelms new residents, leading them to execute agreements relinquishing their right to a jury trial at a time during which they are not in the right frame of mind to properly contemplate the impact of such provisions.

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[2] The article quotes former Sen. Mel Martinez, '"[i]t is an unfair practice given the unequal bargaining position between someone desperate to find a place for their loved ones and a large corporate entity like a nursing home.'" Moreover, the article notes that "[t]he biggest arbitration provider, the American Arbitration Association, frowns on agreements requiring arbitration in disputes over nursing-home care and generally refuses such cases. Some patients 'really are not in an appropriate state of mind to evaluate an agreement like an arbitration clause,' says Eric Tuchmann, the association's general counsel. A second group, the American Health Lawyers Ass'n, also avoids them." Wall St. J., Apr. 11, 2008, at A1.

II. BECAUSE REGULATORY ENFORCEMENT PROCESSES FAIL TO PROTECT RIGHTS OF NURSING FACILITY RESIDENTS IT IS VITAL TO PREVENT UNCONSCIONABLE ARBITRATION CONTRACTS THAT WAIVE AN INDIVIDUAL'S RIGHT TO VINDICATE THEIR CLAIMS IN COURT

Underlying the Court of Appeals demand for a vigilant analysis of the facts surrounding the execution of the arbitration contract is the need to protect an individual's right to access the judicial process to address violations of rights. Given the failure of regulatory enforcement to protect nursing facility residents' rights, preventing improper waiver of the opportunity to vindicate those rights in court is essential. Nursing facility residents are vulnerable and isolated, and thus at high risk of abuse or neglect. While there are laws in place meant to protect nursing facility residents from neglect and abuse, those laws have failed to adequately protect residents' rights.

New Mexico nursing facilities are subject to the Federal Nursing Home Reform Amendments (FNHRA) and implementing regulations, which set forth minimum nationwide standards of care for any nursing facility that accepts Medicare or Medicaid reimbursement (and virtually all accept one, the other, or both). *See* 42 U.S.C. §§ 1395i-3, 1396r (2006) (standards for Medicare-certified and Medicaid-certified facilities); 42 C.F.R. §§ 483.1-.80 (2011) (standards for either Medicare or Medicaid certification). The federal Centers for Medicare & Medicaid Services (CMS) enter into contracts with relevant state agencies to

monitor that state's nursing facilities for compliance with the FNHRA. In New Mexico, accordingly, the New Mexico Department of Health is responsible generally for enforcement of federal and state nursing facility law, although the federal government retains some responsibility for oversight, enforcement, and other matters. *See, e.g.*, Dep't Health & Human Servs., Office of Inspector Gen., OEI-06-03-00410, *Nursing Home Enforcement: Application of Mandatory Remedies* 1 (2006), *available at* http://http://oig.hhs.gov/oei/reports/oei-06-03-00410.pdf.

Unfortunately, non-compliance by nursing facilities is rampant. In 2007, for example, more than 91% of nursing facilities nationwide were cited for violations of federal health and safety standards, according to a report from the Department of Health and Human Service (HHS) Office of Inspector General. Dept. Health & Human Services, Office of Inspector Gen., OEI-02-08-00140, *Trends in Nursing Home Deficiencies and Complaints* 1, 6 (2008), *available at* http://oig.hhs.gov/oei/reports/oei-02-08-00140.pdf. For-profit nursing facilities exhibited particularly severe problems. *Id.* at 6-7. Overall, approximately 17% of nursing facilities committed one or more violations that caused "actual harm or immediate jeopardy" to residents. *Id.* at 9.

The federal Government Accountability Office (GAO) has reached similar conclusions. In 2007, the GAO's Director of Health Care testified before Congress

that "[a] small but significant proportion of nursing facilities nationwide continue to experience quality-of-care problems—as evidenced by the almost 1 in 5 nursing facilities nationwide that were cited for serious deficiencies in 2006 . . . ." Kathryn G. Allen, U.S. Gov't Accountability Office, GAO-07-794T, *Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small but Significant Share of Homes* 9 (2007), *available at* http://www.gao.gov/new.items/d07794t.pdf. These "serious deficiencies," Allen explained, were "deficiencies that cause actual harm or place residents in immediate jeopardy." *Id.* at 3. In addition, Allen noted that "[d]espite CMS's efforts to strengthen federal enforcement policy, it has not deterred some facilities from repeatedly harming residents . . . . [S]anctions may have induced only temporary compliance in these facilities because surveyors found that many of the facilities … were again out of compliance on subsequent surveys." *Id.* at 15-16.

In accord with Allen's testimony, a 2007 GAO report on federal enforcement efforts stated: "almost half of the homes we reviewed—homes with prior serious quality problems—continued to cycle in and out of compliance, continuing to harm residents." U.S. Gov't Accountability Office, GAO-07-241, *Nursing Homes: Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents* 26 (2007), *available at* http://www.gao.gov/new.items/d07241.pdf. The types of deficiencies found in the

facilities that cycled in and out of compliance included inadequate treatment or prevention of pressure sores, resident abuse, medication errors, and employing convicted abusers. *Id.* at 68.

