IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT
No. 19 WAP 2015

DANIEL E. TAYLOR and WILLIAM TAYLOR, as Co-Executors of the Estate of ANNA MARIE TAYLOR, Deceased,
Appellees

v.

EXTENDICARE HEALTH FACILITIES, INC. d/b/a HAVENCREST NURSING CENTER; EXTENDICARE HOLDINGS, INC.; EXTENDICARE HEALTH FACILITY HOLDINGS, INC.; EXTENDICARE HEALTH SERVICES, INC.; EXTENDICARE REIT; EXTENDICARE, L.P.; and EXTENDICARE, INC.,
Appellants.

BRIEF OF *AMICUS CURIAE* AARP IN SUPPORT OF APPELLEES DANIEL E. TAYLOR AND WILLIAM TAYLOR

Allowance of Appeal granted by the Supreme Court of Pennsylvania on September 23, 2015, No. 161 WAL 2015 from the April 2, 2015 Opinion of the Superior Court, Docket No. 2028 WDA 2013, affirming the Order of the Court of Common Pleas of Washington County entered on November 20, 2013 at No. 2012 of 6878.

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STATEMENT OF INTEREST

AARP is a nonpartisan, nonprofit organization with a membership 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. AARP advocates for access to affordable healthcare that compromises neither quality nor respect for individual rights. 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. The fair, efficient, and transparent resolution of claims of neglect and abuse are immensely important rights, especially to older nursing facility residents, who are more at risk of abuse and neglect. Unduly restrictive interpretations of the Federal Arbitration Act (FAA) infringe on these rights and on more expansive substantive and due process rights granted by state laws.

AARP has filed *amicus* briefs in numerous federal and state cases around the country regarding the use of arbitration clauses in long-term care, consumer, and employment contracts. These briefs have 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 ARGUMENT

The abject neglect and abuse of nursing facility residents is an all-too-common occurrence inadequately addressed by regulatory authorities. Nursing facilities frequently fail to comply with regulatory and statutory obligations that set minimum standards for resident care. When noncompliance is detected, regulatory authorities are often unable to vigorously enforce these minimum standards of care and, thus, unable to adequately protect nursing facility resident rights. Access to the courts to vindicate these rights, obtain compensation for damages, and deter future abusive conduct is, therefore, vital.

For nursing facility residents and their families, the scales of justice are tipped against them at the time of admission into nursing facilities and before they can anticipate that they may need to seek redress in the courts. Elderly people seeking admission to nursing facilities are in the midst of medical crises caused by precipitous declines in health, rapid increases in disability, or the death or illness of caregivers. Nursing facilities, in contrast, have dramatically superior bargaining power and unilaterally draft admission contracts that they require patients and family members to sign without a meaningful opportunity to review or negotiate the terms. Appellants, a nursing facility and related legal entities, ask this Court to tip the scales further in their favor by ignoring state laws enacted to ensure the efficient and fair administration of justice.

This Court must faithfully uphold state laws and procedural rules that are designed to protect citizens' rights to fairly access the justice system. In doing so, it must give due regard to agreements to arbitrate disputes out of court. Due regard, however, does not require that agreements to arbitrate be given more favorable treatment than any other contract that may be unenforceable based on valid, arbitration-neutral state laws and rules.

The Superior Court's decision to consolidate for trial five non-arbitrable wrongful death and survival claims with one arbitrable survival claim evenhandedly enforced state laws—the Pennsylvania Wrongful Death Act and Pennsylvania Rule of Civil Procedure 213(e)—that give effect to the State's decision to adjudicate wrongful death and survival actions together, whether or not these claims involve an agreement to arbitrate. Neither the consolidation rule nor the Superior Court's ruling singled out arbitration agreements for the purpose of making them unenforceable. Bifurcating the claims would pose significant obstacles to the efficient administration of justiciable claims, defeating the purpose of the state law and one of the primary purposes of arbitration. This Court should affirm the Superior Court's decision on appeal because it did not violate the nondiscrimination principle of the FAA.

ARGUMENT

I. Because Regulatory Authorities Are Unable to Adequately Protect Nursing Facility Residents, It Is Imperative That Victims of Abuse and Neglect and Their Families Have Fair Access to Remedial Measures Available Through the Civil Justice System.

