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IN THE SUPREME COURT OF THE UNITED STATES

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KINDRED NURSING CENTERS LIMITED :  
PARTNERSHIP, DBA WINCHESTER :  
CENTRE FOR HEALTH AND :  
REHABILITATION, NKA FOUNTAIN :  
CIRCLE HEALTH AND :  
REHABILITATION, ET AL., :

Petitioners : No. 16-32

v. :

JANIS E. CLARK, ET AL., :  
Respondents. :

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Washington, D.C.

Wednesday, February 22, 2017

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:22 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf  
of the Petitioners.

ROBERT E. SALYER, ESQ., Lexington, Ky.; on behalf  
of the Respondents.

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P R O C E E D I N G S

(10:22 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument today in Case 16-32, Kindred Nursing Centers v. Clark.

Mr. Pincus.

ORAL ARGUMENT OF ANDREW J. PINCUS

ON BEHALF OF THE PETITIONERS

MR. PINCUS: Thank you, Mr. Chief Justice, and may it please the Court:

To determine whether a power of attorney confers authority to enter into an arbitration agreement, Kentucky applies the rule different and more demanding than the rule for determining whether a power of attorney confers authority to enter into contracts generally.

The question in this case is whether the Federal Arbitration Act precludes Kentucky from erecting the special obstacle to enforce arbitration agreements signed by an attorney-in-fact. To ask that question, we believe, is to answer it. That's the very reason that Congress enacted the FAA, to prevent discriminatory rules targeting arbitration agreements.

JUSTICE KENNEDY: Suppose Kentucky had a statute providing that an attorney-in-fact lacks authority to do a -- a -- a number of things: Convey

1 real property, move the principal's residence out of  
2 state, invest in foreign real estate, a few more  
3 examples like that, or sign an arbitration clause --  
4 arbitration contract. That's -- that's not this  
5 statute, I know.

6 But at -- at some point, can arbitration  
7 clauses be included in a -- in a list of items that must  
8 be given special attention?

9 MR. PINCUS: At some point they can, Your  
10 Honor. And I think the dividing line -- the statute, of  
11 course, refers to rules that apply to any contract.  
12 This Court has talked about contracts generally. We  
13 don't think that -- that means that the rule has to  
14 apply to every single contract no matter what.

15 If the rule takes its meaning from a  
16 characteristic other than arbitration, to give an  
17 example, if a -- if a State had a law that said all  
18 consumer contracts have to be in at least 10-point type,  
19 surely the court -- the State could apply that law to an  
20 arbitration agreement associated with a consumer  
21 contract.

22 The problem, obviously, arises if there's  
23 some gerrymandering that puts arbitration in a special  
24 category. And -- and we think the rule here fails for  
25 several reasons, one of which is even the categories

1 that the State court said it was erecting really don't  
2 hold up based on the objective evidence. But also more  
3 importantly, the reason that arbitration was included in  
4 this category is the very reason that the FAA forbids,  
5 which is the conclusion by the State that arbitration --  
6 an arbitration contract is especially onerous, and  
7 therefore, should be classed with other especially  
8 onerous contracts. That's exactly what the FAA was  
9 designed to prevent. So that's the -- the problem here.

10 JUSTICE SOTOMAYOR: So how about a different  
11 example, but more related in my mind right now.

12 Under Kentucky law, let's say, the power of  
13 attorney requirements are strictly construed. That was  
14 one of the principles that the court below used to  
15 interpret at least one of the contracts. And as a  
16 general matter, it states that the State requires  
17 express consent to confer power to waive any fundamental  
18 constitutional right.

19 Would this general principle be preempted by  
20 the FFA -- by the FAA?

21 MR. PINCUS: Well, let me distinguish  
22 between those -- those two general principles, Your  
23 Honor, if I may.

24 I think a principle of strict construction,  
25 fairly applied across a wide category of contracts

1 probably is something; in other words, if it applied to  
2 all powers of attorney probably is something that would  
3 pass muster under the FAA, again, recognizing that a  
4 court would have to take care that that notwithstanding  
5 the general rule, there wasn't some  
6 discrimination-in-fact against arbitration.

7 I think the question about a fundamental  
8 rights line, let me answer that in two ways.

9 First of all, in this case, we don't believe  
10 that that's in fact what happened because we think there  
11 are a number of fundamental rights that are not  
12 categorized in the group that the State court mentioned.  
13 And, in fact, what the State court did was identify four  
14 or five especially onerous examples of intrusion on  
15 fundamental rights and say they -- these are all like  
16 arbitration. It didn't say all fundamental rights, for  
17 example. Foreign selection clauses may waive due  
18 process rights. There's no indication that they're  
19 covered; the right to property, et cetera, et cetera.

20 I think -- so that's not this case. If  
21 there were a fundamental rights rule, I think the  
22 problem that it presents is whether that intrudes on the  
23 judgment that the FAA made, that arbitration contracts  
24 are not especially onerous as other waivers of  
25 fundamental rights may be; and therefore, I think that

1 case would -- it's obviously different than this one.

2 The Court doesn't have to reach it, but we  
3 think even in that case, grouping an arbitration  
4 contract with a contract to enter into a guilty plea or  
5 something like that, I think is troublesome because it  
6 really puts arbitration agreements in the very category  
7 that Congress said they shouldn't be in.

8 JUSTICE ALITO: What about if the category  
9 were fundamental rights that implicate the -- the  
10 individual's life or health, so that you would have to  
11 have an express provision giving the attorney-in-fact  
12 authorization to consent to various procedures that a  
13 terminally ill person might undergo, and if this were  
14 put in that category?

15 MR. PINCUS: Well, I -- I -- I just want to  
16 make sure I understand your hypothetical, Your Honor.

17 JUSTICE ALITO: Well, in this case, what's  
18 involved here is care for a -- a person who is unable to  
19 look after that -- that person's own care, an elderly  
20 person, a disabled person in a -- in a nursing facility.

21 So what if that were lumped together with  
22 consent to surgery, consent to terminate feeding, or --  
23 or breathing for a terminally-ill patient. All of those  
24 could be put into a category that implicate life or  
25 health.

1                   MR. PINCUS: They could. I -- I don't think  
2 an arbitration agreement would -- would fall into that  
3 same category of implicating life and health. And --  
4 and also, I think it's important to recognize that --  
5 that, again, here the State court didn't say that all  
6 decisions implicating life or health are subject to its  
7 special express requirement. It -- it -- it identified  
8 a couple of -- an abortion or adoption.

9                   JUSTICE KENNEDY: Well, in Justice Alito's  
10 example, just to take it a little further, suppose the  
11 nursing home said you cannot enter here unless you sign  
12 the arbitration agreement, and this is the -- this is  
13 the only place where this person can go for care. That  
14 brings it closer to some of Justice Alito's examples  
15 because now there's a danger that the care can't be  
16 rendered.

