No. 17-1318

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS[1]

The brief in opposition does not even attempt to defend the primary rationale of the holding below—that a pre-dispute arbitration agreement relates solely to constitutional rights to go to court and to trial by jury and does not relate to the underlying legal claims. For good reason: that newly-announced reading of Kentucky law "divorce[s] an arbitration agreement from the reality of what it is and what it does" (Pet. App. 14a (Hughes, J., dissenting)), which is to provide a mechanism for the resolution of legal claims.

Respondent nonetheless insists that the majority's rationale, even if that rationale plainly disfavors arbitration in violation of the FAA, is irrelevant. Respondent argues that this Court offered the Kentucky court the option of declaring that its interpretation of the Wellner power of attorney was "wholly independent" of the anti-arbitration "clear-statement rule" (*Kindred Nursing Centers Limited P'ship* v. *Clark*, 137 S. Ct. 1421, 1429 (2017)), and that the Kentucky court's statement to that effect is conclusive, so everything else in that court's opinion should be treated as "dictum." Opp. 10, 17.

That argument is nonsensical. This Court's remand gave the Kentucky Supreme Court the opportunity to address whether its interpretation of the Wellner power of attorney rested on application of ordinary and generally-applicable rules of state law. But the Kentucky Court confirmed the opposite: As the dissent explains, the majority "returns to black swan territory by a different route," by "narrow[ly]

[1] The Rule 29.6 Statement in the petition remains accurate.

focus[ing] on the constitutional jury right to the exclusion of the reality of an arbitration agreement." Pet. App. 17a.[2]

Respondent's attempts to rehabilitate the majority's conclusion by offering up other reasoning fare no better. Rather than embrace the majority's view that arbitration agreements are solely about the rights to a jury trial and to go court, respondent says that the word "property" in the Wellner power of attorney must mean only property that was owned by the principal at the time of contracting. But respondent points to nothing in the power of attorney, the arbitration agreement, or Kentucky law supporting that artificial distinction: As the dissent makes clear, it would not apply outside of the arbitration context. Pet. App. 19a-20a; see also Pet. 15-16.

In short, the Kentucky Supreme Court's ruling continues to defy this Court's FAA precedents and fails to honor the mandate in *Kindred I*. Review is warranted to ensure fidelity to this Court's decisions.

I. Respondent's Asserted Obstacles to Review Are Baseless.

A. The Kentucky Court Was Obligated On Remand To Interpret The Wellner Power Of Attorney In A Manner Consistent With The FAA.

Respondent's principal argument against certiorari requires this Court to ignore most of the Kentucky court's majority opinion and the entire dissenting opinion. Respondent relies on this Court's state-

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[2] Respondent jettisons the majority's invocation of waiver (Opp. 14), presumably recognizing that it was wholly unsupported by the record. Pet. 18-19.

ment, in remanding the case in *Kindred I*, that the Kentucky court "should determine whether it adheres], in the absence of its clear-statement rule, to its prior reading of the Wellner power of attorney." *Kindred I*, 137 S. Ct. at 1429. Respondent essentially argues that the Kentucky court's choice to reaffirm its prior ruling is unreviewable, asserting that the majority's reasons for that choice are irrelevant. Opp. 11-17.

But this Court's remand did not give the Kentucky court carte blanche to violate the FAA by relying on a "unique" interpretation of contractual language that is "restricted to [the] field" of arbitration. *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468-69 (2015). Rather, this Court's remand permitted the Kentucky court to reaffirm its ruling ***if*** that ruling was free from the anti-arbitration bias prohibited by the FAA.

Respondent here, as in *Kindred I*, asks this Court to accept the Kentucky court's proclamation of neutrality and "purity from the taint of anti-arbitration bias" (Pet. App. 5a) at face value. But that is the same contention that the Court squarely rejected in *Kindred I* and *Imburgia*. This Court confirmed that the FAA's reach is not limited to state-law rules that facially discriminate against arbitration agreements; it "also displaces any rule that covertly accomplishes the same objective." *Kindred I*, 137 S. Ct. at 1426; see also *Epic Sys. Corp.* v. *Lewis*, --- S. Ct. ----, 2018 WL 2292444, at *6 (May 21, 2018) ("[T]he savings clause does not save defenses that target arbitration either by name or by more subtle methods.").

