No.

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.,

Petitioners,

v.

BEVERLY WELLNER, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JOE P. WELLNER, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF JOE P. WELLNER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

QUESTION PRESENTED

This Court in *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421 (2017), reversed the Kentucky Supreme Court's decision refusing to enforce arbitration agreements based on a state-law rule that singled out arbitration agreements for discriminatory treatment—because Section 2 of the Federal Arbitration Act (FAA) requires courts "to put arbitration agreements on an equal plane with other contracts." *Id.* at 1427.

On remand from this Court's decision in *Kindred*, the Supreme Court of Kentucky held that the power of attorney granted to respondent Beverly Wellner did not authorize her to agree to arbitration on behalf of her principal, even though (1) the power of attorney authorized her to make "contracts of every nature in relation to both real and personal property"; and (2) legal claims are personal property under long-settled Kentucky law. Instead, the court held that a pre-dispute arbitration agreement relates solely to the principal's constitutional rights to a trial by jury and to go to court, and does not relate to the principal's legal claims.

The question presented is:

Whether Section 2 of the FAA preempts the Kentucky Supreme Court's newly-announced rule holding that a power of attorney authorizing the holder to enter into "contracts of every nature in relation to both real and personal property" does not encompass arbitration agreements because those agreements instead relate to rights to trial by jury and access to court.

RULE 29.6 STATEMENT

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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kindred Nursing Centers Limited Partnership, *et al.* ("Kindred") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (App., *infra*, 1a-21a) is reported at 533 S.W.3d 189. This Court's prior opinion is reported at 137 S. Ct. 1421. The Supreme Court of Kentucky's prior opinion is reported at 478 S.W.3d 306.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on November 2, 2017. App., *infra*, 1a. On January 22, 2018, Justice Kagan extended the time for filing a petition for a writ of certiorari to and including March 16, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

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

STATEMENT

This case arises from the Supreme Court of Kentucky's continued refusal to adhere to this Court's precedents interpreting the Federal Arbitration Act—including the Court's prior opinion in this very case, *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421 (2017). This Court held in *Kindred* 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).

This Court reversed the Kentucky Supreme Court's judgment in favor of Janis Clark, and it vacated and remanded the Kentucky court's judgment with respect to Beverly Wellner—the respondent here—instructing the court below to determine whether its prior construction of Wellner's power of attorney was "impermissibl[y] taint[ed]" by its erroneous, arbitration-specific rule. *Id.* at 1429.

The Kentucky Supreme Court's opinion on remand—and the dissenting opinion in response—

leave no doubt that its interpretation of the Wellner power-of-attorney reflects precisely this "impermissible" anti-arbitration sentiment.

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 below acknowledged that as a matter of settled Kentucky law, the term "personal property" includes legal claims (and personal-injury claims in particular). But the majority nonetheless held that respondent Beverly Wellner 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 to a jury trial and to go to court—thereby placing arbitration agreements outside of the scope of Wellner's power of attorney. App., *infra*, 7a.

As Justice Hughes's powerful dissent explains, the majority's reasoning makes no sense.[1] The majority's rationale "divorce[s] an arbitration agreement from the reality of what it is and what it does" (App., *infra*, 14a)—providing a mechanism for the resolution of *legal claims*. Echoing this Court's holding that the clear-statement rule previously adopted by the Kentucky court was "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 ex-

[1] Justice Hughes was also the principal dissenter in the Kentucky Supreme Court's prior opinion. Justice Lisbeth Hughes Abramson changed her name to Lisbeth Tabor Hughes in the time between the Kentucky court's two opinions.

plained that the majority below "returns to black swan territory by a different route." App., *infra*, 17a.

Indeed, the majority below followed the exact path that this Court rejected as incompatible with the FAA in *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015). The holding below, like the lower court decision reversed in *DIRECTV*, rests on a "unique" determination "restricted to th[e] field" of arbitration, in order to avoid enforcing an arbitration agreement. *Id.* at 469. This Court reversed in *DIRECTV*, and it should do so here as well. Indeed, the Kentucky court's transparent defiance of this Court's precedents is so clear as to warrant summary reversal.