17                   MR. PINCUS: Well, interestingly, what  
18 the -- the Kentucky court held in another case, Ping,  
19 that -- that actually a -- the power to make health  
20 decisions would be interpreted to include the power to  
21 enter into an arbitration agreement if arbitration were  
22 a condition of admission. But in this case, because it  
23 wasn't a condition of admission, it didn't apply that  
24 rationale.

25                   I -- I -- I think -- I guess the distinction



1 here seems to me the decisions about health that we're  
2 talking about; operations, medicine, are a category of  
3 important decisions that the State has the power to  
4 decide about.

5 The -- the -- the problem with the -- with  
6 the hypotheticals is that the FAA basically says the  
7 State doesn't have the power to treat arbitration  
8 agreements specially on the theory that they impose some  
9 special burden on the parties to the arbitration  
10 agreement. And so I think a decision by the State to  
11 lump them together with those other decisions runs afoul  
12 of the FAA.

13 JUSTICE ALITO: But the --

14 MR. PINCUS: Again, not in this case.

15 JUSTICE ALITO: But the context here seems  
16 different from the arbitration cases that we've had in  
17 recent years. This doesn't involve an -- an arbitration  
18 about the amount that you were charged for your cable  
19 bill or for your telephone bill. This involves a  
20 situation where an elderly person needs care.

21 And as Justice Kennedy's hypothetical  
22 mentioned, it may be that the only facility that's  
23 available, or all of the facilities, require the signing  
24 of an -- an arbitration agreement which prevents the  
25 assertion of tort claims and the -- the elimination of

1 the deterrents that they provide may really implicate  
2 the care of someone who is vulnerable. So this seems  
3 like something that is close to or that it falls  
4 squarely within the police power of a State.

5 Now, I suppose that there's a connection  
6 here to interstate commerce, I don't know what exactly  
7 it is, but on the assumption that everything is  
8 connected to interstate commerce, I assume that this  
9 falls within the FAA.

10 But you see the problem? This is really  
11 taking the arbitration precedence that we have handed  
12 down in recent years into a different category of  
13 interests.

14 MR. PINCUS: Well, respectfully, I don't --  
15 I don't think so, Your Honor. The -- the courts  
16 unanimously decided the Marmet case a few years ago,  
17 which involved this precise context: An arbitration  
18 agreement in the nursing home context. And there, one  
19 of the arguments that was advanced in -- in opposing --  
20 in supporting the rationale that the arbitration clause  
21 shouldn't be enforced was that tort claims and the  
22 nursing home context is different. And the Court  
23 expressly rejected that criteria.

24 And I think Congress's judgment in the  
25 FAA -- and Congress has specifically looked at the

1 nursing home context in recent years; there have been a  
2 number of hearings and examinations -- is that there  
3 isn't a difference between deciding claims in  
4 arbitration or in court. And the amicus briefs filed in  
5 the case, I think, recite some of the empirical data  
6 that, in fact, in the nursing home context and in other  
7 contexts, arbitration results for claimants are quite  
8 similar. The differences are it's cheaper, the process  
9 is cheaper and faster.

10 JUSTICE GINSBURG: What do you do with the  
11 argument that this doesn't have to do with the  
12 enforcement of an arbitration agreement? It goes to the  
13 question of whether the agreement was ever formed or  
14 made. That is, if it takes outside the power of  
15 attorney, the power to enter into arbitration  
16 agreements, so it's a question that goes to making that  
17 enforcement.

18 MR. PINCUS: Well, two answers, Your Honor.  
19 I -- I -- I think it does go to enforcement because  
20 really the question here is what the Kentucky court  
21 said: We are interpreting the power of attorney  
22 document in a way that renders the arbitration agreement  
23 unenforceable. I don't think anyone argues that any of  
24 the other requisites of contract formation were not  
25 present.

1           But, also, this Court has never drawn a  
2           distinction between contract formation and  
3           enforceability in applying the FAA. And I think to do  
4           so would open a dramatic hole in -- in the FAA, because  
5           it would be quite easy for a State to say, for example,  
6           an arbitration agreement requires notarization; no other  
7           contract does. Or an arbitration agreement, to be  
8           properly formed, must contain a provision that allows it  
9           to be revocable at will.

10           And so it would be quite easy to -- to -- if  
11           formation was ruled off limits, to allow very easy  
12           circumvention of the protections of the FAA.

13           JUSTICE ALITO: Well, what about the  
14           Wellner -- the Wellner documents. As I read what the  
15           court said in the first part of its discussion about  
16           that, it just interpreted the power of attorney as not  
17           reaching arbitration. So there it was just exercising  
18           its ordinary powers of contract interpretation.

19           MR. PINCUS: I think Wellner is closer to  
20           the -- to the issue that the court confronted in  
21           Imburgia, whether that really was an ordinary contract  
22           interpretation. And as we've explained, the argument  
23           for enforcing it is that it expressly provides the  
24           authority to contract with respect to personal property.  
25           And it's been long settled under Kentucky law that

1 choses in action, clauses of action are personal  
2 property.

3 The court didn't apply that precedent, and  
4 that seems to us to be exactly as in Imburgia: The -- a  
5 situation where a generally applicable rule was not  
6 applied in the arbitration context.

7 JUSTICE ALITO: Well, do you think every  
8 time a State court incorrectly interprets a power of  
9 attorney relating to -- as it relates to arbitration,  
10 that that raises an FAA preemption issue?

11 MR. PINCUS: I think the question is whether  
12 the State court's decision fails to put an arbitration  
13 agreement on an equal footing, as the -- as the Court  
14 has said. I -- obviously, there's not going to be the  
15 occasion or the ability for the Court to review all of  
16 those decisions.

17 I think in this case there's obviously a  
18 difference between the Clark situation where there was  
19 no argument that the power of attorney was ambiguous; in  
20 fact, the State court said it wasn't. That's just  
21 applying a new legal rule. In the Clark situation,  
22 there is this question about whether or not it was  
23 ambiguous. But we think under -- under any reasonable  
24 test, it -- it really can't be said to be ambiguous,  
25 given the long-standing rule under Kentucky law and the

1 fact that the -- the power of attorney there, in a  
2 separate provision, conveyed the authority to --

3 JUSTICE SOTOMAYOR: Mr. --

4 MR. PINCUS: -- bringing Federal lawsuits.

5 JUSTICE SOTOMAYOR: Following up on Justice  
6 Alito's question, and I know Ping is not before us, but  
7 applying your arguments to Ping, because the author of  
8 Ping dissented in these two cases, do you think Ping is  
9 closer to the neutral application of a contract  
10 interpretation?

11 MR. PINCUS: I do, because the -- what the  
12 court relied on in Ping was the absence of any general  
13 authority to contract and the fact that the broader --  
14 all -- what Ping provided for was the ability to -- to  
15 invest funds, the ability to make health decisions,  
16 and -- and the ability to essentially administer real  
17 property. It didn't have a general clause relating to  
18 the making of contracts or the making of contracts with  
19 respect to personal property.

