

No. 17-1318

In The
Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED
PARTNERSHIP DBA WINCHESTER CENTRE FOR
HEALTH AND REHABILITATION N/K/A FOUNTAIN
CIRCLE HEALTH AND REHABILITATION, et al.,

Petitioners,

v.

BEVERLY WELLNER, Individually and on
Behalf of the Estate of Joe P. Wellner, Deceased,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

JAMES T. GILBERT
COY, GILBERT,
SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

Counsel for Respondent

QUESTION PRESENTED

In *Kindred Nursing Centers Ltd. Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017), in a proceeding consistent with this Court’s mandate in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421 (2017), the Kentucky Supreme Court explicitly held that its earlier interpretation of the power of attorney of Joe Wellner emanated “wholly independent of the clear statement rule,” and the Kentucky Supreme Court would therefore not reinterpret the extent of authority encompassed in the Wellner power of attorney. Pet. App. 10.

The question thus presented is:

Whether the Kentucky Supreme Court’s Opinion in *Kindred Nursing Centers Ltd. Partnership v. Wellner* conformed to this Court’s mandate.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE.....	3
I. Factual Background.....	3
II. Proceedings Below	4
REASONS FOR DENYING THE PETITION	10
I. Petitioners Are Seeking A Rehearing Of A Matter Already Decided In This Court And Have Identified No Deviation From This Court's Mandate	11
II. The Kentucky Supreme Court's Interpretation Of The Wellner Power Of Attorney In <i>Extendicare Homes v. Whisman</i> Was Plausible As A Matter Of Law And Was Both Reasonable And Correct.....	18
III. Affirmatively Interpreting The Meaning And Effect Of A Power Of Attorney Should Be A Matter For The State Court.....	23
IV. Certiorari Is Not The Appropriate Vehicle For Relief.....	25
CONCLUSION	27

TABLE OF CONTENTS – Continued

	Page
APPENDIX	
Brief excerpt for Kindred Nursing Centers Limited Partnership et al., <i>Kindred Nursing Centers Ltd. Partnership v. Clark</i> , 137 S.Ct. 1421 (2017) (No. 16-32), 2016 WL 7210375	App. 1

TABLE OF AUTHORITIES

	Page
CASES	
<i>Amgen Inc. v. Harris</i> , 136 S.Ct. 758 (2016)	26
<i>Aull v. Houston</i> , 345 S.W.3d 232 (Ky.Ct.App. 2010)	22
<i>Brown v. Commonwealth</i> , 313 S.W.3d 577 (Ky. 2010)	14
<i>Christianson v. Colt Industries Operating Corp.</i> , 486 U.S. 800 (1988)	12
<i>Clinton v. Hibbs' Ex'x</i> , 259 S.W. 356 (Ky. 1924).....	18
<i>Deen v. Hickman</i> , 79 S.Ct. 1 (1958)	14, 25
<i>DIRECTV, Inc. v. Imburgia</i> , 136 S.Ct. 463 (2016) ..	23, 24
<i>Doctor's Associates v. Casarotto</i> , 517 U.S. 681 (1996)	23, 24
<i>Donna Ping v. Beverly Enterprises, Inc.</i> , 376 S.W.3d 581 (Ky. 2012)	4
<i>Extendicare Homes, Inc. v. Whisman</i> , 478 S.W.3d 306 (Ky. 2015)	<i>passim</i>
<i>Flemming v. Nestor</i> , 363 U.S. 603 (1960)	22
<i>Hackworth v. Hastings Industrial Co.</i> , 142 S.W. 681 (Ky. 1912)	19, 24
<i>Harding v. Kentucky River Hardwood Co.</i> , 265 S.W. 429 (Ky. 1924)	18
<i>Kindred Nursing Centers Ltd. Partnership v. Clark</i> , 137 S.Ct. 1421 (2017)	<i>passim</i>
<i>Kindred Nursing Centers Ltd. Partnership v. Wellner</i> , 533 S.W.3d 189 (Ky. 2017)	1