A. Factual Background.

Petitioners Kindred Nursing Centers Limited Partnership, *et al.* ("Kindred") operate nursing homes and rehabilitation centers, including the Winchester Centre for Health and Rehabilitation (a/k/a Fountain Circle Health and Rehabilitation). See *Extendicare Homes, Inc.* v. *Whisman*, 478 S.W.3d 306, 317 (Ky. 2015). Respondent Beverly Wellner represents herself and the estate of Joe Wellner, a former resident of the Winchester Centre.

Before Mr. Wellner was admitted to the Winchester Centre, he had executed a power of attorney designating Beverly Wellner as his attorney-in-fact. This power of attorney conferred broad authority to enter into transactions and agreements relating to Mr. Wellner's affairs. Specifically, as relevant here, it authorizes Beverly Wellner to "make, execute and deliver deeds, releases, conveyances and *contracts of every nature in relation to both real and personal property*." App., *infra*, 7a (emphasis added).

When Mr. Wellner was admitted to the Winchester Centre, Beverly Wellner signed the admission paperwork on his behalf. Beverly Wellner also executed a separate, optional arbitration agreement. *Whisman*, 478 S.W.3d at 318. This arbitration agreement provided that any disputes arising out of the "[r]esident's stay at the Facility" would be resolved in arbitration. *Id.* at 317. It also explained that "execution of this [arbitration] Agreement is not a precondition to the furnishing of services to the Resident by the Facility." *Ibid.*

B. Respondent's Lawsuit.

Respondent Beverly Wellner brought suit against Kindred, asserting state statutory and common-law claims arising out of Mr. Wellner's death while residing at the Winchester Centre. Respondent asserted causes of action for wrongful death, personal injury, and violations of Ky. Rev. Stat. § 216.510 *et seq.*, which enumerates various rights of long-term care residents. *Whisman*, 478 S.W.3d at 312. Kindred moved to dismiss or stay the lawsuit, seeking to enforce the arbitration agreement between Kindred and Mr. Wellner. *Ibid.*

1. The state trial court initially dismissed the action in favor of arbitration. Subsequently, the Supreme Court of Kentucky held in *Ping* v. *Beverly Enterprises, Inc.*, 376 S.W.3d 581, 592-94 (Ky. 2012), that a power of attorney expressly authorizing the attorney-in-fact to manage the principal's "financial affairs" and "health-care decisions" was limited to those express provisions, and did not include the authority to bind the principal to an optional arbitration agreement.

Respondent moved for reconsideration of the dismissal order. The trial court granted reconsideration and reversed its prior ruling, holding that the arbitration agreement was unenforceable because respondent lacked authority to bind Mr. Wellner to arbitration. *Whisman*, 478 S.W.3d at 312.

2. Kindred sought interlocutory review in the Kentucky Court of Appeals. That court denied relief in both cases, holding that in light of *Ping*, respondents lacked authority under their powers of attorney to bind their principals to arbitration. *Ibid.*

Kindred then applied to the Supreme Court of Kentucky for interlocutory relief. *Ibid.* The state supreme court consolidated the case with two others presenting similar issues.

3. A divided Supreme Court of Kentucky affirmed the Court of Appeals' orders denying interlocutory relief to compel arbitration, by a 4-3 vote.

In an opinion by Justice Venters, the majority first considered whether the powers of attorney at issue appeared on their face to authorize the attorneys-in-fact to agree to arbitration on their principals' behalf. It held that the power of attorney in *Wellner* did not give such authorization. Although the *Wellner* power of attorney authorized the attorney-in-fact to make "contracts" related to "personal property," which the majority acknowledged includes legal claims, the majority concluded that an arbitration agreement does not "relate" to personal property, but rather solely to the principal's "constitutional right to access the courts and to trial by jury." *Whisman*, 478 S.W.3d at 326.

