No. 19-99

In The
Supreme Court of the United States

NORTHERN KENTUCKY
AREA DEVELOPMENT DISTRICT,

Petitioner,

v.

DANIELLE SNYDER,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Kentucky

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. THE AMENDED VERSION OF KRS 336.700 DOES NOT RENDER THE QUESTION PRESENTED MOOT

As Respondent has pointed out, the Kentucky legislature passed Senate Bill 7, which amended KRS 336.700 as of June 27, 2019.[1] The amendment to KRS 336.700 is not the end of the story and does not undermine the reasons for granting certiorari.

Should this Court deny certiorari, the parties will go back to the trial where NKADD will renew its motion to compel arbitration and Snyder will oppose it. Given the trial court's documented antipathy to arbitration, as evidenced by its previous decisions denying NKADD's original and renewed motions to compel arbitration, NKADD fully expects the trial court to deny NKADD's motion to compel arbitration. When it does, NKADD will appeal to the same Kentucky appellate courts that ruled against the NKADD's right to arbitrate Snyder's claims the first time around. In light of Kentucky appellate courts' aversion to arbitration, as demonstrated by their decisions in this and other cases, including the appeals preceding this Court's decision in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017), NKADD anticipates that the Kentucky appellate courts will uphold the trial court's decision. The process therefore becomes circuitous and NKADD will never be able to enforce the arbitration provision in its contract with Snyder,

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[1] The constitutionality of KRS 336.700 as amended has already been challenged.

notwithstanding the amendment to KRS 336.700, barring intervention by this Court.

Moreover, should this Court refuse certiorari, the amendment of KRS 336.700 will not be the end of the story for other parties to contracts with arbitration provisions. The Kentucky Supreme Court has demonstrated a pronounced disdain for arbitration, despite this Court's precedent holding that the Federal Arbitration Act (FAA) requires arbitration agreements to be placed on "equal footing" with other contracts. First, the Kentucky Supreme Court ruled that the FAA did not preempt a state-created rule that invalidated arbitration agreements between a nursing home and a resident's power-of-attorney unless the document granting the power-of-attorney contained a clear statement that the power-of-attorney could enter into arbitration agreements. *Kindred Nursing*, *supra*. In reversing that decision, this Court took the Kentucky Supreme Court to task for "flout[ing] the FAA's command to place [arbitration agreements] on equal footing with all other contracts." *Id.* This Court also sharply criticized the Kentucky Supreme Court for trying to "cast the [equal footing] rule in broader terms" by "suggest[ing that it] could also apply when an agent endeavored to waive other 'fundamental constitutional rights' held by a principal." *Id.* Second, in this case, despite this Court's admonitions in *Kindred Nursing*, the Kentucky Supreme Court again applied a state statute that is *not* a generally applicable defense to a contract to invalidate an arbitration agreement, in outright defiance of *Kindred Nursing*.

Given the Kentucky Supreme Court's disdain for arbitration, and its failure to recognize and follow this Court's admonitions about the FAA, absent intervention by this Court, history will repeat itself and the Kentucky Supreme Court will continue to invalidate arbitration agreements on grounds that are not generally applicable to contracts.

II. APPLICATION OF THE FAA IS NOT LIMITED BY THE STATE'S AUTHORITY TO REGULATE CONTRACTS

A. THERE IS NO TENTH AMENDMENT CONCERN HERE

Arguing in the alternative, and relying on the Tenth Amendment, Snyder contends that "the FAA does not apply to a state government's ability to regulate contracts made with state government." (Brief in Opposition, p. 8-13) That argument lacks merit because the Tenth Amendment is not implicated.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." Accordingly, any power not specifically delegated to the federal government by the Constitution is reserved to the States. *New York v. U.S.*, 505 U.S. 144, 156 – 158 (1992). Thus, when federal legislation is challenged on Tenth Amendment grounds, the inquiry is whether the legislation is a proper exercise by Congress of one of its enumerated powers under Article I of the Constitution. *Id.* If so, the

Tenth Amendment is not implicated, because the power to enact the legislation in question is specifically delegated to the United States by the Constitution; if not, there is a Tenth Amendment concern because the power is reserved to the States. *Id*.

Snyder's invocation of the Tenth Amendment is, therefore, a challenge to Congress' authority to (a) enact the FAA and (b) to apply the FAA to public employment relationships in Kentucky. That challenge fails.

First, Congress acted within the scope of its enumerated powers in enacting the FAA. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (the FAA rests on the authority of Congress to enact substantive rules under the Commerce Clause); *Perry v. Thomas*, 482 U.S. 483 (1987) (the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (the FAA's reach is expansive and coincides with the reach of the Commerce Clause).

Second, the FAA applies to public employment relationships in the various states. The Supreme Court has already ruled that public employment relationships affect interstate commerce in other contexts, such that Congress had the authority, under the Commerce Clause, to regulate public employment relationships. *E.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Congress had power under the Commerce Clause to regulate employment relationships between a state and its employees vis-à-vis the

Fair Labor Standards Act); *EEOC v. Wyoming*, 460 U.S. 226 (1983) (Congress had power under the Commerce Clause to regulate employment relationships between a state and its employees vis-à-vis the Age Discrimination in Employment Act); *see also Gregory v. Ashcroft*, 501 U.S. 452 (1991) (same); *Fry v. U.S.*, 421 U.S. 542 (1975) (Congress had power under the Commerce Clause to regulate employment relationships between a state and its employees vis-à-vis the Economic Stabilization Act of 1970).