In 2006, the HHS Office of Inspector General found that even *mandatory* remedies were not imposed by CMS in cases of serious violations. Dept. Health & Human Servs., Office of Inspector Gen., *Nursing Home Enforcement: Application of Mandatory Remedies supra*. Under federal law, termination of federal certification (namely, discontinuance of Medicare or Medicaid reimbursement) is required if a facility is out of compliance for more than six months, or fails to correct an "immediate jeopardy" violation within 23 days. *Id.* Despite this mandate, the Inspector General found that the required remedies were *not* imposed 55% of the time. *Id.* Worse yet, "all of the facilities that were not terminated had new cases of noncompliance serious enough to again require referral to CMS for enforcement action, including cases of extended noncompliance and immediate jeopardy to residents." *Id.*

Another mandatory remedy is denial of federal Medicare reimbursement for all of a facility's new admissions. *Id.* at 8. This remedy is required when a facility is out of compliance for at least three months. *Id.* In the same study, the Inspector General found a failure to apply this remedy in 28% of the relevant occasions, and a late application in another 14% of the occasions. *Id.*

Because of inadequate regulatory protection of nursing facility residents' rights, the ability to vindicate those rights in court becomes even more vital. Unconscionable waiver of the right to go to court leaves nursing facility residents particularly vulnerable to abuse and neglect.

III. THE COURT OF APPEALS RULING ALLOWS FOR A FINDING THAT AN ARBITRATION AGREEMENT WAS PROPERLY EXECUTED IF THE FACILITY CAN MEET ITS BURDEN OF PROOF

A state common law rule placing the burden of proof on the nursing facility to show that the formation of a contract that contains an arbitration agreement was not unconscionable is consistent with Federal Arbitration Act (FAA). *See* 9 U.S.C. § 2 (2006) ("A written provision . . . to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012).

In *Marmet*, the United States Supreme Court vacated a judgment that held that, "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence," 132 S. Ct. 1201, 1203 (quoting *Brown ex rel. Brown v. Genesis Healthcare Corp.*, No. 35494, 2011 WL 2611327 (W. Va., June 29, 2011), *vacated by Marmet*, 132 S. Ct. 1201 (2012)) (internal

quotation marks omitted). The Supreme Court found that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a *categorical rule prohibiting arbitration of a particular type of claim*, and that rule is contrary to the terms and coverage of the FAA." *Id.* at 1203-04 (citing *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1747 (2011)) (emphasis added).

Unlike West Virginia's "categorical rule," the rule articulated by the Court of Appeals in *Strausberg* does not prohibit arbitration of a particular type of claim. *See* 269 P.3d 914, 921 (2011). Rather, when determining whether a valid contract was formed and can be enforced, the rule articulated by *Strausberg* places on the nursing facility the burden of showing that the procedure for the formation of the arbitration agreement was not unconscionable because it is the party that inherently has grossly more bargaining power. The court explained its holding saying that, "admission agreements and other admission-related documents such as mandatory arbitration agreements are often presented to aging and infirmed individuals and their families 'when they are at their most vulnerable, in need of quick assistance, and potentially can easily be taken advantage of.'" *See Strausberg*, 269 P.3d at 918-21 (quoting *Barron v. Evangelical Lutheran Good Samaritan Soc'y*, 265 P.3d 720, 732 (2011)).

No class of claims is categorically denied from arbitration by *Strausberg's* procedural rule. *See id.* at 921. Rather, when an arbitration agreement between a resident and a nursing facility is challenged on unconscionability grounds and the nursing facility proves the contract was not unconscionable, an otherwise valid arbitration agreement will be enforced. *See id.*

Far from being a categorical denial of the enforcement of arbitration agreements in nursing facility contracts, the rule articulated by *Strausberg* will likely only come into play in a very narrow segment of nursing facility agreement cases, such as that in *Strausberg*, where the agreement is challenged as unconscionable and "neither Plaintiff nor the nurse who obtained her signature on the arbitration agreement had clear recollections of the factual circumstances." *See id.* In such circumstances, it makes evidentiary sense to place the burden of proof of showing the contracting procedure was not unconscionable on the nursing facility.

CONCLUSION

The decision of the Court of Appeals of New Mexico should be upheld. The formation of arbitration agreements is routine for the nursing facility, and regular records are (or can be) kept. For residents and their families, such agreements are formed in the midst of a non-routine crisis involving a rapidly progressing, debilitating illness or disability accompanied by severe pain and significant

medication and without the expectation or comprehension that they are waiving their constitutional right to a jury trial. Thus, the nursing facility is not only in a grossly superior bargaining position with respect to the vulnerable, crisis-facing resident but is also in a much better position to prepare and recall the precise procedure that surrounded the contract's formation and, therefore, should shoulder the burden of proving that the procedure for that formation was not unconscionable. *See Strausberg*, 269 P.3d at 920-21.

Respectfully submitted,

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