No. 18A-

In the Supreme Court of the United States

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

APPLICANTS,

V.

BEVERLY WELLNER, ET AL.,

RESPONDENTS.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicants Kindred Nursing Centers Limited Partnership *et al.* ("Kindred") respectfully request a 44-day extension of time, to and including March 16, 2018, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.[1]

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[1] Pursuant to Rule 29.6 of the Rules of this Court, Kindred states the following:

The parent corporations of Kindred Nursing Centers Limited Partnership are Kindred Nursing Centers East, LLC and Kindred Hospital Limited Partnership. The parent corporation of Kindred Nursing Centers East, LLC is Kindred Healthcare Operating, Inc.; and the parent corporations of Kindred Hospital Limited Partnership are Kindred Hospital West, LLC and Kindred Nursing Centers Limited Partnership. The parent corporation of Kindred Healthcare Operating, Inc. is Kindred Healthcare, Inc.

Kindred Healthcare, Inc. is a publicly traded corporation with no parent corporation. No publicly traded company owns 10% or more of the stock of Kindred Healthcare, Inc.

The opinion of the Supreme Court of Kentucky is reported at 533 S.W.3d 189, and was entered on November 2, 2017. Absent an extension, a certiorari petition would be due on January 31, 2018. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a).

1. The Supreme Court of Kentucky's decision on remand continues its pattern of resisting this Court's precedents interpreting the Federal Arbitration Act (FAA)—including the Court's prior opinion in this very case, *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421 (2017). In *Kindred*, this Court held that the Kentucky Supreme Court's clear-statement rule—that a "power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so"—violated the FAA's mandate "to put arbitration agreements on an equal plane with other contracts." *Id.* at 1425, 1427 (emphasis in original). The Court reversed the Kentucky Supreme Court's judgment in favor of one respondent (the Clark estate), and it vacated and remanded the Kentucky court's judgment with respect to the other respondent (the Wellner estate), instructing the court below to determine whether its construction of the Wellner power of attorney was "impermissibl[y] taint[ed]" by its erroneous, arbitration-specific rule. *Id.* at 1429.

On remand, the four-justice majority denied that its interpretation suffered from an "impermissible taint," but—as the three dissenting justices underscored—that denial cannot be taken at face value.

Specifically, the Wellner power of attorney broadly authorizes the attorney-in-fact (the agent) to make "contracts of *every* nature *in relation to* both real and *personal property*" of the principal. 137 S. Ct. at 1425 (emphasis added). The majority acknowledged that as a matter of Kentucky law, the term "personal property" includes legal claims (and personal-injury claims in particular). But it nonetheless held that the attorney-in-fact lacked authority to enter into arbitration agreements because, in its view, a *pre-dispute* arbitration agreement does not relate to the principal's legal claims but instead solely to his or her constitutional rights—placing arbitration agreements outside of the scope of the power of attorney.

The dissent found the majority's rationale unconvincing. Echoing this Court's recognition that the clear-statement rule previously adopted by the Kentucky court was unquestionably "arbitration-specific"—because its applicability outside the arbitration context reached only the legal equivalent of "black swans" (137 S. Ct. at 1427-28)—Justice Hughes explained in her dissent that the majority had "return[ed] to black swan territory by a different route." 533 S.W.3d at 197.

2. Kindred operates nursing homes and rehabilitation centers, including the Winchester Centre for Health and Rehabilitation (a/k/a Fountain Circle Health and Rehabilitation). Respondent Beverly Wellner represents the estate of Joe Wellner, a former resident of the Winchester Centre. Before Joe Wellner was admitted to the Winchester Centre, he had executed a power of attorney authorizing Beverly Wellner to "*make, execute and deliver* deeds, releases, conveyances and *contracts of every nature* in relation to both real *and personal* property" (emphasis added). When

Joe Wellner was admitted to the Winchester Centre, Beverly Wellner signed the admission paperwork on his behalf, and she also executed on his behalf a separate arbitration agreement.

Both Wellner and former respondent Janis Clark brought suit against Kindred, asserting state statutory and common-law claims arising out of their principals' deaths while residing at the Winchester Centre. In each case, Kindred moved to dismiss or stay the lawsuits, seeking to enforce the arbitration agreements that the residents' agents had executed on their behalf.

In an opinion by Justice Venters, a divided Kentucky Supreme Court affirmed, by a 4-3 vote, the trial courts' orders denying Kindred's requests for arbitration. See *Extendicare Homes, Inc.* v. *Whisman*, 478 S.W.3d 306 (Ky. 2015). Justice Abramson "strongly dissent[ed]," pointing out that the majority's approach in both the *Clark* and *Wellner* cases was in "disregard of the Federal Arbitration Act (FAA) and numerous decisions by the United States Supreme Court." *Id.* at 333.