Third, the FAA is a generally applicable law. A state's sovereign status does not exempt it from the application of generally applicable laws enacted by Congress pursuant to one of Congress' enumerated powers. *Fry*, *supra* ("States are not immune from all federal regulation merely because of their sovereign status."). For example, the state of California was acting as a sovereign and within the powers reserved to states when it operated a railroad, as the Supreme Court observed in *U.S. v. California*, 297 U.S. 175 (1936). Nonetheless, the Supreme Court said California operated the railroad "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. *The sovereign power of the states is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution*." *Id.* at 184 (emphasis added).

Because the FAA is a valid exercise of Congress' power under the interstate Commerce Clause, and because the Tenth Amendment does not otherwise shield

states from generally applicable laws such as the FAA, Snyder's Tenth Amendment argument fails.

B. THE FAA PREEMPTS STATE LAW ON CONTRACT FORMATION WHERE THE STATE LAW IN QUESTION DISCRIMINATES AGAINST ARBITRATION AGREEMENTS

The FAA provides: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Snyder argues that KRS 336.700 provides "grounds as exist at law or in equity for the revocation of her arbitration agreement with the NKADD." (Brief in Opposition, p. 11) Specifically, she argues that KRS 336.700 deprives Kentucky employers of the authority to enter into arbitration agreements, rendering the arbitration agreements *ultra vires*. *Id.* Theorizing that a contract formation issue is a "ground as exist[s] at law or in equity for the revocation of any contract," Snyder contends that the FAA does not apply to her arbitration agreement with the NKADD. *Id.* This Court says otherwise and what it says is what matters. *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S.Ct. 1427 (2017).

Kindred Nursing teaches that state-law rules about the formation of arbitration agreements – including rules governing whether or not a party has the authority to enter into such an agreement – are subject to the FAA. *Id.* at 1428 ("By its terms, then, the FAA cares not only about the 'enforcement' of arbitration agreements, but also about their initial validity – that is, about what it takes to enter into them.").

KRS 336.700 attempts to deprive an employer of the authority to enter into an arbitration agreement with an employee, where the arbitration agreement is a condition of employment. Since this rule pertains to the formation of arbitration agreements, it is subject to the FAA, as *Kindred Nursing* makes abundantly clear.

The U.S. Supreme Court also specified in *Kindred Nursing* that state-law rules about the formation of arbitration agreements are preempted by the FAA if they fail to treat arbitration agreements the same as other kinds of contracts, a reference to the FAA's "equal footing" rule. *Id*. at 1424, 1428 ("A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made."). KRS 336.700 fails to treat arbitration agreements the same as other kinds of contracts. The statute selectively deems arbitration agreements invalid under circumstances in which other contracts would not be deemed invalid.

Because KRS 336.700 discriminates against arbitration agreements, it is preempted by the FAA.

C. THE EXTRA-JURISDICTIONAL CASES SNYDER RELIES UPON DO NOT SUPPORT HER ARGUMENT

In her effort to defeat certiorari, Snyder relies on the extra-jurisdictional cases cited by the Kentucky Court of Appeals in its opinion below to support the flawed proposition that the FAA does not govern whether a valid arbitration agreement exists. (Brief in Opposition, p. 9 – 12) But all of those cases would necessarily be decided differently if the courts in those cases had had the benefit of *Kindred Nursing*.

In ruling that the FAA did not preempt the statutes in question as applied in the context of public employment, the Court of Appeals made a crucial but erroneous assumption: "Despite its broad scope, the threshold question of whether a valid arbitration agreement exists is not governed by the FAA." (Pet. App. 24) Had it not been for that flawed assumption, the Court of Appeals never would have reached the question "whether NKADD had authority to enter into the arbitration agreement," because that question would have been preempted by the FAA. Since it would not have reached that question, the Court of Appeals never would have concluded that "KRS 336.700(2) declare[s] an express legislative intent to deprive state agencies and political subdivisions [of] the power to enter into arbitration agreements as a condition of employment." (Pet. App. 26)

While the Court of Appeals did not have the benefit of *Kindred Nursing* when it ruled, the decision

makes it crystal clear that the assumption the Court of Appeals made was erroneous. This Court has said: "By its terms, then, the FAA cares not only about the 'enforcement' of arbitration agreements, but also about their initial validity – that is, about what it takes to enter into them." *Kindred Nursing*, *supra* at 1428. In other words, the FAA *does* govern the threshold question whether a valid arbitration agreement exists. And, because the FAA governs that question, the foundation for the Court of Appeals' ruling disintegrates.

Likewise, each of the extra-jurisdictional cases cited by the Court of Appeals and reiterated by Snyder in her Response predate *Kindred Nursing*. They, too, made the same flawed assumption as the Court of Appeals, and *Kindred Nursing* would necessarily change their outcomes. *See W.M. Schlosser Co., Inc. v. School Bd.*, 980 F.2d 253 (4th Cir. 1992) (assuming the FAA would not apply if the school board lacked authority to enter into an arbitration agreement); *D.C. v. Greene*, 806 A.2d 216 (D.C. 2002) (same); *Bank of Am., N.A. v. D.C.*, 80 A.3d 650 (D.C. 2013) (same). Thus, there is no remaining authority to support the Court of Appeals' decision or Snyder's position.

CONCLUSION

The petition for a writ of certiorari should be granted, or, in the alternative, the Court should consider summarily reversing or vacating the decision below.

Respectfully submitted,

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