TABLE OF AUTHORITIES – Continued

	Page
<i>Mill Street Church of Christ v. Hogan</i> , 785 S.W.2d 263 (Ky.Ct.App. 1990).....	18
<i>State of Washington ex rel. Grays Harbor Log- ging Co. v. Coats-Fordney Logging Co.</i> , 243 U.S. 251 (1917).....	25
<i>Vendo Co. v. Lektro-Vend Corp.</i> , 434 U.S. 425 (1978).....	25
 STATUTES AND RULES	
9 U.S.C. § 2	7
SUP. CT. R. 20.....	25
UNIF. POWER OF ATTORNEY ACT § 102(14)	22
UNIF. POWER OF ATTORNEY ACT § 206.....	22
 OTHER AUTHORITIES	
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 254 (2012).....	12
RESTATEMENT (THIRD) OF AGENCY § 2.02.....	5

INTRODUCTION

Petitioners' Question Presented entirely misstates the holding of the lower court and ignores the posture of the case for which they seek a writ. There is no "newly-announced rule" from the court below, and the Kentucky Supreme Court did not reinterpret the Wellner power of attorney in the decision below. Petitioners attempt to dupe this Court into "re-deciding" portions of the *Kindred Nursing Centers v. Clark* case, *see infra*, under the guise of reviewing the lower court's decision in *Kindred Nursing Centers v. Wellner*.

In *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421 (2017), this Court, in pertinent part, remanded that case to the Kentucky Supreme Court "to determine whether [the Kentucky Supreme Court] adheres, in absence of its clear-statement rule, to its prior reading of the Wellner power of attorney." This Court was clear in stating that if the Kentucky Supreme Court's "interpretation of the document is wholly independent of the court's clear-statement rule, then nothing we have said disturbs it." *Id.* at 1429. In the case below, now under petition, the Kentucky Supreme Court stated that its prior reading of the Wellner power of attorney had been wholly independent of the discredited clear-statement rule, and therefore that court would adhere to its original interpretation of the Wellner power of attorney.

In their Question Presented, Petitioners state that the lower court "held that the power of attorney granted to respondent Beverly Wellner did not authorize her to

agree to arbitration on behalf of her principal.” Pet. i. This is untrue. No such holding exists in the case below. In fact, the court below made it abundantly clear that it would “not review [the] original interpretation of the Wellner POA *ab initio*.”

Any questions posed in a petition of the case below must arise in terms of the lower court’s fidelity to the mandate issued to it. Yet, Petitioners studiously ignore this perspective in their petition. Rather, Petitioners appear to want to reargue the prior law of the case, from *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015) (reversed in part, vacated in part). Such re-argument is inappropriate. This Court in *Clark* has already had the lower court’s interpretive reasoning of the Wellner power of attorney in front of it, via *Extendicare Homes v. Whisman*, decided in *Kindred Nursing Centers v. Clark*, and inquired only as to whether the clear-statement rule had influenced this reasoning.

Fidelity to the remand from *Clark*, rather than a rehash of the strictures of the FAA vis-à-vis the language of the Wellner power of attorney, is the only possible subject matter for a writ. The petition does not identify and argue any reason to question the lower court’s fidelity to the remand, and a writ of certiorari should not issue on a petition that cannot even correctly identify the holding of the lower court. This Court should deny Petitioners’ petition.



STATEMENT OF THE CASE

I. Factual Background

The underlying case involved in this petition stems from allegations of abuse and neglect of nursing home resident Joe Wellner, committed by Petitioners and their nursing home facility, Winchester Centre for Health and Rehabilitation (n/k/a Fountain Circle Health and Rehabilitation Center). Joe P. Wellner was a resident of Fountain Circle Health and Rehabilitation Center from August 16, 2008, until June 15, 2009, dying on June 19, 2009. Respondent Beverly Wellner, on behalf of the Estate of her husband and on behalf of his wrongful death beneficiaries, alleged in a Complaint in the Circuit Court for Clark County, Kentucky, that Joe Wellner sustained numerous injuries, including falls, dehydration, malnutrition, pressure sores, infections, improper wound care, severe pain, and death.

It was alleged, and was taken as fact by the Kentucky Supreme Court below, that at the time of Joe Wellner's admission to Fountain Circle Health and Rehabilitation Center, Joe Wellner's attorney-in-fact, Beverly Wellner, executed a pre-dispute arbitration agreement on behalf of the resident, ostensibly pursuant to a written power of attorney. The Wellner power of attorney provided in pertinent part:

To, make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance.

Extendicare Homes v. Whisman, 478 S.W.3d at 319.