20 JUSTICE SOTOMAYOR: I see --

21 MR. PINCUS: There was some --

22 I'm sorry, Your Honor.

23 JUSTICE SOTOMAYOR: No, no. I was going to  
24 say, Wellner is a little closer.

25 MR. PINCUS: Wellner is --

1 JUSTICE SOTOMAYOR: But it seems to me  
2 that --

3 MR. PINCUS: The difference in Wellner is  
4 that Wellner does have a very broad clause that provides  
5 for the making of contracts with respect to personal  
6 property. And given the fact that under Kentucky law,  
7 personal property includes choses of -- clauses of  
8 action, choses in action, it's pretty clear.

9 And also in Wellner and not in Ping was a  
10 separate provision that gave the attorney the power to  
11 bring and prosecute lawsuits. So if the -- if the -- if  
12 the fear was that that general power to contract with  
13 respect to personal property somehow didn't extend to  
14 litigation, there's a separate clause with respect to  
15 litigation.

16 Now, the Kentucky Court said that clause  
17 alone isn't enough because it doesn't relate to  
18 arbitration or to contracting, but it seems to me the  
19 combination of them is pretty powerful in --

20 JUSTICE SOTOMAYOR: That's a pretty  
21 powerful --

22 MR. PINCUS: -- explaining what's going on.

23 JUSTICE SOTOMAYOR: That's a pretty weak  
24 argument that they've automatically made a special rule  
25 for arbitration. They looked at, will the institute

1 settle and conduct litigation with no mention of  
2 alternative dispute resolution and conveying personal  
3 property, not necessarily contracting. There wasn't a  
4 general contracting clause. So I think there's  
5 arguments on both sides of that question.

6 If there is, what do you suggest we do?

7 MR. PINCUS: Well, let me take a little bit  
8 of issue with -- with your -- with the predicate of your  
9 question, because the Wellner power does say to make,  
10 execute, deliver deeds, releases, conveyances, and  
11 contracts of every nature in relation to both real and  
12 personal property. So I think that is a pretty broad  
13 provision that -- that was not present in Ping.

14 JUSTICE GINSBURG: And, Mr. Pincus, may I  
15 ask you a question about the wrongful death action,  
16 which everyone agrees does not belong to the patient; it  
17 belongs to -- to the survivors. And the same issues of  
18 negligence on the nursing home part would arise in the  
19 patient's suit as in the survivor's suit.

20 Now, who determines which one goes first?  
21 Because if the -- if the survivor's action goes first  
22 and the nursing home is found liable, wouldn't the  
23 nursing home be bound by that in the arbitration?

24 MR. PINCUS: I guess that, in the first  
25 instance, would be a question of Kentucky law, Your



1 Honor. I'm not sure how Kentucky law in arbitration  
2 treats prior decisions. And I also -- since there are  
3 different parties, I don't know whether Kentucky law  
4 provides for offensive, non-mutual estoppel. So I guess  
5 those would be the questions that would arise in that  
6 context.

7 Of course, the Court has said most recently  
8 in the KPMG case that the fact that there are claims  
9 that -- that could be bundled together doesn't mean that  
10 the ones that are subject to an arbitration clause  
11 shouldn't be sent to arbitration.

12 So just to -- to sort of return to first  
13 principles and -- and to elaborate on my answer to  
14 Justice Sotomayor's question, I -- there are two -- two  
15 distinct issues in this case. One is the general  
16 express reference rule that the Court announced and  
17 applied with respect to Wellner in particular. That  
18 rule obviously also applies to the Clark power of  
19 attorney -- I mean, applied in Clark with respect to the  
20 Wellner power of attorney.

21 There's the second question about whether  
22 the -- the language that -- that I quoted is  
23 sufficiently clear that a decision by the State court  
24 that it is ambiguous triggers the same kind of a concern  
25 that the Court identified in Imburgia as -- as

1 indicating that this is really a special rule targeting  
2 arbitration, as opposed to the application of a neutral  
3 principle.

4 Unless the Court has any further questions,  
5 I'll save the remainder of my time for rebuttal. Thank  
6 you.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.  
8 Mr. Salyer.

9 ORAL ARGUMENT OF ROBERT E. SALYER

10 ON BEHALF OF THE RESPONDENTS

11 MR. SALYER: Thank you, Mr. Chief Justice,  
12 and may it please the Court:

13 Kentucky is a common law State in the  
14 development of its power of attorney interpretive law.  
15 It is not a uniform power of attorney act State.  
16 Therefore, over time, the Kentucky Supreme Court and the  
17 lower courts of Kentucky developed Kentucky's  
18 interpretive rules regarding powers of attorney case by  
19 case, again, over time. And -- and this is the rule  
20 that the Kentucky Supreme Court has established in this  
21 case below. The power to waive generally fundamental  
22 constitutional rights must be unambiguously expressed in  
23 the text of a power of attorney.

24 Now --

25 JUSTICE GINSBURG: Is -- is there such an

1 explicit reference in the power of attorney with respect  
2 to anything other than arbitration agreements?

3 MR. SALYER: Is -- is there anything?

4 JUSTICE GINSBURG: Is there an explicit  
5 reference -- to be effective, you've just told us, the  
6 power of attorney has to explicitly state the -- that  
7 disputes will be settled by an arbitration.

8 My question is whether there is any other  
9 contract that in order to be made effectively in  
10 Kentucky, it must be an explicit reference in the power  
11 of attorney.

12 MR. SALYER: Oh, I -- I understand your --  
13 your question, Justice Ginsburg.

14 From -- this is the announcing of this  
15 particular rule, but logically, from here on out, any  
16 such actions taken by an -- a -- an attorney-in-fact  
17 that might restrict the principal's free speech rights,  
18 say, by entering into a contract with a  
19 non-disparagement clause or some sort of confidentiality  
20 clause, that would necessarily have to be spelled out in  
21 a power of attorney.

22 JUSTICE BREYER: In other words --

23 JUSTICE KENNEDY: In other words -- in other  
24 words, for a number of years Kentucky had allowed powers  
25 of attorney and the first time that one was called into

1 question under this theory was with reference to the  
2 arbitration.

3 MR. SALYER: Well, Your Honor, here --  
4 here's the thing about Kentucky powers of attorney. It  
5 has been the law of Kentucky since 1912 that powers of  
6 attorney are to be strictly interpreted and that the --  
7 the third party deals with the principal by an agent at  
8 that third party's own peril. Therefore, it is up to  
9 and -- and incumbent upon that third party to be very  
10 clear and understand what the agent is allowed to do.  
11 And -- and -- and the fact is that it is -- the reason  
12 that these cases have not come up is that the third  
13 parties, the -- the banks, the -- the whatever that  
14 are -- are receiving powers of attorney as authority of  
15 agents for principals, they've always demanded very  
16 explicit information in that power of attorney.

17 And this happens to be an instance where you  
18 have the third party who doesn't -- who doesn't actually  
19 want more explicit language in the power of attorney.

20 Have I answered your -- your -- yes, sir.

21 JUSTICE BREYER: So in Kentucky, I issue a  
22 power of attorney to Jones and say, you have full power  
23 to protect, defend and maximize the value of all my  
24 property. Okay. That's what it says.