The prevalence of abuse and neglect in nursing facilities and the inability of regulatory authorities to effectively detect and remedy this problem, make it imperative that victims and their families have fair access to complementary remedial measures available through the civil justice system—particularly when the bad conduct results in the suffering and death of a vulnerable person. Appellants' supporting *amici* cynically diminish the value of Mrs. Taylor's life and the suffering that her death wrought on her loved ones by claiming that wrongful death claims are "trivial" and "often have no recoverable damages." Pennsylvania Healthcare Ass'n et al. Amicus Br. at 25-26. On this basis, they urge this court to accept the "reality" that a wrongful death action exists only in theory. *Id.* at 26. *Amici* are flatly wrong on the law, as the Pennsylvania Wrongful Death Act created a real and valuable claim for wrongful death. *See* 42 Pa.C.S. § 8301(a) (authorizing wrongful death claim) and § 8301(c) (authorizing recovery of special damages "for reasonable hospital, nursing, medical, funeral expenses and expenses of administration necessitated by reason of injuries causing death" in addition to "other damages"). This court is bound to enforce the Pennsylvania Wrongful Death Act as written, not as Appellants' *amici* claim it operates "in reality."

Moreover, *Amici's* ageist justifications[1] for Mrs. Taylor's death ignore the severity, frequency, and real life impact of elder abuse and neglect in nursing facilities, and, consequently, the necessity and value of wrongful death and other civil remedies as mechanisms to seek redress for such abuses.

A. Vulnerable Nursing Facility Residents Are Frequent Victims of Abuse and Neglect.

Nursing facility residents are more vulnerable to abuse and neglect due to their isolation from social networks; their congregate living setting; their dependence on others to perform activities of daily living such as eating, bathing, dressing, and toileting; and their cognitive impairments. *See* Panel to Review Risk and Prevalence of Elder Abuse and Neglect, Nat'l Research Council, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, 91-100 (Richard J. Bonnie & Robert B. Wallace eds., 2003) (reviewing studies on risk factors for abuse in different settings) [hereinafter *Elder Mistreatment*]. In 2012, more than 1.4 million Americans lived in 15,652 nursing homes certified to participate in the Medicaid and/or Medicare health insurance programs. Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Nursing Home Data Compendium 2013 Edition*, 5, 11 (2013) [hereinafter *2013*

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[1] While *Appellants' amici's* brief notes that Mrs. Taylor was 82 years old with a "litany of serious health conditions," Pennsylvania Healthcare Ass'n et al. Amicus Br. at 26-27, it fails to mention that skilled nursing facilities are licensed, paid, and have legal duties to care for people just like Mrs. Taylor. *See* part I.B. *infra*.

Compendium], *available at* http://goo.gl/zHKGGs. The vast majority of these nursing facility residents shared at least one characteristic that put them at risk of abuse and neglect: 85% were 65 years of age or older, 62% had functional impairments in four or more activities of daily living, and 63% had moderate or severe cognitive impairments. *Id.* at 168, 170.

The available empirical data suggest that nursing facility residents are, in fact, frequent victims of abuse and neglect. Residents report abuse. In one study conducted in 2000, 44% of the nursing facility residents interviewed said they had been abused and 95% said they had been neglected or had witnessed the neglect of another resident. *See Elder Mistreatment* at 453, 463 (citing K. Broyles, *The Silenced Voice Speaks Out: A Study of Abuse and Neglect of Nursing Home Residents* (2000) (A Report from the Atlanta Long Term Care Ombudsman Program and Atlanta Legal Aid Soc'y to the Nat'l Citizens Coalition for Nursing Home Reform)). The Long-Term Care Ombudsman Office receives complaints of abuse that implicate as many as one-third of all nursing facilities. *See* Nicholas Castle, Jamie C. Ferguson-Rome & Jeanne A. Teresi, *Elder Abuse in Residential Long-Term Care: An Update to the 2003 National Research Council Report*, 34 J. Applied Gerontology 407, 429 (2015) [hereinafter *Elder Abuse in Residential Long-Term Care*]. Nursing facility staff also report abuse. In one study, over 50% of nursing facility staff admitted to subjecting older patients to physical violence,

mental abuse, or neglect within the prior year. *See* Merav Ben Natan & Ariela Lowenstein, *Study of Factors That Affect Abuse of Older People in Nursing Homes*, 17 J. Nursing Mgmt. 20, 22 (2010).