When Joe Wellner was admitted to Fountain Circle Health and Rehabilitation Center, his attorney-in-fact, pursuant to the power of attorney, putatively executed a separate, free-standing, pre-dispute arbitration agreement on his behalf. This arbitration agreement was not a condition for the provision of health care at Petitioners' facility. There was no evidence of the authority of the attorney-in-fact, other than the written power of attorney.

II. Proceedings Below

Upon motion filed in the Kentucky State trial court case of *Wellner v. Kindred Nursing Centers* to compel arbitration, the Clark County Circuit Court initially ordered enforcement of the putative arbitration agreement. However, the Kentucky Supreme Court subsequently entered a decision in the case of *Donna Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), cert. denied, 133 S.Ct. 1996 (2013), and Respondent moved for reconsideration in the Clark County Circuit Court.

Relying upon the binding authority of *Ping*, the Clark County Circuit Court vacated its earlier order compelling arbitration, substituting therefor an order denying the motions to compel arbitration. *Extendicare Homes v. Whisman*, 478 S.W.3d at 345. Petitioners filed motions for interlocutory relief in the Court of Appeals of Kentucky. Given the Kentucky Supreme Court's decision in *Ping v. Beverly Enterprises*, see *supra*, and the reliance in *Ping* on the RESTATEMENT

THIRD OF AGENCY § 2.02, the Kentucky Court of Appeals denied relief. *Id.* at 318

Petitioners appealed to the Kentucky Supreme Court. The Kentucky Supreme Court consolidated the case below with two other appellate cases from the Kentucky Court of Appeals, appellate cases which had in turn come up from the Clark and Trigg County Circuit Courts. The Kentucky Supreme Court therefore had occasion to decide the scope of agency power encompassed in three separate powers of attorney, vis-à-vis pre-dispute arbitration agreements in *Extendicare Homes v. Whisman*.

Not surprisingly, the Kentucky Supreme Court in *Extendicare Homes v. Whisman* interpreted the three powers of attorney distinctively from one another, based upon their respective verbiage. With respect to two of the three powers of attorney, including that of Joe Wellner, the Kentucky Supreme Court determined that neither encompassed the authority to enter into a pre-dispute arbitration agreement.

With regard to the Wellner power of attorney, the Kentucky Supreme Court concluded that the power of attorney language was insufficient on its face to permit the attorney-in-fact to bind the principal to a pre-dispute arbitration agreement. *Extendicare Homes v. Whisman*, 478 S.W.3d at 326. The Wellner power of attorney simply did not contain language encompassing Fountain Circle's pre-dispute arbitration agreement. It included language granting the attorney-in-fact some authority over Joe Wellner's legal affairs, and language

granting the power to make contracts regarding Joe Wellner's property. However, the Kentucky Supreme Court concluded that the instrument language that included "the right to institute legal proceedings" to recover money was insufficient because, self-evidently, executing an arbitration agreement, pre-dispute, is not the institution of any kind of legal proceeding. *Id.* at 325. Additionally, the Kentucky Supreme Court also concluded that, while a chose-in-action, such as a right to be vindicated through formal dispute resolution, is a species of property under Kentucky law; pre-dispute arbitration agreements are fundamentally transactions involving the parties' rights in a vacuum, apart from property (*e.g.*, preemptive forum waiver and forum selection), and not a transaction normatively understood by a lay reader as a property contract. *Id.* at 325-326. This was an interpretation of the language of the Wellner power of attorney and was independent of the judicially-imposed clear-statement rule.

With respect to one of the other two powers of attorney, that of Olive Clark to her daughter Janis Clark, the Kentucky Supreme Court determined that that power of attorney on its face encompassed the authority to enter into the pre-dispute arbitration agreement. The Kentucky Supreme Court noted that the Clark power of attorney gave the agent the authority to "dispose of all matters," and was in effect a "universal delegation of authority." "[I]t would be impossible to say that entering into [an] arbitration agreement was not covered." *Id.* at 327. Nonetheless, the Kentucky

Supreme Court affirmed the lower courts' decisions not to enforce arbitration, reasoning that the significance of ceding one's right to jury trial, even in a civil context, was so important that a Kentucky power of attorney must specifically reference such power of cession in the instrument, before the power would be recognized. That is, the Kentucky judiciary erected a paternalistic barrier with regard to when it would recognize an agent's power to execute an arbitration agreement. The Kentucky Supreme Court thus established what this Court characterized as the "clear-statement rule" for Kentucky powers of attorney.