25 MR. SALYER: Yes, Your Honor.

1 JUSTICE BREYER: And someone claims that  
2 this piece of land over here that we thought belonged to  
3 Smith belongs to him under various deeds. All right?

4 MR. SALYER: Yes, Your Honor.

5 JUSTICE BREYER: Now, the -- the attorney  
6 says, in my opinion, I want this tried before a judge  
7 because I think I'll get a fairer shake. Okay.  
8 Illegal; right?

9 MR. SALYER: Are you making the distinction,  
10 Your Honor, between --

11 JUSTICE BREYER: Well, you just said  
12 anything that waives the right to a jury is illegal  
13 unless it's explicitly there. So, that's case one.

14 Case two, similar kind of argument, and the  
15 lawyers for the two parties get together and say, we'd  
16 like to settle this case. Illegal; right? No power,  
17 they can't do it in Kentucky. Can't settle cases.  
18 Can't have traces -- cases tried before a judge. Is  
19 that right?

20 MR. SALYER: No, Your Honor. That --  
21 that --

22 JUSTICE BREYER: Oh, that's not right. Oh,  
23 I see. In other words, you -- you -- you -- why -- why  
24 isn't it right? Because after all, the fundamental  
25 right of trial by jury is being -- you're giving the

1 attorney the power to refuse to have a jury.

2 MR. SALYER: Well, Your Honor --

3 JUSTICE BREYER: So what's the difference  
4 between that and the case we have, where we're not going  
5 to have a mediator, we're not going to have settlement,  
6 we're not going to have a judge trial, we're going to  
7 have an arbitrator.

8 MR. SALYER: Your Honor, the -- the  
9 interpretive rule that the Kentucky Supreme Court  
10 enunciated was the power to waive generally fundamental  
11 constitutional rights. The -- the idea that -- that  
12 the -- the person is going to waive their jury rights  
13 in -- in general from now on --

14 JUSTICE BREYER: All he did was say that in  
15 the attorney's judgment, if he wants to go to  
16 arbitration and thinks that's best, he can do it. Now,  
17 I just don't see the difference between that and  
18 implying, in the attorney's judgment, if he wants to  
19 settle a case, rather than going to a jury, he can do  
20 it. Or, if in the attorney's judgment, he would like a  
21 case tried before a judge instead of a jury, he can do  
22 it. And you're going to tell me that that's ridiculous  
23 to think that a general power of attorney would give the  
24 attorney the right to say, no jury, judge trial. No  
25 jury, mediator. Oh, but it makes perfect sense to say

1 no jury, arbitrary -- arbitrator.

2 Now, if you're not going to tell me that  
3 those are treated exactly alike, I will tell you in my  
4 opinion right now you have discriminated against  
5 arbitration --

6 MR. SALYER: Well, Your Honor --

7 JUSTICE BREYER: Unless you can find some  
8 difference.

9 MR. SALYER: It seems to me that the  
10 analogue to what you're -- you're proposing would be an  
11 instance where the -- the attorney engaged with another  
12 party never to have a jury trial with that party  
13 pre-dispute just for a -- for from now on. Or that  
14 they're always going to go to mediation and never go  
15 to --

16 JUSTICE BREYER: No, that isn't this. You  
17 say that a attorney -- I'll be repeating myself. I'm  
18 testing out whether it's really true. Of course I'm  
19 highly suspicious as you can tell from my tone of voice.  
20 What I really think has happened is that Kentucky just  
21 doesn't like the Federal law. That's what I suspect.  
22 So they're not going to follow it. Now, that, of  
23 course, you're going to say, no, they would never do  
24 that. So I'm trying to test this out. And that's why I  
25 asked my question. Because it seems to me that

1 arbitration as a means of settlement of a case, of a  
2 dispute, mediation as a means of settling a dispute, a  
3 judge as a means of settling a dispute, are equally and  
4 no different in the respect that none of those three  
5 involves a trial by jury.

6 So I just want to know -- and you have  
7 already said, no, no, they're all different. Well, that  
8 to me proves that they're treating arbitration  
9 specially. So I put my whole argument there because I  
10 want you to have an opportunity to reply.

11 MR. SALYER: Thank you, Your Honor.

12 I -- I think that the -- the -- the  
13 distinction that -- that would be made there is that  
14 we're -- we're talking about an agreement that's  
15 pre-dispute and waives a -- this particular right  
16 vis-à-vis the nursing home resident and the nursing home  
17 potentially in perpetuity.

18 And I guess the analogue to -- to a --  
19 coming to an agreement to settle pre-dispute would be a  
20 liquidated damages clause. And I think that the -- that  
21 the Kentucky Supreme Court probably would not look very  
22 favorably on an attorney-in-fact executing a liquidated  
23 damages clause with a nursing home to settle any  
24 potential personal injury that occurred at -- during the  
25 nursing home resident's stay.



1                   But I -- I actually want to get to -- to, if  
2 I could, to a more overarching point in -- in this case;  
3 and that is, the Federal Arbitration Act does not extend  
4 this Court's powers of interpretation beyond agreements  
5 to arbitrate. Moreover, DIRECTV was the exception that  
6 proved the rule, and the rule applies here. Excuse me.

7                   This Court does not ordinarily instruct  
8 States in how to interpret the instruments and documents  
9 that are governed by State law. Now --

10                   CHIEF JUSTICE ROBERTS: And maybe I missed  
11 your -- missed your point. The FAA does not extend  
12 beyond what?

13                   MR. SALYER: Agreements to -- beyond  
14 agreements to arbitrate and --

15                   CHIEF JUSTICE ROBERTS: Interpret --  
16 interpreting them or anything with respect to them? For  
17 example, you're not arguing that if Kentucky had a law  
18 saying you can't have agreements to arbitrate, that  
19 would certainly be covered by the FAA.

20                   MR. SALYER: Yes, Your Honor, that --  
21 that -- well, we believe, would be covered by the FAA.

22                   CHIEF JUSTICE ROBERTS: So -- and if that  
23 was a decision of a court that said, under our common  
24 law you can't have agreements to arbitrate, that would  
25 also?

1 MR. SALYER: Totally not. That's what the  
2 Federal Arbitration Act is directly directed at.

3 CHIEF JUSTICE ROBERTS: Well, since we're  
4 talking about laws that have an impact on agreements to  
5 arbitrate, I guess I don't understand the effect of your  
6 principle.

7 MR. SALYER: Well, we're looking at the  
8 black letter of Section 2, which provides that  
9 agreements to arbitrate shall be valid, irrevocable, and  
10 enforceable, save upon such grounds as exist for the  
11 revocation of any contract.

12 CHIEF JUSTICE ROBERTS: Right.

13 MR. SALYER: That pertains specifically to  
14 arbitration agreements. And so what do we have here?  
15 We have an absence of authority of the signator to this  
16 arbitration agreement. That certainly should qualify as  
17 a -- a ground for revocation of any contract, absence of  
18 authority.