National databases also provide evidence of the significant levels of abuse and neglect in nursing facilities. An estimated 7% of all complaints to the long-term care ombudsmen regarding nursing facilities were complaints of abuse, gross neglect, or exploitation. *See* Admin. on Aging, U.S. Dep't of Health and Human Servs., *2012 National Ombudsman Reporting System Data Tables*, Table B-2, Tab A (2012), http://www.aoa.gov/aoa_programs/elder_rights/Ombudsman/National_State_Data/2012/Index.aspx (last visited Jan. 25, 2016). In 2012, state surveys—inspections mandated by federal regulations and used to determine whether facilities are in compliance with federal and state law—revealed that 12% of the facilities surveyed had been cited for causing actual harm to residents or putting them in immediate jeopardy, 3.1% for substandard care, 5.6% for use of restraints, and 13.9% for failure to prevent or treat bedsores. *2013 Compendium*, at 51, 114, 126, 138. The complex challenge of collecting accurate data on the prevalence of abuse in nursing facilities means that these numbers, though unacceptably high, are a mere sampling of a problem that is largely under-detected and under-reported. *See Elder Abuse in Residential Long-Term Care*, *supra* at 429.

B. Federal and State Enforcement Efforts Have Failed to Effectively Address Abuse and Neglect in Nursing Facilities.

Nursing facilities are regulated on the state and federal level in order to ensure quality care. In particular, nursing facilities that receive federal funding[2] must comply with the 1987 Omnibus Budget Reconciliation Act (OBRA) and its implementing regulations, which set forth minimum standards of care for long-term care facilities. *See* 42 U.S.C. §§ 1395i-3, 1396r (2012); 42 C.F.R. §§ 483.1-.75 (2011). States are responsible for inspecting nursing homes to ensure compliance with these minimum standards of care. *See, e.g.*, Pa. Dep't of Health, *Long Term Care Survey Process*, http://goo.gl/1wqDgO (last visited Jan. 25, 2016).

Despite the mandatory nature of these minimum standards of care, the majority of facilities fail to comply. In 2010, for example, more than 93% of nursing facilities in the country were cited for violations of federal health and safety standards. *See* Charlene Harrington et al., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2005 Through 2010*, 79 (Dep't of Soc. & Behavioral Scis., Univ. of Cal., San Francisco, 2011). An average of 23.36% of all facilities surveyed in 2010 were cited for one or more deficiencies that caused

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[2] The national expenditure on nursing facilities and continuing care retirement communities is projected to be $176.1 billion in 2016—$86 billion of which will be covered by Medicaid and Medicare. Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., *National Health Expenditure Projections 2014-2024*, Table 13, https://www.cms. gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nationalhealthaccountsprojected.html (last visited Jan. 25, 2016).

harm or immediate jeopardy to residents and 7.18% were cited for substandard care. *Id.* at 80, 82. These reports reveal a fraction of the care deficiencies because state surveys of compliance with federal quality standards repeatedly understate serious care problems. U.S. Gov't Accountability Off., GAO-08-517, *Nursing Homes: Federal Monitoring Surveys Demonstrate Continued Understatement of Serious Care Problems and CMS Oversight Weaknesses*, 11 (2008), *available at* http://www.gao.gov/new.items/d08517.pdf. "From fiscal year 2002 through 2007, about 15 percent of federal comparative surveys nationwide identified state surveys that failed to cite at least one deficiency at the most serious levels of noncompliance—the actual harm and immediate jeopardy levels." *Id.* at 4.

Federal and state regulatory enforcement efforts are inadequate to remedy the problem, as demonstrated by the fact that many nursing facilities, even after being cited by regulators, continue the practices that harm and sometimes kill residents. The GAO found that in 2005 about 17% of nursing facilities were cited for deficiencies that caused "actual harm or immediate jeopardy" to patients. *See* U.S. Gov't Accountability Off., GAO-07-241, *Nursing Homes: Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents*, 65 (2007) [hereinafter *GAO Nursing Home Federal Enforcement Report*], *available at* http://www.gao.gov/products/GAO-07-241. In another study four years later, the GAO found that the number of nursing facilities

cited for the most serious deficiencies, referred to as "immediate jeopardy," had increased over the previous several years, particularly in for-profit and multi-facility chains. U.S. Gov't Accountability Off., GAO-11-571, *Nursing Homes: Private Investment Homes Sometimes Differed from Others in Deficiencies, Staffing, and Financial Performance*, at Highlights (2011), *available at* http://www.gao.gov/assets/330/ 321067.pdf. Federal enforcement efforts have "not deterred some homes from repeatedly harming residents." *See* U.S. Gov't Accountability Off., GAO-07-794T, *Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small but Significant Share of Homes* 3, 9-16 (2007), *available at* http://www.gao.gov/new.items/d07794t.pdf. Almost half of the nursing facilities with past citations for serious quality problems "continued to cycle in and out of compliance, continuing to harm residents." *GAO Nursing Home Federal Enforcement Report*, *supra* at 26. These facilities that cycled in and out of compliance were cited for deficiencies such as inadequate treatment or failure to prevent pressure ulcers. *See id.* at 68-69.