This Court granted Kindred's petition for certiorari and reversed in part and vacated in part the Kentucky Supreme Court's decision. 137 S. Ct. 1421. The Court held that the Kentucky court's clear-statement rule "fail[ed] to put arbitration agreements on an equal plane with other contracts," and was therefore preempted by the FAA. *Id.* at 1426-27. By relying on "the jury right's unsurpassed standing in the State Constitution" as a reason to refuse to enforce an arbitration agreement, the Kentucky Court "did exactly what [*AT&T Mobility LLC* v.] *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration

agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* at 1427. "Such a rule is too tailor-made to arbitration agreements," the Court explained, "subjecting them, by virtue of their defining trait, to uncommon barriers." *Ibid.* And this Court rejected the Kentucky court's "sometime-attempt to cast the rule in broader terms," noting that the "patently objectionable and utterly fanciful contracts" offered by the Kentucky court "only makes clear the arbitration-specific character of the rule, much as if it were made applicable to arbitration agreements and black swans." *Id.* at 1427-28.

The Court therefore reversed the Kentucky court's decision in the *Clark* case, which rested solely on the impermissible clear-statement rule. In the *Wellner* case, the Court vacated and remanded for the Kentucky court to "determine whether it adheres, in the absence of its clear-statement rule, to its prior reading of the Wellner power of attorney," while warning that "if that rule at all influenced the construction of the Wellner power of attorney, then that court must evaluate the document's meaning anew." *Id.* at 1429.

On remand, a divided Kentucky Supreme Court, again by a 4-3 vote and in an opinion authored by Justice Venters, concluded that the Wellner power of attorney did not authorize Beverly Wellner to enter into an arbitration agreement on Joe Wellner's behalf. The majority announced that its interpretation of the Wellner power of attorney is "pur[e] from the taint of anti-arbitration bias." 533 S.W.3d at 192. Instead, the majority said, its interpretation was "the manifestation of our profound respect for the right of access to the Court of Justice explicitly

guaranteed by the Kentucky Constitution and the right to trial by jury designated as 'sacred' by Section 7 of the Kentucky Constitution." *Ibid.*

Turning to the language of the Wellner power of attorney authorizing Beverly Weller to make contracts "in relation to both real and personal property," the Kentucky court recognized that, as a matter of Kentucky law, "a personal injury claim is a chose-in-action, and therefore constitutes personal property." *Id.* at 194 (quotation marks omitted). But it then concluded that a "pre-dispute arbitration agreement" has "nothing at all to do with" "institut[ing] legal proceedings" or "even settling existing claims by arbitration or litigation," nor did it "relate to any property rights" of the principal. *Ibid.* Instead, the Kentucky court held that the arbitration agreement relates solely to the principal's "fundamental constitutional rights" of access to court and trial by jury. *Ibid.* The majority also suggested in a footnote that Kindred had waived any challenge to this interpretation by purportedly failing to raise before this Court any challenge to the majority's "construction of the Wellner POA beyond its criticism of the clear statement rule." *Id.* at 192 n.3.

Justice Hughes again[2] "strongly dissent[ed]," pointing out that "the majority has failed to follow the United States Supreme Court's directive in * * * forcefully reversing the original majority opinion in this case." *Id.* at 195, 199. She explained that "[t]he Court's distinction between pre-dispute arbitration agreements as not pertaining to a principal's property rights but rather only his constitutional jury

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[2] Justice Lisbeth Hughes Abramson changed her name to Lisbeth Tabor Hughes in the time between the Kentucky court's two opinions.

right *vis-à-vis* post-dispute (or perhaps active dispute) arbitration agreements, which they concede necessarily affect property rights, is simply another attempt to single out arbitration for 'hostile' treatment under the guise of Kentucky contract and agency law." *Id.* at 195.

She continued: "The majority's view of arbitration as contrary to the 'sacred' right to a jury trial (a point which it continues to emphasize in the current majority) clearly underlies its willingness to divorce an arbitration agreement from the reality of what it is and what it does" (*id.* at 196)—namely, provide a mechanism for the resolution of *legal claims*. The dissent concluded that "today's holding returns to black swan territory by a different route," by "narrow[ly] focus[ing] on the constitutional jury right to the exclusion of the reality of an arbitration agreement." *Id.* at 197.