In *Kindred Nursing Centers v. Clark*, this Court held that such a rule runs afoul of the FAA, which provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable," as any other contract. 9 U.S.C. § 2 enshrines a principle of non-discrimination against utilizing arbitration as a means of dispute resolution. In effect, the U.S. Congress has acted to prohibit courts from paternalistically interposing their judgment over parties who freely contract for arbitration. *Kindred Nursing Centers v. Clark* establishes that this prohibition applies with equal force whether the arbitration contract is executed directly or through an agent. This Court stated:

The Kentucky Supreme Court's clear-statement rule [. . .] fails to put arbitration agreements on an equal plane with other contracts. By the court's own account, that rule (like the one *Concepcion* posited) serves to safeguard a

person’s “right to access the courts and to trial by jury.” (citations omitted)

* * *

Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA’s edict against singling out those contracts for disfavored treatment.

Kindred Nursing Centers v. Clark, 137 S.Ct. at 1426-1427.

This Court therefore reversed the lower court’s decision with respect to the power of attorney of Olive Clark. With regard to the Wellner power of attorney, this Court returned the case to the Kentucky Supreme Court, with the following instructions:

On remand, the court should determine whether it adheres, in the absence of its clear-statement rule, to its prior reading of the Wellner power of attorney.

Id. at 1429.

Importantly, as is clear from the above, this Court has already had occasion to, and has already in fact, reviewed the lower court’s interpretation of the Wellner power of attorney, as a matter separate from the imposition of the preempted clear-statement rule:

The Kentucky Supreme Court began its opinion by stating that the Wellner power of attorney was insufficiently broad to give Beverly the authority to execute an arbitration agreement

for Joe. See *supra*, at 3. If that interpretation of the document is wholly independent of the court's clear-statement rule, then nothing we have said disturbs it.

Id.

Thus, the Kentucky Supreme Court below considered its sole task to be examining its prior interpretation of the Wellner power of attorney and announcing whether that interpretation implicated the discredited clear-statement rule. The lower court announced in no uncertain terms that this rule was not implicated. It did not reinterpret the Wellner power of attorney, and, in fact, it opined that under the circumstances, it was bound *not* to reinterpret the power of attorney. Therefore, the lower court stated its adherence to its previous interpretation of the Wellner power of attorney:

[O]ur conclusion that the Wellner POA was insufficient to vest Beverly Wellner with the power to execute a pre-dispute arbitration agreement as part of Joe Wellner's admission to a nursing home 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 *Extendicare* decision remains undisturbed.

Pet. App. 10.

As in the case of *Extendicare Homes v. Whisman*, Justice Hughes¹ authored a Dissent, joined by Chief

¹ Formerly Justice Noble.

Justice Minton and Justice VanMeter. Justice Hughes believed the Kentucky Supreme Court's original interpretation of the Wellner power of attorney had been an error, and she attributed this error solely to an impermissible hostility for arbitration dispute resolution. The Dissent did not address itself to whether the clear-statement rule had been implicated in the Wellner interpretation, even though this was the only issue remaining for the court to take up below. Pet. App. 10-21.



REASONS FOR DENYING THE PETITION

In the case on petition, the Kentucky Supreme Court was tasked with entering a clarification of its own recent case, *Extendicare Homes v. Whisman*. The lower court thus went on to resolve the one issue left outstanding from the law of the case, *i.e.*, whether the earlier holding of that court relied upon the preempted “clear-statement rule.” The lower court explicitly stated that it was only resolving this one question on remand. Thus, any other comment in its entered Opinion would necessarily be dictum. Petitioners have not identified any reason to review the lower court’s actual holding. Rather, they have engaged in an overt attempt to re-argue their prior appellate case.

As a matter of this Court’s own law of the case, the lower court’s original interpretation of the Wellner power of attorney was a plausible reading consistent with the FAA. Indeed, the lower court’s original (and only) interpretation of the Wellner power of attorney

was also reasonable, and accurately represents the authority encompassed by that instrument. No writ of certiorari should issue.

I. Petitioners Are Seeking A Rehearing Of A Matter Already Decided In This Court And Have Identified No Deviation From This Court's Mandate.

If the lower court had simply stated that it “adhered, in the absence of the clear-statement rule, to its prior reading of the Wellner power of attorney,” there could be no question of seeking certiorari for such a decision. As it is, the result must be the same even with the longer Kentucky Supreme Court Opinion in the case below. This Court’s remand of the Wellner power of attorney to the lower court, with instructions, forecloses any dispute.