Federal law mandates the most severe consequences for facilities that fail to timely remedy serious, longstanding, or repeated violations of federal quality of care standards. These consequences include exclusion from participation in Medicare or Medicaid or temporary suspension of reimbursement. *See* 42 C.F.R. §§ 488.406, 488.412, 488.14, 488.417 (2011). However, a 2006 report by the U.S.

Department of Health and Human Services found that, for violations requiring a nursing facility's permanent exclusion from participation in Medicare, CMS failed to impose that mandatory sanction 55% of the time. *See* Office of the Inspector Gen., Dep't of Health & Human Servs., OEI-06-03-00410, *Nursing Home Enforcement: Application of Mandatory Remedies*, at i (2006), *available at* http://goo.gl/vsQJqn. For violations requiring temporary suspension of Medicare reimbursement, CMS failed to impose that mandatory sanction 28% of the time. *Id.* at ii. Even though cited facilities often remedied the violations after the time for Medicare exclusion or payment suspension had expired, all those reviewed in a subsequent survey were found to have new instances of noncompliance that again required referral to CMS for enforcement action. *Id.*

Pennsylvania nursing facilities have also failed to comply with regulatory minimum standards of care. In the span of only three years (from August 3, 2012 to October 8, 2015), inspection reports showed that Pennsylvania's nursing facilities were cited for 12,255 deficiencies. *See* ProPublica, *Nursing Home Inspect: Pennsylvania*, http://goo.gl/AJ0lzb (last visited Feb. 1, 2016) (raw data available at https://data.medicare.gov/data/nursing-home-compare). The vast majority of these deficiencies (11,637) involved the potential for more than

minimal harm to the residents. *Id.*[3] A significant number of these deficiencies—292—were categorized in the higher-severity levels, those that cause actual harm to residents. *Id.* From August to December 2012 alone, Pennsylvania nursing facilities were cited 404 times and 8 of these citations were for widespread deficiencies that caused actual harm and put residents' health or safety in immediate jeopardy. *Id.* Yet, in the same year,[4] the Pennsylvania Department of Health, in conjunction with CMS, issued only two penalties (provisional licenses). *See* Pa. Dep't of Health, *Long Term Care Survey Process*, *supra*. From 2013 to 2015, the State issued more penalties for serious deficiencies, but these enforcement actions paled in comparison to the number of cited deficiencies. Consistent with the national trend, in Pennsylvania there were many more citations for deficiencies than there were penalties. As a consequence of lax state and federal enforcement of quality care standards, nursing facilities know that they will most likely not face penalties for the most serious and persistent violations, eliminating the coercive incentive to provide care that meets minimum standards and reasonably mitigates the risk of harm to vulnerable residents.

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[3] "Health inspections are based on federal regulations, which surveyors implement using national interpretive guidance and a federally-specified survey process. Federal staff train state surveyors and oversee state performance." Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., *Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide* 5 (2015), *available at* http://goo.gl/3cf8P (describing the designations for severity and scope of deficiencies used by state surveyors).

[4] Mrs. Taylor resided at Appellants' nursing facility in February and March 2012.

C. Private Negligence Actions Supplement Lax Federal and State Regulatory Enforcement.

Civil lawsuits against nursing facilities for negligence have complemented the regulatory enforcement system as a means to penalize and deter violations of minimum care standards that harm residents and even cause their deaths. Indeed, the effectiveness of these lawsuits led the nursing facility industry to successfully lobby state legislatures for caps on punitive damages in nursing facility neglect cases. *See* Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 Elder L.J. 331, 334 (2007). Despite the negative effect that limits on punitive damages and other "tort reforms" have on elderly and vulnerable victims of abuse and neglect, *see id.* at 368-82, personal injury lawsuits continue to be filed against nursing facilities. The sheer prevalence and severity of abuse and neglect in nursing facilities and the historic and continued failure of state and federal governments to hold nursing facilities accountable create a continued need for nursing facility residents to use every tool of deterrence available to them.