19 So that is as far as the Federal Arbitration  
20 Act extends. It extends to the enforcement of formed,  
21 existing arbitration agreements. It doesn't bootstrap  
22 them into place by -- Section 2 creates substantive  
23 contract rights, certainly. The presumption of  
24 arbitrability in certain instances, the preemption of  
25 State law in certain instances. What it does not create

1 are other kinds of rights, such as the right -- the  
2 entitlement to the creation of agency in someone else's  
3 agency instrument.

4 Have I answered --

5 JUSTICE GINSBURG: So -- and your reasoning,  
6 I take it, that Kentucky could adopt a law that says  
7 agents lack authority to enter into arbitration on  
8 behalf of the principal.

9 MR. SALYER: Well, technically, Your Honor,  
10 that's correct. However, this Court would not have to  
11 go that far in this particular case, because again, what  
12 we're talking about is interpreting a power of attorney.

13 And if you -- if you take a look at -- let's  
14 use a comparison, the -- the spectrum of Volt on one end  
15 and DIRECTV on the other end. We have instances where  
16 this Court in Volt said that ordinarily, issues of State  
17 contract law interpretation are for the States. And it  
18 accepted the -- the lower California court's  
19 interpretation of that -- that particular California  
20 contract, even though it -- it meant that there was not  
21 going to be an arbitration. On the other hand, in  
22 DIRECTV, the opposite occurred.

23 And now what's really the difference there?  
24 The difference there is where the decision maker has  
25 effectively abandoned its interpretive role. In

1 DIRECTV, one could certainly say that the California  
2 Appellate Court in that case had abandoned its  
3 interpretive role and rather imposed its own policy  
4 interests and -- and predilections on that -- that  
5 contract.

6           To use another example -- now, this is  
7 slightly different because it would fall under the  
8 10(b)4 deference standards -- but the difference between  
9 Stolt-Nielson on the one hand and Oxford Health on the  
10 other. You have an instance where an arbitrator simply  
11 imposed a policy decision on its quote-unquote  
12 "interpretation of the contract," and in which case the  
13 arbitrator had gone outside of his express powers under  
14 that contract, and Oxford Health, where, even though  
15 there was some suspicion that the arbitrator had gotten  
16 his or her interpretation of the agreement wrong,  
17 nonetheless, that arbitrator was attempting to interpret  
18 that arbitration contract, and this Court respected  
19 that.

20           Now, again, I understand that that was under  
21 the 10(b)4 analysis. But if you look in this case,  
22 Clark refers to all contracts. And I think my friend,  
23 Mr. Pincus, is probably relying on a literal  
24 interpretation, well, all contracts means -- means all  
25 contracts. But we must recall that in Volt v. Leland

1 Stanford, what we had was also a potential literal  
2 interpretation, the Law of the place. The law of the  
3 place, in that instance, the place being California,  
4 well, what is the literal law of that place? That  
5 law -- the law of that place is the law of the State of  
6 California and Federal law.

7 But the California court had determined that  
8 the local understanding of the local usage of that  
9 phrase -- phrase, "law of the place," actually just  
10 referred to California State law.

11 CHIEF JUSTICE ROBERTS: Can I talk about --  
12 focus a little bit on -- on Wellner. What is your  
13 response to Mr. Pincus's argument that personal property  
14 does include arbitration because choses in action are  
15 personal property?

16 MR. SALYER: Well, the -- my response to  
17 that, Your Honor, Mr. Chief Justice, is that the  
18 Kentucky Supreme Court certainly engaged in trying to  
19 understand the intentions of the words that the  
20 principals meant. And it simply said that a  
21 principal -- no principal who grants the power to their  
22 son, their daughter, their -- their spouse, their --  
23 their attorney-in-fact to buy and sell property or  
24 engage in contracts involving property would ever think  
25 about -- would allow that -- that attorney-in-fact to

1 engage -- engage in one of these arbitration agreements.

2 In that -- in the earlier case regarding  
3 powers of attorney in Kentucky -- and that was -- I  
4 believe it's U.S. Guarantee & Trust. It's an older  
5 case, from -- from 1912. The -- there's language to the  
6 effect of giving the power for an agent to buy or sell  
7 property does not intrinsically give that person the --  
8 the power to mortgage property, although one could say  
9 that that should naturally flow from -- from the -- the  
10 overarching language. So that's the -- the sort of  
11 backdrop and context in which the Kentucky Supreme Court  
12 is operating.

13 If I could turn for a second to DIRECTV,  
14 which is a -- obviously relied upon, to a large extent,  
15 by Kindred. In that particular case, I think that this  
16 Court reiterated its basic assumption that ordinarily,  
17 what a State instrument means is a question for State  
18 law in the State courts. And only in exceptional  
19 circumstances will this Court engage in a preemption,  
20 and in essence, an independent review and  
21 reinterpretation of that State instrument.

22 And in DIRECTV, the two similar points that  
23 seem to -- to stand out are that that California  
24 Appellate Court singled out arbitration, singled out the  
25 Federal Arbitration Act for not incorporating Federal

1 Arbitration Act preemption into the way they read their  
2 California contract, the DIRECTV contract. And they did  
3 so without attempting to tie that effectively to what  
4 the parties might intend in the DIRECTV contract.

5 Here, we do not have that. We have the  
6 Kentucky Supreme Court announcing an interpretive rule  
7 that -- and it may be difficult for them to -- to work  
8 it out over -- over time, but again, that's the way the  
9 common law develops, that if you have a general waiver  
10 of a fundamental constitutional right by a power of  
11 attorney, that has to be spelled out in the document.

12 JUSTICE BREYER: We give the power of  
13 attorney to manage my patent, general. A lot of  
14 litigation. The other side comes in and says, okay,  
15 we'll settle. I'd like you to sign this paper, and this  
16 says what you will say and what you won't say about my  
17 patent. Absolutely normal. What you will say about  
18 your patent, what you won't say about it in certain  
19 areas. Can't do that in Kentucky, huh? Free speech.  
20 Free speech.

21 MR. SALYER: Your Honor, Mr. Justice Breyer,  
22 I think that's correct.

23 JUSTICE BREYER: Can't -- can't give a  
24 power -- general power of attorney that will allow a  
25 person to settle a patent case on perfectly ordinary

1 terms.

2 MR. SALYER: Well, it doesn't make a  
3 difference --

4 JUSTICE BREYER: Is there any case that  
5 suggests that -- except this case, which happens to deal  
6 with arbitration.

7 MR. SALYER: Well, it does have to --

8 JUSTICE BREYER: You see, I don't know how  
9 to -- the part I don't know how to deal with your  
10 argument is, is you say every time I think of examples  
11 that would be very weird, which is what I'm trying to  
12 do, then -- then you say, oh, well, yeah, that's right.  
13 You can't do that anymore in Kentucky. And every time  
14 you say that, the law of Kentucky in terms of attorneys,  
15 powers of attorney is getting more and more peculiar.  
16 That's why I suspect something is going to happen there.