On remand, the court should determine whether it adheres, in the absence of its clear-statement rule, to its prior reading of the Wellner power of attorney.

* * *

If that interpretation of the document is wholly independent of the court’s clear-statement rule, then nothing we have said disturbs it.

Clark, 137 S.Ct. at 1429.

With such a clear holding of this Court, accompanied by such clear instructions, the law of the case in this case has been set: If the lower court concluded that

the Wellner power of attorney did not encompass sufficient authority to execute the pre-dispute arbitration agreement, and that conclusion was wholly independent of the discredited clear-statement rule; such a conclusion does not, as a matter of the law of the case, offend the FAA. “‘As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.’” *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-816 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)); see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 254-255 (2012) (when an ambiguous provision “has already been given an authoritative judicial interpretation . . . the principle of *stare decisis* applies with particular force”). This is only to say that there must exist, as a matter of this Court’s own law of the case, a plausible reading of the power of attorney congruent with the requirements of the FAA, whereby that instrument does not encompass sufficient authority.

Despite the impression left by Petitioners’ petition, the court below “[did] not review [the] original interpretation of the Wellner POA *ab initio*.” Pet. App. 5 n. 3. Rather, the lower court deemed its mandate to be limited to expressing whether or not that court’s Opinion in *Extendicare Homes v. Whisman*, with regard to the interpretation of the Wellner power of attorney, was impermissibly influenced by the clear-statement

rule preempted by this Court. The Kentucky Supreme Court concluded very clearly that it was not:

[O]ur conclusion that the Wellner POA was insufficient to vest Beverly Wellner with the power to execute a pre-dispute arbitration agreement as part of Joe Wellner's admission to a nursing home 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 *Extendicare* decision remains undisturbed.

Pet. App. 10.

This limited review was necessitated by this Court's own treatment and explication regarding the Wellner power of attorney:

If *that* interpretation of the document is wholly independent of the court's clear-statement rule, then nothing we have said disturbs it. But if that rule at all influenced the construction for the Wellner power of attorney, *then* the court must evaluate the document's meaning *anew*.

Clark, 137 S.Ct. at 429 (emphasis added).

The lower court thus correctly saw its mandate as very precisely delimited. This Court called upon the lower court to clarify the latter's own prior decision and to declare whether the preempted clear-statement rule tainted that decision. If the taint was present, the lower court would reinterpret the reach of authority

encompassed by the Wellner power of attorney. If the taint was absent, the lower court was foreclosed from reinterpreting the reach of authority encompassed by the Wellner power of attorney, both by this Court's precedent, see *Deen v. Hickman*, 79 S.Ct. 1 (1958) (upon determination by this Court that a reasonable jury could have determined negligence on the part of railroad-defendant, the Texas Supreme Court was foreclosed from ordering consideration that the jury's verdict was so against the weight and preponderance of the evidence as to require a new trial in the interest of the justice), and by Kentucky's own law of mandate, and principles of *stare decisis*. See *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010) ("on remand from a higher court a lower court must obey and give effect to the higher court's express or necessarily implied holdings and instructions").

Thus, even assuming *arguendo* that the Kentucky Supreme Court's original (and only) interpretation of the Wellner power of attorney was in error in some way, a conclusion which Respondent obviously denies, the lower court was in any event powerless to effect a change if the clear-statement was not implicated. While Petitioners use the lower court's conclusion that Petitioners had waived additional argument to lambaste that court, see Pet. 18-19, Petitioners miss the larger point: It is not so much that Petitioners *waived* substantive argument in front of this Court regarding the Wellner power of attorney, as much as it is that Petitioners, having already argued the points made in their petition here (see App. 1, *infra*), ***has already lost***

the argument in front of this Court regarding the Wellner power of attorney interpretation.

The sole question put to the lower court was whether its previous interpretation was “wholly independent of its clear-statement rule.” Upon verifying that such interpretation had in fact been independent of the clear-statement rule, the lower court correctly considered itself bound by this Court’s mandate and Kentucky’s law of the case doctrine to adhere to that previous interpretation without reinterpretation. Indeed, the Kentucky Supreme Court stated:

By the explicit terms of the Supreme Court mandate, if our original interpretation of the Wellner POA was wholly independent of the clear statement rule, then it must stand as the final decision of this Court.