II. Nursing Facilities Unfairly Use Their Grossly Superior Bargaining Power and Complete Control of the Contract's Formation to Extract Vulnerable Residents' and Family Members' Uninformed Consent to Waive The Right to Access the Civil Courts.

In support of Appellees' arguments regarding the enforceability of the arbitration agreement at issue in this case, AARP offers the Court additional

information about the formation of such agreements in the context of institutional long term care. This information may aid the court in deciding the legal issues of impracticability, legal consideration, and unconscionability in contract formation.

A. Nursing Facility Admission is a Crisis-Driven, Stress-Laden Event.

The nursing facility admission process is an "emotionally-charged, stress-laden event," in which the potential resident is 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 (Cal. Ct. App. 1996) (citing Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 255, 258 (1990)). This inherently stressful admissions process involves many decisions and considerations, 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; available rehabilitation services; transportation for appointments; and a myriad other important aspects of daily life for the residents and their families. Potential residents and their family members are focused on these issues, as well as their own health or the health of their loved one, when they are asked to sign admission agreements containing pre-dispute arbitration provisions.

B. Nursing Facilities Have Grossly Superior Bargaining Power, Knowledge, and Control Over the Contract's Formation.

Nursing facilities have grossly superior bargaining power, knowledge, and control over the contract's formation. Nursing facilities enter into contracts to admit residents to their facilities on a regular basis. In 2013, Pennsylvania's 713 nursing facilities had 88,203 available beds, which were occupied at a rate of 91% throughout the year. *See* Penn. Dep't of Health, Bureau of Health Stats. & Research, *Data from the Long Term Care Facilities Questionnaire, Reporting Period January 1, 2013 – December 31, 2013, Report 1: Utilization Data by Facility*, *available at* http://www.statistics.health.pa.gov/HealthStatistics/HealthFacilities/NursingHomeReports/Documents/Nursing_Home_Report_2013.pdf. In addition to the frequency with which they enter into admission agreements, nursing facilities have the advantage of drafting these agreements with the expert advice of professionals who have a sophisticated understanding of each term in the agreement and its implications for their clients, the nursing facilities. *See The Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before the S. Subcomm. on Antitrust Competition and Consumer Rights of the S. Comm. on the Judiciary and the Special Comm. on Aging*, 110th Cong. 9 (2008) (statement of Kelley Rice-Schild, Executive Director, Floridean Nursing and Rehabilitation Center), available at https://www.gpo.gov/fdsys/pkg/CHRG-110shrg44741/html/CHRG-110shrg44741.htm [hereinafter *Statement of Kelley Rice-Schild*] (noting

that the American Health Care Association and the National Center for Assisted Living, organizations representing long-term care providers, created a model arbitration agreement for their members to use in the admission process).

C. Prospective Nursing Facility Residents Are Presented with Arbitration Agreements in a Time of Crisis, When They Are Without the Necessary Resources to Make Free and Informed Decisions.

People seeking admission to nursing facilities, their families, and their representatives have probably never before seen a nursing facility contract, let alone read the arbitration provisions contained therein. *See* S. Rep. No. 110-518, pt. I. B. (2008) [hereinafter "S. Rep. 110-518"], *available at* http://www.gpo.gov/fdsys/pkg/CRPT-110srpt518/html/CRPT-110srpt518.htm. Moreover, they do not have an attorney present during the admission process to explain the terms of the agreement, advise on whether to accept the terms, and help negotiate different terms. *Id.* Importantly, this means that prospective residents and their family members have no one present during the admission process who can tell them that they can decline to agree to pre-dispute arbitration and that the facility may not deny admission based on refusal to accept this term. *See* 42 U.S.C. §1396r(c)(5)(A)(iii) (2005); 42 C.F.R. § 483.12(d)(3) (2005) (prohibiting a nursing facility receiving payments from Medicare or Medicaid from charging, accepting, or receiving, in addition to any amount paid under the plan, any other consideration as a precondition for admission, an expedition of admission, or a requisite for

continued stay in the facility); R. 86a, ¶14 (arbitration agreement states that it is not a condition of admission or continued stay).[5]

Time pressure brought on by a recent hospitalization or a precipitous decline in health significantly impairs the potential resident and family member or representative's ability to seek and carefully consider long-term care alternatives. An older person's move to a nursing facility often follows a period of acute hospitalization, after which the patient and family cannot manage home care demands. *See* 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). In the 1980s, the federal government changed the way hospitals are paid for their Medicare patients. Under the new prospective payment system (PPS), Medicare would reimburse hospitals a fixed amount for treating each patient rather than reimbursing all costs of treating a patient. Qian et al., *'Quicker and Sicker' Under Medicare's Prospective Payment System for Hospitals: New Evidence on an Old Issue from a National Longitudinal Survey*, 63 Bulletin of Econ. Research 1 (2011). PPS incentivized hospitals to control costs by discharging Medicare patients quickly, even if the patient had not fully recovered. *Id.* at 2. This led to large discharges of Medicare patients in