17 So what should I -- what do you think?

18 MR. SALYER: Well, Your Honor, I think that  
19 the interpretive rule is -- is rather explicit.

20 JUSTICE BREYER: Now -- now we say that you  
21 cannot enter into a power of attorney giving the power  
22 of attorney the power to enter into normal patent  
23 settlements.

24 MR. SALYER: To --

25 JUSTICE BREYER: Well, what about business



1 settlements? What about business settlements where, you  
2 know, there is a perfectly normal thing where a person  
3 agrees not to compete, and in agreeing not to compete,  
4 you're agreeing not to go to certain places?

5 MR. SALYER: Well --

6 JUSTICE BREYER: For that business anyway, a  
7 lot of constitutional rights that might infringe. It  
8 might if you didn't waive it. I don't know.

9 MR. SALYER: Well, Justice Breyer, I mean,  
10 that -- again, that's a -- that's a question of what  
11 constitutes a fundamental -- constitute --

12 JUSTICE BREYER: Yeah.

13 MR. SALYER: -- fundamental constitutional  
14 right. Now --

15 JUSTICE BREYER: What do you say about the  
16 competing product?

17 MR. SALYER: Right. That would, in fact, be  
18 a infringement on the principal's free speech. Indeed,  
19 in instances where there are settlements in personal  
20 injury actions, often there are non-disparagement  
21 clauses.

22 JUSTICE BREYER: Right, right. And, by the  
23 way, he makes a product, you know, the person who's  
24 given the power of attorney. And as part of the  
25 disagreement, the attorney -- a disagreement with OSHA.

1 He agrees that OSHA can come in and inspect his plant at  
2 various hours of the day or night. That kind of power  
3 of attorney would be illegal also in Kentucky. I mean,  
4 is there any State that makes that kind of power of  
5 attorney illegal or requires it to be explicit somehow  
6 that you could settle an ordinary OSHA case, you could  
7 settle an ordinary competition case, you could settle an  
8 ordinary, you know, patent case on fairly ordinary  
9 terms, and it says when you give a power of attorney to  
10 do that, you have to be explicit? Is there any State  
11 other than Kentucky in this opinion that has ever held  
12 such a thing? Maybe there is.

13 MR. SALYER: Well, Your Honor, if I could  
14 use a -- a comparative example from the -- the UCC, we  
15 know that in ongoing transactions between commercial  
16 parties under the UCC, whether a -- a contract clause is  
17 incorporated into the contract, if and when it is  
18 incorporated, may turn on whether or not that clause is  
19 considered material.

20 Now, whether or not it's -- it's considered  
21 material is a question of State law. And as -- as I  
22 understand, they -- that has never been challenged at --  
23 that -- some instances, that would -- that will, in  
24 fact, cause arbitration clauses not to be incorporated  
25 in contracts and not be enforceable because they're

1 considered material and they haven't been negotiated  
2 properly.

3                   What -- what constitutes a fundamental  
4 constitutional right is, of course, an -- an open  
5 question, but it does seem that certain things such as  
6 speech, marriage, religious rights, those sorts of  
7 things cannot be dealt with on a permanent basis  
8 vis-à-vis another party by an agent without the  
9 principal explicitly authorizing them to do so.

10                   Furthermore, what the principal has  
11 explicitly authorized the agent to do so is an  
12 interpretive question regarding this -- this instrument.  
13 And just as a -- with a State statute, what a State  
14 statute means is a question for the State supreme court.  
15 What the principals meant was encompassed within these  
16 powers of attorney. Ultimately, someone has to  
17 determine what that is. And I posit that that -- that  
18 should be the State's supreme court.

19                   JUSTICE GINSBURG: But what about the  
20 principle that making an arbitration agreement harder to  
21 form than other agreements violates the Federal  
22 Arbitration Act. As Mr. Pincus mentioned, the main rule  
23 is equal footing. Arbitration we thought to be on the  
24 same footing as all other contracts. If you make the  
25 arbitration agreement harder to form because you have to

1 have this explicit reference than other contracts,  
2 doesn't that discriminate against arbitration  
3 agreements?

4 MR. SALYER: Perhaps it does, Your Honor.  
5 But, again, our -- our position is that the Federal  
6 Arbitration Act does not extend beyond agreements to  
7 arbitrate, such that in the -- the instance of the --  
8 the UCC example that I just used where a State decision  
9 as to whether or not arbitration clauses are considered  
10 material might make that -- might make it harder to form  
11 the arbitration agreement as part of the larger  
12 commercial contract. We believe that the Federal  
13 Arbitration does not speak to that.

14 However, there are, on the other hand,  
15 instances where if a State specifically singles out  
16 arbitration to make it more difficult to form, we  
17 believe that the formation -- that the FAA would have  
18 something to say along those lines. And the -- the  
19 example I would like to use in that instance is the  
20 facts of Casarotto, if -- if they were slightly  
21 different.

22 If the Montana statute hadn't used the  
23 language in its subsection that unless the arbitration  
24 clause is in -- you know, on the first page in bold  
25 letters, then that particular clause is unenforceable.

1 If they -- if that statute had simply said, we do not  
2 recognize the formation of an agreement to arbitrate  
3 unless these hoops are -- are jumped through, that, we  
4 believe, would be addressed by the Federal Arbitration  
5 Act because it's not really a formation issue. It's  
6 really an enforceability issue, relieving the parties to  
7 the contract in Casarotto of the responsibility for what  
8 they voluntarily signed in which there was a clear  
9 meaning.

10 JUSTICE GINSBURG: Well, you say you're  
11 distinguishing formation from enforcement, but we have  
12 two separate agreements that both been formed the power  
13 of attorney that's been concluded, the agent has signed  
14 the arbitration agreement. So it's not a question of  
15 the formation of those agreements; it's what -- what  
16 they mean, what is the proper interpretation of the  
17 power of attorney.

18 MR. SALYER: Yes, Justice Ginsburg. That --  
19 that's correct inasmuch as -- the question here revolves  
20 around what the power of attorney means. If the power  
21 of attorney encompassed the authority for the agent to  
22 sign this agreement, then, as the Kentucky Supreme Court  
23 said, the agreement will be enforced. If it doesn't,  
24 then there's no agreement. And I'm saying -- saying  
25 that the Federal Arbitration Act does not bear upon

1 answering that question; that that is a function of  
2 State law and of the State court's interpretation of a  
3 power of attorney instrument.

4           So in summation, our -- our general --  
5 our -- our general position is that the Federal  
6 Arbitration Act again does not extend this Court's  
7 interpretive powers beyond agreements to arbitrate. It  
8 does not extend them to powers of attorney. However,  
9 this Court need not even reach out to that particular  
10 principle because we are talking about interpreting a  
11 power of attorney, which, in the ordinary course of a  
12 State instrument, is up to the State supreme court to --  
13 to -- to make that interpretation. And this Court will  
14 only step in and substitute its interpretation for that  
15 of the State supreme court in the exceptional  
16 circumstances.

17           And the only exceptional circumstances that  
18 this Court has identified in DIRECTV do not apply here.  
19 The Kentucky Supreme Court did not single out  
20 arbitration for distinctive treatment, and the Kentucky  
21 Supreme Court went out of its way to tie the -- its  
22 interpretation of the meaning and authority of the power  
23 of attorney to the intention of the principal.

