No. 17-365

In the Supreme Court of the United States

KINDRED HOSPITALS EAST, LLC D.B.A. KINDRED HOSPITAL OCALA,

Petitioner,

v.

ESTATE OF MARIANNE KLEMISH, AND FRANK KLEMISH,

Respondents.

On Petition for a Writ of Certiorari to the Florida Fifth District Court of Appeal

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

The brief in opposition makes only a cursory attempt to defend the merits of the decision below. That is not surprising, because the decision is indefensible: The Florida appellate court refused to enforce the parties' *contractual* agreement to arbitrate medical malpractice disputes on the ground that the contract fails to mirror Florida's *statutory* scheme for the voluntary arbitration of malpractice disputes after they arise. That statutory regime requires, among other things, that health care providers *concede liability* and arbitrate only the amount of damages. Mandating state-specified terms as a condition of enforcing a binding pre-dispute arbitration agreement is incompatible with "arbitration [as] envisioned by the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011); see also *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1426-27 (2017); Chamber Am. Br. 6-12.

Unable to defend the decision below, respondents instead try to change the subject, devoting nearly all of their opposition to inventing claimed obstacles to this Court's review.

Those arguments are wrong. The FAA preemption issue was presented below; the FAA applies to the arbitration agreement in this case; and this Court has repeatedly granted review when, as here, state courts have deviated from this Court's precedents interpreting the FAA.

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

I. The Question Presented Was Properly Raised In The Florida Courts.

Respondents first argue that the FAA preemption issue was not properly raised below. Opp. 12-22. They are wrong.

Kindred presented that question at the first available opportunity, arguing to the Florida Supreme Court that the intermediate appellate court in this case—as well as the subsequent Florida Supreme Court decision in *Hernandez* v. *Crespo*, 211 So.3d 19 (2016)—adopted a special state-law rule that conflicts with the FAA. Pet. 12-13, 25-26.

After the intermediate appellate court in this case certified the existence of a conflict with a different district, Kindred filed a one-paragraph notice with the Florida Supreme Court to inform it of that certification. The Florida Supreme Court then held this case until it decided *Crespo*, after which it issued an order to show cause why *Crespo* was not dispositive.

In its response to that order—the very first substantive filing with the Florida Supreme Court—Kindred argued that the rule set forth in the decision below and reiterated in *Crespo* is invalid under the FAA. Pet. App. 15a, 26a-28a.

Respondents' contention that Kindred failed to develop the argument sufficiently (Opp. 21-22) borders on the frivolous. Kindred argued that (Pet. App. 15a, 26a-28a):

- This Court's (then-pending) decision in "*Kindred Nursing* * * * will determine a controlling issue in this case."

- The Florida "Court has effectively overruled *Franks* [v. *Bowers*, 116 So.3d 1240 (Fla. 2013)] and concluded that no alternative contractual arbitration process is available in a Florida medical malpractice dispute. Such a result would violate the Federal Arbitration Act" (citing four of this Court's FAA decisions).
- "[T]he Federal Arbitration Act preempts state laws that are restricted to the field of arbitration and do not place arbitration agreements on equal footing with all other contracts."
- The Florida court should "hold[] this case in abeyance" for *Kindred Nursing*, which will decide the "controlling issue" of "whether federal law preempts state laws that impose special requirements on arbitration agreements which do not place arbitration agreements on equal footing with all other contracts."

These arguments were more than sufficient to present the "federal claim with fair precision" to the state court. *Adams* v. *Robertson*, 520 U.S. 83, 88 (1997) (quotation marks omitted).

Moreover, the Florida Supreme Court necessarily considered and rejected that claim when it declined jurisdiction by a 4-3 vote, and again when it declined Kindred's motion to reinstate the appeal by the same 4-3 vote. Pet. App. 9a, 11a. Indeed, the federal preemption issue was the *sole* issue raised in the latter motion. *Id.* at 31a-36a. Rather than resting on an independent and adequate state-law ground, the only way to explain the denial of that motion is that the Florida justices were divided over the federal question.