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[5] The American Health Care Association developed a model arbitration agreement for elective use by its members that states that entering into an arbitration agreement is not a condition of admission and that provides a 30-day rescission period. *Statement of Kelley Rice-Schild*, at 6.

unstable condition who were diverted to nursing homes and suffered large increases in mortality. *Id.* The entire process has been described as discharging patients "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health & Aging 145, 148 (2000) [hereinafter *Navigating the Hazards*]; *see also* Christopher Weaver, *Hospital Discharges Rise at Lucrative Times: Facilities Release Medicare Patients After Rules Trigger High Payments*, W.S.J., Feb. 17, 2015. 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. *Navigating the Hazards,* at 150-51. Consequently, the patient is 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.*; Laura M. Owings & Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 Tenn. B.J. 20, 22-24 (2007) (arguing that agreements to arbitrate in the health care context should be scrutinized more carefully, particularly if there are indications that they are contracts of adhesion).

Family members having to make these decisions for their loved ones fare no better simply because they themselves are not sick or debilitated because they are also under extreme pressure brought about by a loved one's medical crisis and their

inability to provide the necessary care at home. *See* Maureen Armour, *A Nursing Home's Good Faith Duty "To" Care: Redefining a Fragile Relationship Using the Law of Contract*, 39 St. Louis L.J. 217, 221-22, 225 (Fall 1994) (describing medical crises that precipitate the need for long term institutional care, the stressful decision to admit a loved one to a nursing facility, and the perception by family caregivers that they can no longer provide the necessary care). At the time of admission to a nursing facility, prospective residents and their family members/ representatives are presented with stacks of complex documents during a time of crisis with no meaningful opportunity to read, ask questions, or get advice about the terms. *See id.* at 225-226 (describing the "voluminous" admission documents that families are asked to sign, including waivers of liability, consents to restraints, physician directives, and copies of state and federal regulations). Arbitration agreements are often buried in these stacks and are not noticed by residents and family members nor pointed out by facility staff. *See* Ann E. Krasuski, *Comment, Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts With Residents*, 8 DePaul J. Health Care L. 263, 263-64 (2004) (describing reasons why arbitration agreements go unnoticed when admission documents are signed). Nursing facility staff offer minimal guidance or provide inaccurate information about the meaning and effect of the arbitration provision. *See* S. Rep. No. 110-518, at pt. I.B. Even if family members were displeased with contractual terms,

they would have little time to investigate options or to wait for an opening at a facility of one's choice because the need to find a long-term care placement for loved ones arises quickly and often is unplanned. *See* Denese A. Vlosky et al., *"Say-so" As a Predictor of Nursing Home Readiness*, 93 J. Fam. & Consumer Scis. 59 (2001). Under these circumstances, it is extremely difficult for potential 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 unknown future disputes. All of these factors have led many to conclude that pre-dispute binding arbitration agreements in long term care are contracts of adhesion. *See, e.g.,* Robert Hornstein, *The Fiction of Freedom of Contract – Nursning Home Admission Contract Arbitration Agreements: A Primer on Preserving the Right of Access to Court Under Florida Law*, 16 St. Thomas L. Rev. 319, 320-21 (Winter 2003).

III. The Federal Arbitration Act Does Not Preempt The Consolidation Rule Applied by the Superior Court.

A. The FAA Does Not Preempt All State Laws That Indirectly Affect Arbitration.

The FAA embodies a principle of nondiscrimination toward arbitration agreements and does not preempt all laws that affect arbitration. Congress enacted

the FAA in order to "...[place] arbitration agreements on equal footing with all other contracts...." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). For this reason, the FAA is clear that "[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 . . . 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 (2012) (emphasis added); *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1204 (2012) (remanding for consideration of whether the arbitration provisions at issue "are unenforceable under state common law principles that are not specific to arbitration"); *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1745 (2011) ("courts must place arbitration agreements on an equal footing with other contracts").