24           No further questions.

25           CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Pincus, you have ten minutes.

2 REBUTTAL ARGUMENT OF ANDREW J. PINCUS

3 ON BEHALF OF THE PETITIONERS

4 MR. PINCUS: Thank you, Mr. Chief Justice.

5 Just a couple of quick points.

6 With respect to the -- the question about  
7 whether the FAA is limited to arbitration agreements, I  
8 think it's important to note that the text of the FAA  
9 says that arbitration agreements shall be valid  
10 irrevocable, and enforceable, save upon such grounds as  
11 exist at law or in equity for the revocation of any  
12 contract.

13 So it's true the focus of the FAA is on  
14 whether the arbitration agreement is enforceable or not,  
15 but there's nothing in the FAA that prohibits its  
16 application to an antecedent agreement if that  
17 antecedent agreement prohibits the enforcement of the  
18 arbitration agreement on a ground that's specific to  
19 arbitration.

20 And I think that's not only true of the text  
21 of the statutes; it's true because the implications of  
22 that rule would be quite dramatic. For example, a State  
23 could just enact a statute that says a power of attorney  
24 can never be interpreted to confer the ability to enter  
25 into an arbitration agreement either at all, which my

1 friend, I think, acknowledged would -- would be  
2 problematic under the FAA or could impose all kinds of  
3 special requirements. It has to be notarized. There  
4 have to be warnings about the dangers of arbitration.  
5 And surely --

6 CHIEF JUSTICE ROBERTS: Now, the State could  
7 also --

8 MR. PINCUS: -- that would --

9 CHIEF JUSTICE ROBERTS: The State could also  
10 enact a statute that says powers of attorney can't  
11 waive -- can't waive fundamental rights. Would -- would  
12 that violate the FAA, in your view?

13 MR. PINCUS: I -- I think it would present a  
14 more difficult question than this case. And let me  
15 explain why and then let me answer your -- your  
16 question, Mr. Chief Justice.

17 I think as -- as some of Justice Breyer's  
18 questions indicated, the rule here doesn't, in fact,  
19 embody that principle because it is both -- it -- it is  
20 underinclusive in two respects. It doesn't even affect  
21 all jury waivers because --

22 CHIEF JUSTICE ROBERTS: Yeah. But I mean,  
23 legislators -- legislatures often pass statutes that are  
24 underinclusive or overinclusive. So I don't think that  
25 distinguishes the case.



1 MR. PINCUS: Well, I think the question  
2 would be just how inclusive is it. If -- if it's  
3 interpreted -- if it is the same kind of --

4 CHIEF JUSTICE ROBERTS: It -- it says it  
5 embodies the rule that the supreme -- Kentucky Supreme  
6 Court adopted, which is that you can't -- you can't  
7 waive fundamental rights, and like a lot of statutes,  
8 it's going to require some interpretation. But that's  
9 all it says. It says, you can't -- you know, they're  
10 worried about the scope of powers of attorney, and they  
11 say powers of attorney in Kentucky cannot waive  
12 fundamental rights under the Constitution.

13 MR. PINCUS: And -- and I -- I -- I think  
14 our answer to that question would be -- although the  
15 Court doesn't have to reach it here -- that lumping  
16 arbitration agreements into that category of fundamental  
17 rights is a judgment that the FAA precludes the State  
18 from making because the judgment --

19 JUSTICE KAGAN: But that -- that suggests  
20 that the arbitration is a preferred right, and I thought  
21 that the idea of the FAA was to say it can't be --  
22 whatever, dis-preferred, un-preferred, you know -- but  
23 not to put it on its own separate plane, like you can't  
24 deal with this in the same way that you could deal with  
25 any other fundamental right.

1                   MR. PINCUS: Well, that's why I say it would  
2 be a harder question, Your Honor, but -- but I think  
3 the -- the critical thing is here, it's quite clear from  
4 the State court's own opinion that that isn't the rule  
5 of decision here because the State court, as the dissent  
6 points out, the -- the express authorization requirement  
7 doesn't apply to jury waivers in a host of different  
8 circumstances, as Justice Breyer's opinions pointed out,  
9 and it also doesn't apply to lots of fundamental --  
10 other kinds of fundamental rights.

11                   JUSTICE KAGAN: But how do we really know?  
12 Are -- are you saying that a court can never announce a  
13 generally applicable rule first in an arbitration case?

14                   MR. PINCUS: Well, I think it -- it  
15 certainly is something that should raise a lot of  
16 suspicion. Can it never -- I would never want to say  
17 never, but I do think that this aspect of the case  
18 presents a -- a more compelling argument for application  
19 of the FAA than Imburgia.

20                   In Imburgia, the threshold question for the  
21 court was, does the California State courts'  
22 interpretation of the phrase "law of your State"  
23 actually discriminate against -- single out arbitration?  
24 There's no doubt that this rule is singling out  
25 arbitration. If that's what the court --

1 JUSTICE KAGAN: Suppose -- well, suppose --

2 MR. PINCUS: -- expressly says, the question  
3 is how broad is it singling out.

4 CHIEF JUSTICE ROBERTS: It doesn't single  
5 out arbitration. That happens to be the issue before  
6 it. I mean, basically, it seems to me what it's coming  
7 down to is you just don't believe the Kentucky Supreme  
8 Court when it says this is the general principle. And  
9 you're saying, well, I really think you're hostile to  
10 arbitration because I haven't heard that principle  
11 before and this is the first one. But you know, if --  
12 if the Kentucky legislature passes a law that does the  
13 same thing, I mean, are you going to be suspicious of  
14 them too just because arbitration might be the first  
15 time it comes up?

16 MR. PINCUS: I -- I think it -- it depends  
17 on the circumstances and it depends on -- on how  
18 badly --

19 JUSTICE KAGAN: Suppose -- suppose we send  
20 this back and we say we don't really believe you. We  
21 think you're being hostile to arbitration, and they say,  
22 well, prove it. And in five cases involving other  
23 fundamental rights they do what Justice Breyer suggests  
24 that they don't really have any intention of doing, but  
25 they really do it. They say no, we're -- we're really

1 serious about this. We think powers of attorney are --  
2 are -- are special things and we have to impose special  
3 protections. And then it comes up here, you know, the  
4 sixth time. They say, and arbitration too.

5 What do we do then?

6 MR. PINCUS: Well, I -- I guess a couple of  
7 things. First of all, I -- I do think the Court has to  
8 make a judgment, as it did in Imburgia, based on what's  
9 before it at the time. And what's before the Court at  
10 this time is a rule created in the context of  
11 arbitration --

12 JUSTICE KAGAN: Well, I know, but I want --

13 MR. PINCUS: -- premised on --

14 JUSTICE KAGAN: -- what I want to hear you  
15 talk about, usually we don't presume that State courts  
16 are acting in ways that are not in accordance with law.  
17 Actually, we usually give them the benefit of a kind of  
18 good faith presumption.