Because Kindred raised the federal question as soon as it arose in this case—with the intermediate appellate court's refusal to enforce the arbitration agreement—that question is properly before this Court. Cf. *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Environmental Protection,* 560 U.S. 702, 713 (2010) (federal question was properly presented when "the state-court decision itself is claimed to constitute a violation of federal law"); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 85 n.9 (1980) ("this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law"); SUPREME COURT PRACTICE 195 (10th ed. 2013).[2]

Respondents fault Kindred for not raising a full-blown FAA preemption argument in the trial court, but they ignore that Kindred *prevailed* in compelling arbitration before that court (Pet. App. 38a-40a). Kindred accordingly did not have occasion to challenge an interpretation of Florida law that had not yet been rendered. When the trial court ruled, the Florida Supreme Court had granted review in but not yet decided *Crespo*, see 171 So.3d 116 (2015), and

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[2] Respondents mischaracterize Kindred's position, repeatedly asserting that Kindred is challenging the constitutionality of the Medical Malpractice Act's arbitration scheme. *E.g.*, Opp. 16-17. But Kindred has never argued that the FAA prevents Florida from devising an arbitration mechanism that parties can choose to select once a dispute arises. It is challenging the Florida courts' *judicial* creation of a state-law rule prohibiting enforcement of any agreement to arbitrate a malpractice claim that does not incorporate the statutory terms. That rule was first applied in this case by the intermediate appellate court.

the latter court's *Franks* decision—stating that parties may "contract around a state law" like the MMA—supplied the controlling rule. Understandably, then, Kindred focused on explaining to the trial court (successfully) why the arbitration agreement in this case did not run afoul of *Franks*. Resp. App. 22-27; see also Pet. 21-24.

Moreover, Kindred *did* rely upon federal principles in its trial court briefing: Citing decisions of this Court and the Eleventh Circuit, Kindred highlighted the "national policy in favor of enforcing arbitration agreements" and the requirement that courts "place arbitration agreements on equal footing with other contracts." Resp. App. 21-22. These principles, of course, are rooted in Section 2 of the FAA.

And Kindred's approach also made perfect sense: Having prevailed before the trial court, Kindred defended that court's reasoning before the District Court of Appeal. After the intermediate court reached a contrary conclusion, Kindred immediately raised the FAA's applicability in its next filing, before the Florida Supreme Court—which is what this Court's decisions require. See pages 2-4, *supra*.

Finally, respondents contend that this Court should decline to exercise jurisdiction and wait for a future Florida case in which the FAA preemption issue was raised at an earlier stage of litigation. Opp. 18-19, 32. But as the petition explains (at 25-26), parties are highly unlikely to invoke arbitration under similar circumstances in Florida courts, suffering losses at every level of the state court system, solely for the opportunity to seek this Court's review—particularly if review is denied here.

II. The FAA Applies Here.

Next, respondents attempt to evade review by arguing that the FAA does not govern this case. Those arguments are incorrect.

A. The Arbitration Agreement Involves Interstate Commerce.

Respondents argue that the contract at issue does not "involve[] commerce" and is therefore outside the FAA's coverage because it is "between a Florida patient" and a "Florida rehabilitation facility." Opp. 28-30. In respondents' view, the FAA cannot apply unless the trial court makes a factual determination about the *particular* contract's effect on interstate commerce. *Id.* at 28-29.

But that cramped view of the FAA's reach is squarely inconsistent with this Court's precedents. As respondents concede (Opp. 29), this Court made clear in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995), that the phrase "involving commerce" in Section 2 of the FAA "signals an intent to exercise Congress' commerce power to the full." *Id.* at 277; accord, *e.g.*, *Perry* v. *Thomas*, 482 U.S. 483, 490 (1987) (Section 2 extends to "the full reach of the Commerce Clause").

Moreover, this Court in *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52 (2003), unanimously rejected respondents' contention that a transaction-specific factual showing of interstate commerce is required. The Court explained that the Alabama Supreme Court's "search for evidence" of this kind was "misguided," because "'Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question

would represent a general practice * * * subject to federal control.'" *Id.* at 56-57.