The majority held that the power of attorney in *Clark*, another of the consolidated cases involving pe-

titioners, *did* convey the necessary authority, concluding that in light of its broad language, "it would be impossible to say that entering into a pre-dispute arbitration agreement was not covered." *Id.* at 327.

The majority then proceeded to consider, in *Clark* "as well as the other cases," the "extent to which the authority of an attorney-in-fact to waive his principal's fundamental constitutional rights to access the courts, to trial by jury, and to appeal to a higher court, can be inferred from a less-than-explicit grant of authority." *Ibid.* It held that only an express grant of authority to enter into arbitration agreements is sufficient to authorize an attorney-in-fact to agree to arbitration. The majority emphasized that the drafters of the Kentucky Constitution had "deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting *that right and that right alone* as a divine God-given right." *Id.* at 329 (last emphasis added).

C. This Court's Reversal And Remand.

Kindred petitioned for certiorari in *Clark* and *Wellner*. This Court granted certiorari (137 S. Ct. 368 (2016)) and reversed in part and vacated in part (see *Kindred Nursing Centers Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1424 (2017) ("*Kindred I*")). The Court concluded that the Kentucky court's clear-statement rule "fails to put arbitration agreements on an equal plane with other contracts" (*id.* at 1426-27) because it "hing[ed] 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, "to survive the FAA's

edict against singling out those contracts for disfavored treatment." *Id.* at 1427.

The Court reversed the judgment in *Clark*, because the Kentucky court's interpretation of that contract "was based exclusively on the clear-statement rule that we have held violates the FAA." *Id.* at 1429. With respect to *Wellner*, this Court held that the Kentucky court was less clear about the role that the clear-statement rule had played in its ruling that Beverly Wellner lacked the authority to agree to arbitration. "If that interpretation of the document is wholly independent of the court's clear-statement rule," this Court explained, "then nothing we have said disturbs it. But if that rule at all influenced the construction of the *Wellner* power of attorney, then the court must evaluate the document's meaning anew." *Ibid.* The Court vacated the judgment in *Wellner* and remanded for further proceedings. *Ibid.*

D. The Kentucky Supreme Court's Decision On Remand.

On remand, the Kentucky court once again divided 4-3, and the majority, once again in an opinion by Justice Venters, held that Wellner's power of attorney did not authorize Beverly Wellner to enter into an arbitration agreement. The majority announced that its interpretation of the Wellner power of attorney is "pur[e] from the taint of anti-arbitration bias." App., *infra*, 5a. 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.*

Addressing the language of the power of attorney authorizing Beverly Weller to make contracts "in relation to both real and personal property," the majority acknowledged that Kentucky law has long established that "'a personal injury claim is a chose-in-action, and therefore constitutes personal property.'" App., *infra*, 7a (quoting *Whisman*, 478 S.W.3d at 325-26) (citing in turn *Button* v. *Drake*, 195 S.W.2d 66, 69 (1946)). It followed, the majority recognized, that "the power to make contracts relating to personal property authorizes the agent to arbitrate [a] principal's personal injury claim" after it arises. App., *infra*, 9a.

But the court then held 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. App., *infra*, 9a. Instead, the Kentucky court held that such an arbitration agreement relates solely to the principal's "fundamental constitutional rights" of access to court and trial by jury. *Ibid.*

The majority also stated 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 4a n.3.

The majority concluded that its determination "that the Wellner [power of attorney] was insufficient to vest [respondent] with the power to execute a predispute arbitration agreement * * * was wholly independent of the clear statement rule decried by the United States Supreme Court. Therefore, as stated by the United States Supreme Court, that aspect of

the * * * decision remains undisturbed." App., *infra*, 10a.

Justice Hughes, joined by Justices Minton and VanMeter, again "strongly dissent[ed]," stating that "the majority has failed to follow the United States Supreme Court's directive in * * * forcefully reversing the original majority opinion in this case." App., *infra*, 10a, 21a. As she put it, "[t]he [Kentucky] Court's distinction between pre-dispute arbitration agreements as not pertaining to a principal's property rights but rather only his constitutional jury 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 11a-12a (emphasis added).