And the lower court's decision on remand leaves no doubt that its holding rests on discrimination

against arbitration contracts. The Kentucky court's "sometime-attempt to cast the rule in broader terms cannot salvage its decision." *Kindred I*, 137 S. Ct. at 1427. Instead, the FAA asks whether there is any indication that state courts would reach the same interpretation or apply the same rule to contracts in general. *Ibid.*; see also *Imburgia*, 136 S. Ct. at 469. Here, as in those cases, *every* indication is to the contrary. See Pet. 13-19; pages 7-10, *infra*.

For similar reasons, respondent fares no better in contending that law of the case applies. Opp. 11-12, 14-15. This Court vacated and remanded in *Kindred I* because it was unclear whether the Kentucky court had interpreted the Wellner power of attorney in a manner consistent with the FAA, concluding that the Kentucky court should have an opportunity to articulate whether there is a generally-applicable state-law ground for its interpretation of that document.

Respondent is wrong to contend that petitioners have "already lost the argument in front of this Court." Opp. 14-15. If that were true, there would have been no need for a remand. Respondent elsewhere concedes as much, noting that in order to adhere to its prior interpretation of the Wellner power of attorney, the court below was obligated to advance "a plausible reading of the power of attorney *congruent with the requirements of the FAA*." *Id.* at 12 (emphasis added). As the dissent explains, the majority failed to do so.

Respondent is also wrong that mandamus (rather than certiorari) is the sole avenue for review here. Opp. 25-26. *Amgen Inc.* v. *Harris*, 136 S. Ct. 758 (2016) (per curiam) (cited at Pet. 21 n.3) confirms as much: this Court granted certiorari and

summarily reversed when the Ninth Circuit "failed to assess" the complaint in the manner this Court had instructed in remanding the case the first time around. Respondent says that this case is different because the Ninth Circuit in *Amgen* was charged with reconsidering its earlier opinion in light of this Court's precedent (Opp. 26 n.2), but that is a *similarity*, not a difference. In *Kindred I*, this Court "return[ed] the case to the state court *for further consideration*," and "remand[ed] the case for further proceedings *not inconsistent* with this opinion" (137 S. Ct. at 1429 (emphasis added))—language that this Court uses routinely.

Indeed, the posture of this case is similar to that in *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996), in which this Court had summarily vacated and remanded a decision of the Montana Supreme Court for further consideration in light of this Court's precedents. *Id.* at 685. When the Montana Supreme Court adhered to its prior judgment on remand, petitioners sought review for a second time, and this Court "again granted certiorari" and reversed. *Id.* at 686.

Certiorari review and reversal are equally warranted here. The Kentucky court, while purporting to apply this Court's instructions in *Kindred I*, did so in a manner inconsistent with the FAA and this Court's precedents. That error of federal law—in conflict with this Court's decisions—is grounds for review on certiorari.[3]

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[3] The cases respondent cites do not support respondent's position. In *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425 (1978), this Court issued a plurality opinion, and petitioner sought *clarification* of the mandate to determine whether this Court's

B. Granting Review Will Not "Federalize" State Contract Law.

Respondent contends that the "petition threatens to federalize a huge area of State law." Opp. 25. But that is the exact argument respondents made, and this Court rejected, in both *Kindred I* and *Imburgia*. See Respondents' Br., *Kindred I*, 2017 WL 104593, at *43-46; Br. in Opp., *Kindred I*, 2016 WL 4710183, at *34; Br. in Opp., *Imburgia*, 2015 WL 455815, at *3.