The arbitration agreement here easily satisfies that standard. As the decision cited by respondents explains, even hospitals whose "primary activity is the provision of health care services in a local market" necessarily "engage[] in interstate commerce" as "a matter of practical economics," including by purchasing "out-of-state medicines and supplies" and generat[ing] revenue from out-of-state sources" such as insurance companies and Medicare payments. *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 328-29 (1991) (cited at Opp. 29).

B. The Agreement's Reference To The Florida Arbitration Code Does Not Preclude Application Of Section 2 Of The FAA.

Respondents are also mistaken (Opp. 23-27) in asserting that the FAA's protections have been jettisoned because the arbitration agreement states that "the provisions of the Florida Arbitration Code * * * shall govern the arbitration" itself (Pet. App. 44a) and that the arbitrator "will be appointed in the manner set forth in the Florida Arbitration Code" (*id.* at 45a).

As this Court has emphasized, Section 2 of the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Perry*, 482 U.S. at 489 (citation omitted).

Consistent with that principle, Florida courts have repeatedly held that the FAA still applies when an arbitration agreement references the Florida Arbitration Code. For example, in construing a provision that referenced "the Florida Arbitration Code," a

Florida court explained that "[t]o the extent the contract affects interstate commerce in Florida, it is governed by both the FAC and the FAA." *CT Miami, LLC* v. *Samsung Elecs. Latinoamerica Miami, Inc.*, 201 So.3d 85, 90 & n.3 (Fla. Dist. Ct. App. 2015) ("both state and federal arbitration acts apply to such clauses").

The Florida Supreme Court applied the same rule in *Gessa* v. *Manor Care of Florida, Inc.*, 86 So.3d 484 (Fla. 2011), which involved an arbitration provision containing a reference to the Florida Arbitration Code nearly identical to the one here. *Id.* at 488. The Florida court recognized that this Court's decision in *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 623 (2010), was controlling authority. 86 So.3d at 493-94. And while the state court distinguished the facts of *Rent-A-Center*, it acknowledged that "section 2 of the Federal Arbitration Act" supplied the rule of decision. *Id.* at 494.

Respondents rely on *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989). But unlike *Volt*, this case does not involve a claimed conflict between the FAA's procedures and contract terms designating state arbitration procedures. Instead, this case involves a challenge to a judicially-created rule not grounded in Florida's arbitration code *preventing* enforcement of private arbitration agreements according to their terms.[3]

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[3] For that reason, the procedural differences between the FAA and the Florida Arbitration Code (Opp. 9-11) have no bearing on the issue here.

Volt involved a choice-of-law clause that was interpreted to reflect the parties' choice of California's arbitration procedures. Given that choice, this Court held that the FAA did not prevent applying a California state statute that permitted a court to stay arbitration proceedings pending related litigation, even though the FAA did not contain a provision authorizing the stay. See 489 U.S. at 477 (citing Cal. Civ. Proc. Code § 1281.2(c)); compare *Preston* v. *Ferrer*, 552 U.S. 346, 361 (2008) (choice of California law did not incorporate a California statute incompatible with the FAA; distinguishing *Volt* as situation where there is a "procedural void for the choice-of-law clause to fill"). Here, by contrast, the challenged rule *refuses* enforcement of the parties' arbitration agreement.

Applying the FAA is also consistent with this Court's decision in *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015). Just as a reference to "the law of your state" does not demonstrate the parties' intent to incorporate "*invalid* state law" preempted by the FAA (*id.* at 469), the choice of the Florida Arbitration Code to govern the arbitration proceedings cannot plausibly demonstrate an intent to incorporate a judicially-created public-policy rule that prohibits the enforcement of the parties' arbitration agreement.

Respondents also half-heartedly defend the decision below by accusing Kindred of "cherry-pick[ing] which portions of the Medical Malpractice Act to follow." Opp. 25; see also *id.* at 32-33. But they have no response to our showing that the incorporated pre-suit requirements of the MMA are mandatory for *all* malpractice claims in Florida—whether in court or in arbitration—and therefore the agreement does not

selectively incorporate features of the MMA's statutory *arbitration* scheme. Pet. 23.