"[A]n arbitration agreement *is* about property rights," Justice Hughes continued, "because without a claim regarding such rights it has no meaning or purpose." App., *infra*, 14a. That is because an arbitration agreement "derives its entire meaning from the fact that the signatories may have or do have a dispute and they agree on the forum for disposing of that claim, whenever it arises." *Id.* at 12a. She concluded that "[t]he 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 14a.

The dissent summarized: "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." App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

This Court has made clear that the FAA prohibits two approaches that lower courts have utilized to refuse to enforce arbitration agreements. *First*, the FAA bars courts from adopting broad legal rules that single out arbitration agreements for suspect status. See, *e.g.*, *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 533 (2012); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). *Second*, the FAA prohibits courts from achieving the same impermissible result by interpreting contract terms in the arbitration context differently from the interpretation given to the same terms in other kinds of contracts. See, *e.g.*, *Imburgia*, 136 S. Ct. at 469.

In its initial decision in this case, the Supreme Court of Kentucky tried the first avenue, and this Court reversed. Unfazed, the Kentucky court has now employed both approaches in refusing to enforce the Wellner arbitration agreement. Its latest decision warrants the same fate.

The Kentucky court's refusal to compel arbitration on remand rests on a single proposition—that a pre-dispute arbitration agreement relates only to "constitutional rights" and not to "personal property." But that *ad hoc* reasoning does not withstand even minimal scrutiny: in Kentucky, legal claims (including personal injury claims) are personal property, and the fundamental purpose of an arbitration agreement is to provide a mechanism for the resolution of the parties' legal claims. The Kentucky court's attempt to turn a blind eye to this reality was nothing more than a transparent attempt to circumvent

this Court's ruling in *Kindred I* and avoid enforcing the arbitration agreement that Beverly Wellner entered into on behalf of her principal.

Moreover, the Kentucky court majority's characterization of an arbitration agreement as relating only to jury trials and access to court is a transparent attempt to craft a new rule limiting the scope of powers of attorney tied to unique characteristics of arbitration agreements. Just as the "clear statement rule" invalidated by this Court in *Kindred I* was justified by "the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial" (137 S. Ct. at 1427), the rule applied by the majority on remand is tied to those very same characteristics. It is invalid for the very same reason.

Review and summary reversal are warranted to make clear that such defiance of this Court's precedents is impermissible.

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

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); accord *Kindred I*, 137 S. Ct. at 1428 (noting the "hostility to arbitration that led Congress to enact the FAA") (quotation marks omitted). This Court has stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced accord-

ing to their terms." *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); see also *Casarotto*, 517 U.S. at 687; *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

Section 2 of the FAA therefore commands that "[a]n agreement to arbitrate is valid, irrevocable, and *enforceable as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (quoting 9 U.S.C. § 2). "Congress precluded States from singling out arbitration provisions for suspect status" (*Casarotto*, 517 U.S. at 687) or from invalidating arbitration provisions on the basis of state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred I*, 137 S. Ct. at 1426 (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011)); see also *Perry*, 482 U.S. at 492 n.9. In addition, Section 2 precludes States from discriminating against arbitration agreements by interpreting contractual language in a "unique" manner that is "restricted to th[e] field" of arbitration. *Imburgia*, 136 S. Ct. at 469.

The decision below is a paradigmatic example of both types of Section 2 violations

First, just as in *Imburgia*, the proclamation of neutrality by the majority below cannot be taken at face value.

Beverly Wellner's power of attorney granted her broad authority to "make * * * contracts of every nature in relation to both real and personal property." App., *infra*, at 7a. Under Kentucky law, as the major-

ity below readily acknowledged, legal claims (including personal injury claims) are personal property. *Id.* at 9a.; see also *Button*, 195 S.W.2d at 69.[2] That should have been the end of the analysis: because a legal claim is personal property under Kentucky law, then it follows that an arbitration agreement—which binds the parties to resolve any legal claims in arbitration, rather than in court—"relat[es] to" personal property.