3. Kindred will explain in its petition for certiorari that this Court's review is warranted because the decision below fails to follow this Court's opinion in this case as well as the Court's other FAA precedents.

As the dissent below explains in detail, the majority's description of what an arbitration agreement does makes no sense, because the point of such an agreement is to address the resolution of the legal claims of the parties—claims that the majority concedes are personal property under settled Kentucky law. As the dissent put it, "[a]n arbitration agreement, regardless of when signed or whether characterized as pre- or post-dispute, has absolutely no reason to exist unless there is a current or potential claim to be pursued or defended against." 533 S.W.3d at

195 (Hughes, J., dissenting). Indeed, the very first sentence of the arbitration agreement calls for the resolution by arbitration of "[a]ny and all *claims* or controversies * * *, whether existing *or arising in the future*." *Ibid.* (quoting the agreement) (emphasis added). The majority's conclusion that the arbitration agreement does not relate to Joe Wellner's legal claims is therefore impossible to square with both reality and the text of the agreement.

Rather, the dissent explains that "[t]he narrow focus on the constitutional jury right to the exclusion of the reality of an arbitration agreement returns us to the realm of 'utterly fanciful contracts' where arbitration agreements exist in a vacuum independent of disputes and property rights." *Id.* at 197 (quoting *Kindred*, 137 S. Ct. at 1427).

The dissent also rightly criticizes the majority's reliance on "the 'futureness' of the dispute" as a means to avoid construing a pre-dispute arbitration agreement as relating to the principal's legal claims. *Id.* at 198. As a matter of logic and common sense, the right to "collect debts," for example, "manifestly includes future debts"—and the same is true of the authority to make contracts in relation to personal property, which "includes future property of the principal whether a stock dividend, a check for a property insurance claim, an unexpected inheritance or a run-of-the-mill refund in a consumer class action." *Id.* at 199.

The petition will explain that by holding otherwise solely with respect to arbitration, the majority has again singled out arbitration agreements for disfavored treatment in violation of the FAA. It has engaged in the same kind of

"unique" contract interpretation, "restricted to th[e] field" of arbitration, that this Court has rejected as incompatible with the FAA. *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 469 (2015).

Finally, the majority's suggestion of waiver plainly misstates the undisputed record—and thus serves only to underscore the hostility to arbitration animating the majority's ruling. In both its petition for certiorari and its merits briefing before this Court, Kindred squarely challenged as "not only nonsensical but also * * * preempted by the FAA" the Kentucky court's theory that "an agreement to arbitrate the principal's legal claims somehow did not relate to the claims, but rather solely to the principal's constitutional right to trial by jury." Pet. 16-17 (quotation marks and alterations omitted); see also Br. for Pet. 23; Reply Br. 16-17 & n.10.

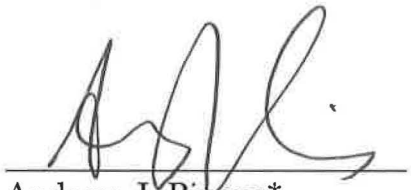
The petition will suggest the Court may wish to consider summary reversal.

4. Kindred requests this extension of time to file the petition for a writ of certiorari because undersigned counsel primarily responsible for preparing the petition have had and will have responsibility for a number of other matters in this Court and other courts with proximate due dates. These include: reply brief in support of certiorari filed on January 3, 2018 in *Spokeo, Inc.* v. *Robins*, No. 17-806 (S. Ct.); petition for a writ of certiorari filed on January 10, 2018 in *Lamps Plus, Inc.* v. *Varela*, No. 17-988 (S. Ct.); *amicus* brief filed on January 18, 2018 in *United States* v. *Microsoft*, No. 17-2 (S. Ct.); *amicus* brief filed on January 19, 2018 in *Janus* v. *American Federation of State, County, and Municipal Employees, Counsel 31*, No. 16-1466 (S. Ct.); reply brief in support of certiorari due on January 24, 2018

in *The Ritz-Carlton Dev. Co.* v. *Narayan*, No. 17-694 (S. Ct.); response brief filed on January 11, 2018 in *Scott* v. *Bond*, No. 17-2288 (4th Cir.); answering brief due on February 5, 2018 in *John Doe I* v. *Nestle*, No. 17-55435 (9th Cir.); opening brief due on February 9, 2018 in *McArdle* v. *AT&T Mobility*, No. 17-17246 (9th Cir.); and reply brief due on February 26, 2018 in *Perez* v. *DIRECTV, LLC*, No. 17-55764 (9th Cir.).

For the foregoing reasons, the application for a 44-day extension of time, to and including March 16, 2018, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted.



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