This Court's prior rejection of respondent's argument is unsurprising: *Kindred I* and *Imburgia*, like this case, required nothing more than applying the long-settled "equal footing" principle that this Court has invoked repeatedly to hold preempted state laws and court rulings that impermissibly treated arbitration agreements differently from other contracts. Indeed, 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 Techs., LLC* v. *Howard*, 568 U.S. 17, 17-18 (2012)

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opinion required the district court to dissolve an injunction. *Id.* at 427. In construing the request as an action for mandamus, this Court noted that when a lower court fails to execute or misconstrues this Court's mandate, the remedy is *either* "a new appeal" or "a writ of mandamus to execute the mandate of this court." *Id.* at 428. Here, this Court's mandate in *Kindred I* was clear; but the Kentucky court on remand again singled out arbitration agreements for unfair treatment in violation of the FAA.

And in *Deen* v. *Hickman*, 358 U.S. 57 (1958) (per curiam), mandamus was appropriate because the lower court ordered adjudication of an issue already decided by this Court. Here, by contrast, *Kindred I* did not decide whether the Kentucky court had interpreted the Wellner power of attorney consistent with the FAA.

(per curiam); see also *Marmet Health Care Center, Inc.* v. *Brown*, 565 U.S. 530, 531 (2012) (per curiam) ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.").

Respondent's assertion that the relief sought here is "qualitatively different" than *Imburgia* is mystifying. Opp. 23. The petition does not ask this Court to prescribe the content of Kentucky contract law. Rather, it asks, just as in *Imburgia*, if the lower court's "interpretation of [the] contract * * * is consistent with the [FAA]." 136 S. Ct. at 468. For all of the reasons set out in the petition, Justice Hughes's dissent, and below, it was not.

II. The Decision Below Conflicts With The FAA And This Court's Decisions Interpreting The Statute.

The petition explains in detail how the Kentucky court's gerrymandered, arbitration-specific interpretation of "contracts of every nature in relation to * * * property" to exclude pre-dispute arbitration agreements violates Section 2 of the FAA in two ways. Pet. 12-19. the decision below refuses to enforce 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 (quotation marks omitted). And it discriminates 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.

Respondent tacitly concedes that the Kentucky Supreme Court was wrong to treat arbitration

agreements as relating solely to the waiver of the right to go to court and receive a jury trial. Pet. 13-14, 17-18. Noticeably absent from the Opposition is any reliance on the majority's characterization of an arbitration agreement, likely because the point of *any* arbitration agreement is to provide a mechanism for the resolution of the legal claims of the parties, which both respondent and the majority below concede are personal property under settled Kentucky law.

Instead, respondent argues that the word "property" in the Wellner power of attorney encompasses only a principal's property interests that already exist or have accrued—that is, property that the principal owns at the time of execution of a contract made under the power of attorney. Opp. 20-23. Respondent asserts, without any support, that "'[p]roperty,' as used in the instrument language, refers to things, and not to a subject matter in the abstract," and that a principal cannot enter into contracts relating to property that the principal has not yet obtained at the time of contracting. *Id.* at 20-21.

But as the dissent explains, this purported distinction finds no support in Kentucky law (or common sense), and instead "is simply *another attempt to single out arbitration* for 'hostile' treatment under the guise of Kentucky contract and agency law." Pet. App. 11a-12a (emphasis added). There is no indication that the distinction applies to any other kind of property apart from legal claims. The dissent noted, for instance, that the right to "collect debts" in the power of attorney "manifestly includes future debts," such as "a tenant's rental payment"—even though the principal's right to that rental payment would

had not have accrued at the time of the lease. Pet. App. 19a.

And the dissent observed more broadly that the authority to make contracts in relation to personal property "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 20a. That is necessarily so because "that is in the nature of the instrument, i.e., to deal with the principal's affairs in the manner stated whether or not a particular thing, event, [or] type of property was in existence." *Ibid.* Indeed, the arbitration agreement itself does not support the proffered distinction, because the very first sentence makes clear that it encompasses both "existing" "claims or controversies" and those "*arising in the future*." *Id.* at 12a (emphasis added).