19 So if you're saying, well, no, they have to  
20 prove it first in five other cases before we'll believe  
21 them that they really do mean all constitutional rights,  
22 that seems, you know, an unusual rule to apply to State  
23 supreme courts who we usually think are acting in good  
24 faith and in accordance with law.

25 MR. PINCUS: Well, I don't -- I don't know

1 that they have to prove it. I think this Court has to  
2 look at the objective indicia, as it did in *Imburgia*, as  
3 it's done in other cases, to see what -- what is really  
4 going on in a case. And I think even the majority below  
5 did not -- although it said all fundamental rights, the  
6 five instances that it identified were not general,  
7 fundamental rights. Free speech, for example, was not  
8 one. They are the most --

9 CHIEF JUSTICE ROBERTS: So you --

10 MR. PINCUS: -- onerous -- I'm sorry.

11 CHIEF JUSTICE ROBERTS: You have to look at  
12 what's going on in the case. So in my case where you  
13 just have a statute, there's nothing else to look at.  
14 So how -- how -- I still don't get why that would be  
15 invalid.

16 MR. PINCUS: I -- I think the question in  
17 that case would not be whether it's going to be applied  
18 to the category of fundamental rights. The question in  
19 that case would be does the FAA permit a State to make a  
20 judgment that contracts with respect to arbitration  
21 should be lumped in --

22 CHIEF JUSTICE ROBERTS: There's no talk  
23 about arbitration. The word "arbitration" --

24 MR. PINCUS: No, I understand --

25 CHIEF JUSTICE ROBERTS: -- doesn't come up.

1                   MR. PINCUS:  -- but -- but there still is a  
2 question, I think.  What the FAA -- at bottom, what the  
3 FAA said to -- was reacting to was State courts saying  
4 arbitration is especially onerous and troublesome and  
5 we're going to require -- we're going to require special  
6 processes if we --

7                   CHIEF JUSTICE ROBERTS:  We understand that.  
8 But I'm talking about a legislative proposition.  And it  
9 doesn't say anything about arbitration.  It just says  
10 powers of attorney.  You can't waive fundamental rights  
11 unless it's expressly stated.

12                   MR. PINCUS:  I -- I think it would be a much  
13 harder case.  I don't know --

14                   CHIEF JUSTICE ROBERTS:  Well, I know, but  
15 the problem is -- is that it is, in terms of the  
16 law-making authority, Kentucky would say to the supreme  
17 court, you know, we make these rules through the courts  
18 as we did in this case.  And I just -- I guess I just  
19 don't see -- I -- I don't think you've -- well, you  
20 haven't come up with a distinction that persuades me,  
21 and that's important because I think, as Justice Kagan  
22 said, we have to assume the Kentucky Supreme Court is  
23 acting in good faith.

24                   JUSTICE BREYER:  So isn't it that -- that  
25 your answer is there's nothing wrong with that statute?

1 MR. PINCUS: Well, I think -- I think --

2 JUSTICE BREYER: And that, in fact, what the  
3 statutes does, whether it covers arbitration or not, if  
4 a court holds that it does cover arbitration, you have  
5 to look to see whether the other things in there are  
6 like arbitration sufficiently or there are other things  
7 that aren't covered that are like arbitration  
8 sufficiently, so that you could, at the end, draw a  
9 conclusion that this is or is not discriminatory.

10 CHIEF JUSTICE ROBERTS: There's nothing else  
11 in there. The -- the first time --

12 MR. PINCUS: That's exactly --

13 CHIEF JUSTICE ROBERTS: The first time the  
14 statute is applied, it happens to be to an arbitration  
15 case. It happens to be to this case. But you can't say  
16 oh, look in the background of it. It's all about  
17 hostility to arbitration. You can't --

18 MR. PINCUS: Well, I -- I -- I guess two  
19 answers. Just to return to this case for a minute, I --  
20 I don't think that's the rule that's being applied. I  
21 think it's clear, because the instances of fundamental  
22 rights that were identified were one part --

23 CHIEF JUSTICE ROBERTS: Mr. Pincus, you  
24 understand that when your first answer is, let's go to  
25 this case, that's not the most compelling response.

1                   MR. PINCUS: I understand, Your Honor,  
2 but -- but I -- I -- and to answer the question more  
3 broadly, I -- I do think there's a -- there's a question  
4 that the Court would have to answer in that  
5 circumstance, whether, as Justice Breyer put it more  
6 eloquently than I did, that the -- that arbitration is  
7 being included in that category not because of some  
8 special characteristic of arbitration, but because  
9 arbitration agreements have the same characteristics as  
10 all of those other things --

11                   CHIEF JUSTICE ROBERTS: All right. Well,  
12 how would you do that? That's the position that you and  
13 maybe Justice Breyer are taking. How would you -- how  
14 would you go about that? How would you say we've got to  
15 decide why arbitration is being included in this?

16                   MR. PINCUS: Well, and -- I would say, as an  
17 advocate at least, that the problem with that judgment  
18 is that what Congress said in the FAA is, in fact, you  
19 can't say that arbitration agreements should be treated  
20 like some special category of contracts just because of  
21 a characteristic of arbitration. There has to be  
22 another reason. And what the State is doing there is  
23 saying arbitration is especially significant because of  
24 a -- of a characteristic. It waives the jury right that  
25 is intrinsic to arbitration, and I think that conflicts



1 with the Federal policy.

2 So, yes, the State could say that with all  
3 fundamental rights. My argument would be it can't do  
4 that with respect to arbitration and -- and I might  
5 lose.

6 JUSTICE BREYER: If -- so the -- as I -- as  
7 I understand the question better, one, of course the  
8 legislature could enact such a statute.

9 Two, if we have our first case arbitration  
10 and they say arbitration is included among it, then what  
11 we're job is is to read the opinion.

12 Now, sometimes courts don't write enough in  
13 the opinion for us to make the decision as to whether or  
14 not it is being discriminated against, in which case we  
15 send it back and ask them to write more. So is that  
16 what we should do?

17 CHIEF JUSTICE ROBERTS: Yes or no, and your  
18 time is expired.

19 MR. PINCUS: No.

20 (Laughter.)

21 MR. PINCUS: I think you have enough here.

22 CHIEF JUSTICE ROBERTS: No. Thank you. You  
23 can answer it.

24 MR. PINCUS: I -- I think the answer is no  
25 because I -- I think there's enough in this opinion.

1 I -- I think for the reasons indicated in Justice  
2 Breyer's question, the -- the category here doesn't  
3 apply to all jury waivers. So the argument that it  
4 applies even to the waiver of a jury right is not true,  
5 and it doesn't apply to all fundamental rights. The  
6 examples that were given are the most onerous kind --

7 JUSTICE KAGAN: He cheated --

8 MR. PINCUS: -- of contracts you can  
9 imagine.

10 (Laughter.)

11 MR. PINCUS: Sorry.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 The case is submitted.

14 (Whereupon, at 11:23 a.m., the case in the  
15 above-entitled matter was submitted.)

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