But the majority rejected this straightforward analysis. It concluded that a pre-dispute arbitration agreement—the most common kind of arbitration agreement—relates solely to the principal's constitutional rights of access to court and trial by jury rather than the principal's personal property (including the principal's legal claims). App., *infra*, 5a, 9a.

As Justice Hughes' dissent explains in detail, the majority's characterization of an arbitration agreement 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." App., *infra*, 12a (Hughes, J., dissenting).

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[2] This Court has also recognized "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

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*." App., *infra*, 12a (Hughes, J., dissenting) (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.

The concession by the majority below that "the power to make contracts relating to personal property authorizes the agent to arbitrate the principal's personal injury claim" *after* a dispute has arisen (App., *infra*, 9a) confirms the contrived nature of its attempted distinction between legal claims and constitutional rights to a jury trial and to go to court. The only possible basis for that distinction could be a view that future legal claims that have not yet accrued cannot be considered "property."

The dissent rightly criticized that line of reasoning as well. To begin with, the distinction finds no support in the text of the arbitration agreement, which expressly covers claims "arising in the future." App., *infra*, 12a. And there is also no indication that the majority's purported distinction applies to any other kind of property apart from legal claims. The dissent explains that 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." App., *infra*, 19a-20a.

It would be nonsensical to limit a power of attorney's authority to make contracts in relation to personal property to the principal's existing property interests. Such a rule would yield the illogical result, for instance, that the attorney-in-fact could sell the principal's *existing* possessions at the time the power of attorney was executed but not future possessions that the principal has yet to acquire. Kentucky courts would never hold that an agent's authority to sell a principal's car under a power of attorney signed in 2018 turns on whether the principal bought the car in 2017 or 2019.

Second, having adopted this special arbitration-specific, gerrymandered definition of "contracts of every nature in relation to * * * property," the majority went on to categorize arbitration agreements by recycling the very same arbitration-specific approach that this Court held unlawful in *Kindred I*.

The Kentucky court majority held in its initial decision that a power of attorney authorized the holder to enter into an arbitration agreement only if the power clearly conferred that authority, because an arbitration agreement waived the "sacred" constitutional right of trial by jury. 478 S.W.3d at 329, This Court held that rule invalid under the FAA, because it "hing[ed] 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, "to survive the FAA's edict against singling out those contracts for disfavored treatment." *Ibid.*

The Kentucky majority returned to this precise impermissible rationale on remand. Rather than characterizing an arbitration agreement as relating to property—as its precedents equating legal claims with property required—the lower court characterized arbitration agreements *solely* by reference to the very same characteristics that this Court held out-of-bounds in *Kindred I*: that an arbitration agreement relates to the principal's "fundamental constitutional rights" of access to court and trial by jury. App., *infra*, 9a.

It is true, of course, that an arbitration agreement relates to rights to a jury trial and to go to court. *Kindred I*, 137 S. Ct. at 1427. But an arbitration agreement *also* relates to legal claims—which are personal property in Kentucky—by specifying the mechanism for the resolution of those claims. App., *infra*, 14a (Hughes, J., dissenting). This Court recognized over four decades ago that an arbitration agreement is simply "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the *dispute*." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (emphasis added); see also, *e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (explaining that by entering into an arbitration agreement, a party "submits to the[] resolution [of claims] in an arbitral, rather than a judicial, forum"); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984) (explaining that the FAA prohibits States from requiring a judicial forum for the resolution of *claims* which the contracting parties agreed to resolve by arbitration") (emphasis added).

The two functions of an arbitration agreement—"waiver of a right to go to court and receive a jury trial" and establishing a mechanism relating to a form of property, legal claims—cannot be separated; both are equally "primary characteristic[s] of an arbitration agreement." *Kindred I*, 137 S. Ct. at 1427. In the words of the dissent, the majority's contrary holding therefore "divorce[s] an arbitration agreement from the reality of what it is and what it does." App., *infra*, 14a.