Consistent with the FAA's nondiscrimination principle, Pennsylvania courts have cautioned that a liberal policy favoring arbitration does not require that courts "rubber stamp" all arbitration agreements or make them more enforceable than any other contract. *See Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 661 (Pa. Super. Ct. 2013) (noting that the FAA does not preempt all state law related to arbitration). Therefore, Pennsylvania courts have not enforced arbitration agreements when doing so would contravene valid, arbitration-neutral Pennsylvania laws. In *Wert v. Manorcare of Carlisle PA, LLC*, 124 A.3d 1248

(Pa. 2015), this Court affirmed an order overruling preliminary objections to compel arbitration because the arbitration agreement relied, as part of an essential term, upon the National Arbitration Forum Code procedures that were void as to consumer arbitration disputes. Similarly, in *Wisler v. Manor Care of Lancaster PA, LLC*, 124 A.3d 317 (Pa. Super.), *appeal denied*, 2015 Pa. LEXIS 2733 (Dec. 1, 2015), the Superior Court held that the trial court properly found an arbitration agreement invalid because a decedent's power of attorney lacked express authority to sign the arbitration agreement on the decedent's behalf, as required by Pennsylvania law. These cases illustrate that the FAA does not categorically preempt state laws that incidentally affect enforcement of arbitration agreements.

B. The State Law and Procedural Rule Authorizing Consolidation Are Arbitration-Neutral.

Neither the Pennsylvania Wrongful Death Act, 42 Pa.C.S. §8301(a), nor Pennsylvania Rule of Procedure 213(e), Pa.R.C.P. 213(e), which authorized consolidation of the claims at issue, *Taylor v. Extendicare Health Facilities, Inc., et al.*, 113 A.3d 317, 325 (Pa. Super. Ct. 2015), treats agreements to arbitrate differently than other contracts. The FAA preempts state laws or judicial decisions that treat arbitration agreements differently than other contracts or that are used as ruses to obstruct the enforcement of arbitration agreements. *See DirecTV v. Imburgia*, 136 S.Ct. 463, 471 (2015) (California court's interpretation of "law of your state" did not place arbitration contracts "on equal footing with all other

contracts") (citing *Buckeye Check Cashing*, 546 U.S. at 443); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (Montana statute that rendered arbitration agreements unenforceable unless they contained bold notice conflicted with the FAA because such a notice requirement was not applicable to contracts generally); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477-78 (1989) (the FAA was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts). Neither the Wrongful Death Act nor Rule 213(e) bans arbitration. *See, e.g., Marmet Health Care Ctr.*, 132 S.Ct. at 1203-04 (holding that the FAA preempts state laws that are an outright ban against arbitration agreements as a matter of policy). Further, consolidation under the Wrongful Death Act and Rule 213(e) applies to all causes of action resulting from negligence or wrongful death, not just those involving a contract with an arbitration clause. *Taylor*, 113 A.3d at 325; *accord Christman v. Manor Care of West Reading PA, LLC*, 2016 Pa. Super. Unpub. LEXIS 7, 12-13 (Pa. Super. Ct. 2016) (stating that the rule and statute do not prohibit arbitration of wrongful death and survival claims and are neutral regarding arbitration). Additionally, the consolidation rule does not preclude wrongful death and survival actions from proceeding together in arbitration when all of the parties, including

the wrongful death beneficiaries, agree to arbitrate. *Taylor*, 113 A.3d at 325; *Christman*, 2016 Pa. Super. Unpub. LEXIS at 13.

C. The Superior Court's Ruling Was Not Hostile to Arbitration and Was Consistent With One of Its Primary Purposes.

The Superior Court did not use state law as a ruse to target arbitration or to impede compliance with the FAA. Rather, it transparently explained the application of state law that required consolidation in this case: "On the facts herein, the wrongful death beneficiaries' constitutional right to a jury trial and the state's interest in litigating wrongful death and survival claims together require that they all proceed in court rather than arbitration...." *Taylor*, 113 A.3d at 328.

The Superior Court in this case did not demonstrate hostility toward arbitration. In *DirecTV v. Imburgia*, the Court rejected a California state court's interpretation of a state law in a way that invalidated an entire arbitration agreement because it targeted and was hostile to arbitration. 136 S.Ct. at 469-471. The Court determined that the lower court disfavored arbitration because, among other things, it failed to suggest that California courts would reach the same contractual interpretation in other contexts. *Id.* at 469-70. Additionally, the Court explained that the language the lower court used to support its reasoning that the contractual term "law of your state" meant "state law before it was preempted by the FAA" was focused only on arbitration and not framed in general terms. *Id.* at 470.