Respondent's silence on these points speaks volumes. And in other contexts, the Kentucky courts recognize interests that have yet to accrue as a form of property. See, *e.g.*, *Godley* v. *Kentucky Res. Corp.*, 640 F.2d 831, 835 (6th Cir. 1981) (under Kentucky law, "[t]he right to unaccrued rent is * * * classified as real property") (citing *Baker* v. *Vanderpool*, 178 S.W.2d 189 (Ky. 1944)); *Kentucky Bank & Trust Co.* v. *Ashland Oil & Transp. Co.*, 310 S.W.2d 287, 290 (Ky. Ct. App. 1958) (holding that "[t]he right to *unaccrued* royalties" from oil or mineral reserves "is real property or an interest or estate").

Moreover, the cases respondent does cite confirm the lack of support for respondent's novel distinction between accrued and unaccrued property. Respondent completely misreads *Flemming* v. *Nestor*, 363 U.S. 603 (1960): this Court did not hold that future

(*i.e.*, unaccrued) Social Security benefits are not "property" at all, as respondent contends, but rather that those future benefits are not "*accrued* property rights." *Id.* at 611 (emphasis added). That language implicitly recognizes that the term "property" includes both accrued and unaccrued rights.

Aull v. *Houston*, 345 S.W.3d 232 (Ky. Ct. App. 2010), is likewise inapposite. It held, in a case involving the wrongful death of a five-year old, that the potential availability of social security disability benefits is not a proper measure of damages under Kentucky's wrongful death statute, which measures future damages "by the loss resulting from the destruction of the decedent's power to labor." *Id.* at 235-36. That issue of statutory interpretation has nothing to do with the meaning of "property" under Kentucky law.

Respondent's reliance on the Uniform Power of Attorney Act is also misplaced. The Act uses separate terms for "stocks and bonds" (Section 206) and "commodities and options" (Section 207), but it does not place any additional restrictions on the latter, as respondent suggests.

And there is considerable irony in respondent's invocation of the Uniform Act given respondent's insistence in *Kindred I* that Kentucky has *not* adopted the Act. See Resp. Br., *Kindred I*, 2017 WL 104593, at *14. Indeed, if Kentucky had adopted the Uniform Act, respondent would have had to explain away Section 203, which provides that general language authorizing the agent "to do all acts that a principal could do" includes the authorization to "submit to alternative dispute resolution" claims by or against the principal.

III. Summary Relief Is Appropriate.

As the petition suggests, the Court may wish to consider summary reversal. Respondent has offered no persuasive rebuttal to our arguments, and those in Justice Hughes's dissent, demonstrating that the decision below impermissibly singles out arbitration agreements for disfavored treatment, in clear violation of the FAA and this Court's precedents, including the Court's earlier opinion in this very case.

Because the interpretation of the Wellner power of attorney was thoroughly briefed in *Kindred I* and again here, it is unlikely that the parties will have more to add if plenary review is granted. The Kentucky Supreme Court confirmed on remand that its interpretation of the Wellner power of attorney rests on an arbitration-specific approach to Kentucky law in violation of Section 2 of the FAA. And as the petition details, this Court has not hesitated to take summary action in state-court decisions that contravene the FAA. Pet. 20 (collecting cases).

In the alternative, the Court should consider granting, vacating, and remanding the case in light of the recent decision in *Epic Systems*. That decision confirmed that *Kindred I*'s holding is not limited to the clear-statement rule that was before the Court; it establishes more broadly that the "'equal-treatment' rule for arbitration contracts" embodied by the savings clause "means [that] the savings clause does not save defenses that target arbitration either by name *or by more subtle methods*." 2018 WL 2292444, at *6 (emphasis added) (quoting *Kindred I*, 137 S. Ct. at 1426). Vacatur in light of *Epic Systems* would underscore that lower courts may not evade this Court's precedents by swapping out one anti-arbitration rule for another.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal or vacatur for reconsideration in light of *Epic Systems*.

Respectfully submitted.

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