And the majority's approach singles out arbitration contracts based on characteristics unique to an arbitration—precisely what this Court found unlawful in *Kindred I*. As the dissent below explained, the majority's "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." App., *infra*, 17a (quoting *Kindred I*, 137 S. Ct. at 1427). It reaches the same, illegitimate "black swan territory" of the Kentucky court's initial ruling "by a different route": "narrow[ly] focus[ing] on the constitutional jury right to the exclusion of the reality of an arbitration agreement." *Ibid.*

Finally, the majority's invocation of waiver (perhaps in an attempt to insulate its opinion from further review by this Court) plainly misstates the undisputed record—and thus serves only to underscore the impermissible hostility to arbitration animating the majority's ruling. In both its petition for certiorari and its merits briefing before this Court, Kindred expressly 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." *Kindred I* Pet. 16-17 (quotation marks and alterations omitted); see also Br. for Pet. 23; Reply Br. 16-17 & n.10. The majority's mischaracterization of the record to suggest the possibility of waiver speaks volumes about the infirmity of the Kentucky court's underlying holding.

In short, in light of Kentucky's long-standing recognition that causes of action are personal property (see *Button*, 195 S.W.2d at 69), it is unthinkable that Kentucky courts would interpret the phrase "contracts * * * in relation to * * * personal property" (App., *infra*, 7a) to exclude any other kind of agreement relating to an individual's legal claims. The decision below is thus preempted by the FAA every bit as much as the California Court of Appeal's contractual interpretation in *Imburgia*.

B. Summary Reversal Is Appropriate.

Review is necessary in order to preserve the integrity of this Court's precedents and deter lower courts from following the lead of the Supreme Court of Kentucky in defying the FAA and this Court's precedents.

In *Imburgia*, this Court emphatically stated that "[l]ower court judges are certainly free to note their disagreement with a decision of this Court. But the 'Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.'" *Imburgia*, 136 S. Ct. at 468 (quoting *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990)). Lower courts, this Court explained, therefore "must

follow" this Court's "authoritative interpretation[s]" of the FAA. *Ibid.*

The Court has enforced that imperative numerous times by granting review of, and summarily vacating or reversing, state court decisions that contravene the FAA. See *Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 20 (2012) (per curiam) (lower court "disregard[ed] this Court's precedents on the FAA"); *Marmet*, 565 U.S. at 531 (lower court erred "by misreading and disregarding the precedents of this Court interpreting the FAA"); *KPMG LLP* v. *Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (lower court "fail[ed] to give effect to the plain meaning of the [FAA]"); see also *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2002) (per curiam) (lower court refused to apply the FAA by taking an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's holdings). And the Court has emphasized that because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 568 U.S. at 17-18.

As Justice Hughes's powerful dissent makes clear, this Court's repeated admonitions—including in *this very case*—have fallen on deaf ears in Kentucky. And as the decision below demonstrates, state courts intent on evading this Court's precedents interpreting the FAA will resort to a variety of tactics to achieve that goal. This Court should respond by summarily reversing here and sending a clear mes-

sage that transparent attempts by lower courts to evade this Court's rulings will not be tolerated.[3]

Summary reversal is warranted not only in order to preserve this Court's authority as the ultimate interpreter of federal law, but to protect the uniformity and consistency of federal arbitration law. This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). Yet unreasoned, *ad hoc* departures from the FAA's principles like the one embarked upon by the majority below will create confusion about the application of arbitration agreements and lead to the defeat of the contracting parties' expectations.

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[3] This Court has not hesitated in other contexts to summarily reverse lower court decisions on a second round of review when the lower court failed to adhere to this Court's instructions in remanding the case on the first round. For example, in *Amgen Inc.* v. *Harris*, 136 S. Ct. 758 (2016) (per curiam), an ERISA case, the Court previously vacated and remanded the Ninth Circuit's decision for reconsideration in light of an intervening decision by this Court. *Id.* at 758. The Court then summarily reversed after petitioner again sought review, explaining that the Ninth Circuit "failed to assess" the complaint in the way it had been instructed to do. *Id.* at 760.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioners

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