In contrast, the Superior Court in *Taylor* looked to other arbitration cases and Rule 213(e) to show enforcement of an established state policy to avoid piecemeal dispute settlement. *Taylor*, 113 A.3d at 326-28. The Superior Court considered the utility of Rule 213(e) and how it applied to the facts of the case, without framing the language of the decision to single out arbitration agreements. In so doing, it found that arbitrating the survival action against one defendant and litigating the wrongful death actions and survival actions against the other defendants would increase the potential for inconsistent liability findings and damages overlap. *Taylor*, 113 A.3d at 325-27 (giving specific examples of potentially duplicative damages). Other Pennsylvania Courts have interpreted the wrongful death and survival action consolidation rule consistent with the reasoning in *Taylor*. *Id.*; *Christman*, 2016 Pa. Super. Unpub. LEXIS at 13-15; *Tuomi v. Extendicare, Inc.,* 119 A.3d 1030, 1033 (Pa. Super. Ct. 2015) (holding that Pa.R.C.P. No. 213 and the Wrongful Death Statute, 42 Pa.C.S. § 8301, which precluded bifurcation of wrongful death and survival claims, are not preempted by the FAA because they are neutral regarding the arbitration of such claims); *Maloney v. Extendicare Homes, Inc.*, 2015 Pa. Super. Unpub. LEXIS 4016 (Pa. Super. Ct. 2015). Similarly, outside of the wrongful death context, Pennsylvania courts have also weighed state interests in avoiding repetitive, piecemeal, potentially inconsistent litigation in the context of rules of joinder of indispensable

parties against a party's interest in arbitration. In cases involving multiple parties that are indispensable to the litigation, but who have not all agreed to arbitrate, Pennsylvania courts have not compelled arbitration because arbitration would contravene the rule of joinder. *See, e.g., Univ. Mech. & Eng'g Contrs. v. Ins. Co. of North Am.,* 2002 Phila. Ct. Com. Pl. LEXIS 42, 16-18 (Pa. C.P. 2002) (insurance contract dispute); *School Dist. v. Livingston-Rosenwinkel, P.C.*, 690 A.2d 1321, 1323 (Pa. Commw. Ct. 1997) (construction contract dispute). As the Superior Court in *Taylor* pointed out, the strong potential for inconsistent liability and duplicative damages determinations in this case could lead to inefficient litigation and would contravene the purposes underlying both arbitration and the consolidation rule at issue. *Taylor*, 113 A.3d at 325-27. These same inefficiencies also make it more difficult, time-consuming, and expensive for families of deceased victims to obtain resolution of their claims.

The Superior Court correctly pointed out that Pennsylvania's policy favoring arbitration agreements and the FAA are not intended to render arbitration agreements more enforceable than other contracts or more enforceable than generally applicable state law. *Id.* at 324-25. The Superior Court's ruling in this case is consistent with the well-established principle that a contractual provision that violates an existing statute may not be enforced—a principle that has been applied in cases involving other types of contracts. *See Belfiore v. Muhammed,*

1984 WL 320918, 11 Phila. Co. Rptr. 384, 386 (1984) (citing *Dippel v. Brunozzi*, 74 A.2d 112 (Pa. 1950)); *Prudential Property and Casualty Ins. Co. v. Colbert*, 813 A.2d 747 (Pa. 2002) (definition of insured in a contract conflicted with state insurance laws). Thus, the Superior Court properly applied ordinary state law principles, giving due regard to the federal and state policy favoring arbitration. *Id.* at 323-27.

CONCLUSION

Abuse and neglect of vulnerable nursing facility residents is an all-too-common occurrence that is not effectively remedied or deterred through regulatory enforcement efforts. The grossly superior bargaining power and control over contract formation that nursing facilities have often results in agreements to arbitrate that are signed by prospective residents and their representatives without knowing and voluntary consent. This not only raises serious questions about the enforceability of these agreements, but should serve to underscore the importance of applying the FAA's nondiscrimination principle in a way that does not favor arbitration over the application of valid, arbitration-neutral state laws. State laws that are intended to promote efficient, less expensive access to justice and consistent legal outcomes should not be preempted because they incidentally affect private arbitration agreements. For these reasons, and those set forth in Appellees' brief, this Court should affirm the Superior Court's ruling.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that (2) copies of the Amicus Brief of AARP in Support of Appellees were served on this 10th day of February, 2016, by first class mail next day service, upon each of the following, which service satisfies the requirements of Pa.R.A.P. 121:

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