C. The Case's Origins In State Court Do Not Bar Review.

Finally, respondents argue that *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) was wrongly decided, and that the FAA does not apply in state courts. Opp. 30-31 (citing dissenting opinions by Justice Thomas). But this Court has repeatedly recognized that, because "[s]tate courts rather than federal courts are more 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).

Indeed, no fewer than 13 times since *Southland*, this Court has taken summary action in or undertaken plenary review of state-court arbitration decisions. *Kindred Nursing*; *Schumacher Homes of Circleville, Inc.* v. *Spencer*, 136 S. Ct. 1157 (2016); *Ritz-Carlton Dev. Co.* v. *Narayan*, 136 S. Ct. 800 (2016); *Imburgia*; *Nitro-Lift*; *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530 (2012); *KPMG LLP* v. *Cocchi*, 565 U.S. 18 (2011); *Preston*; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Citizens Bank*; *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce*; *Perry*. And the Court has twice rejected requests to overrule *Southland*. See *Allied-Bruce*, 513 U.S. at 272; *Preston*, 552 U.S. at 353 n.2. The reasons to continue to give *Southland stare decisis* effect have only grown stronger since *Preston*. See *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015) (*stare decisis* "carries enhanced force when a decision * * * interprets a statute" such as the FAA; and when "Congress has spurned multiple

opportunities to reverse" this Court's precedents if it so chose).

III. Summary Relief Is Appropriate.

Respondents' arguments underscore why the Court may wish to consider granting summary reversal. Respondents offer no persuasive response to our showing that the decision below impermissibly singles out arbitration agreements for disfavored treatment and is therefore irreconcilable with this Court's FAA precedents. There is no reason to think that respondents will have any more to say if plenary review were granted.

Moreover, this Court's intervention will provide needed guidance to other lower courts that have misapplied the FAA by holding arbitration agreements invalid for failing to incorporate requirements supposedly mandated by state law. That is precisely what the Hawaii Supreme Court did on remand from this Court, as the pending certiorari petition explains. See Pet. for Certiorari at 15-22, *Ritz-Carlton Dev. Co.* v. *Narayan*, No. 17-694 (Nov. 9, 2017).

Alternatively, the Court should consider granting, vacating, and remanding the case in light of *Kindred Nursing*. Pet. 29-30. Respondents raise three objections, none of which is persuasive.

First, respondents argue that the Florida Supreme Court already "had the opportunity to review this case in light of *Kindred Nursing*" (Opp. 34) when it denied Kindred's motion to reinstate the appeal. But the Florida Supreme Court acted summarily, without any analysis of whether the decision below was in accord with *Kindred Nursing*.

Second, respondents maintain that "a GVR directed to an intermediate appellate court could only cause confusion" because the Florida Supreme Court's decision in *Crespo* remains on the books. Opp. 35. But unlike in this case, the FAA preemption issue was never addressed or resolved by the Florida Supreme Court in *Crespo* (Pet. 26 & n.10), so there is no impediment to the Florida court's concluding as a matter of federal law that the state-law rule announced in *Crespo* is preempted by the FAA. And any decision by the Florida intermediate appellate court would be subject to review by the Florida Supreme Court, which could then explicitly address the FAA issue.[4]

Third, respondents rely (Opp. 35) on this Court's statement in *Kindred Nursing* that its decision "falls well within the confines of (and goes no further than) present well-established law." 137 S. Ct. at 1429 (quoting *Imburgia*, 136 S. Ct. at 471). The same is true of *Imburgia*, but that fact posed no obstacle to this Court vacating and remanding state-court decisions in light of that case. See *Schumacher Homes*, 136 S. Ct. 1157; *Narayan*, 136 S. Ct. 799. And in *Schumacher Homes*, the West Virginia Supreme Court reversed course and ordered the trial court to compel arbitration. 237 W. Va. 379 (2016).

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[4] This Court's denial of review in *Crespo* likely reflects the fact that the FAA was never raised during plenary briefing on the merits before the Florida Supreme Court (as the Brief in Opposition in that case pointed out (at 17)) rather than, as respondents here suggest (Opp. 35), approval of that decision on the merits.

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 *Kindred Nursing*.

Respectfully submitted.

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