Pet. App. 5 n.3.

To the extent that the petition identifies the actual question remaining at this stage, *i.e.*, the lower court’s fidelity to the remand, Petitioners argue from the presumption that Respondent has the burden to establish the lower court’s fidelity to the remand. “[J]ust as in *Imburgia*, the proclamation of neutrality by the majority below cannot be taken at face value.” Pet. 13.

However, the opposite is true. As this Court even remarked in oral argument in *Kindred v. Clark*:

[U]sually we don’t presume that State courts are acting in ways that are not in accordance

with law. Actually, we usually give them the benefit of a kind of good faith presumption.

So if you're saying, well, no, they have to prove it first in five other cases before we'll believe them that they really do mean all constitutional rights, that seems, you know, an unusual rule to apply to State supreme courts who we usually think are acting in good faith and in accordance with law.

Tr. of Oral Arg. 44 (Kagan, J.).

[W]ell, you haven't come up with a distinction that persuades me, and that's important because I think, as Justice Kagan said, we have to assume the Kentucky Supreme Court is acting in good faith.

Tr. of Oral Arg. 46 (Roberts, C.J.).

Petitioners' implied position, that the lower court did not conform to the remand from *Clark*, despite that court's protestation to the contrary, can only exist as an exercise in conclusion-based and circular reasoning. In *Extendicare*, the lower court interpreted the Wellner power of attorney as encompassing insufficient authority to execute a pre-dispute arbitration agreement. In the decision below, the lower court clarified that this interpretation did not stem from an application of the clear-statement rule. Petitioners are impliedly taking the position that the earlier interpretation of the Wellner power of attorney must necessarily have involved an application of the clear-statement rule, and

therefore the lower court violated its mandate in the decision below by denying this application.

The law of the case here disposes of such an argument. Petitioners throughout their petition have stubbornly refused to concede what they must concede – that there does exist a plausible reading, consistent with the FAA, for the Wellner power of attorney not to include the authority to execute a pre-dispute arbitration agreement.

Moreover, simply put, if the lower court had applied the clear-statement rule in its previous interpretation of the Wellner power of attorney, then why did it not say so? That the lower court reiterated *in dicta* its reasoning for the inadequacy of the Wellner power of attorney should be conclusive to establish that those reasons were separate and apart from the clear-statement rule. This is so, even if that reasoning was not compelling to the Dissent below.

Petitioners have identified no reason to question the Kentucky Supreme Court's adherence to this Court's mandate. As such, this petition should be denied.

II. The Kentucky Supreme Court's Interpretation Of The Wellner Power Of Attorney In *Extendicare Homes v. Whisman* Was Plausible As A Matter Of Law And Was Both Reasonable And Correct.

As outlined above, the Kentucky Supreme Court did not reinterpret the Wellner power of attorney in the decision below, so its interpretation of the same is not currently before this Court. However, should this Court reach this issue, the Kentucky Supreme Court's interpretation of the Wellner power of attorney found in *Extendicare Homes v. Whisman*, was not only plausible as a matter of the law of the case; it was also both reasonable and correct.

Under Kentucky law, powers of attorney are strictly construed. *Harding v. Kentucky River Hardwood Co.*, 265 S.W. 429 (Ky. 1924). They exist only to give effect to the purposes and intentions of the principal. See *Clinton v. Hibbs' Ex'x*, 259 S.W. 356, 357-358 (Ky. 1924) (finding principal's intent, agent's authority to conduct all business and execute all notes, at the agent's discretion, held not to encompass the power to bind the principal as surety). "Powers of attorney delegating authority to perform specific acts, and also containing general words, are limited to the particular acts authorized." *Harding v. Kentucky River Hardwood*, 265 S.W. at 431 (quoting *U.S. Fidelity Co. v. McGinnis*, 145 S.W. 1112 (Ky. 1912)). The burden to establish agency and the extent of agency is upon the proponent thereof. See *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky.Ct.App. 1990). Most

importantly, “a party dealing with an agent is chargeable with notice of the contents of the power under which he acts, and ***must interpret it at his own peril.***” *Hackworth v. Hastings Industrial Co.*, 142 S.W. 681, 682 (Ky. 1912) (citing *Sandford v. Handy*, 23 Wend. 260 (N.Y.Sup.Ct. 1840) (emphasis added)).

The Kentucky Supreme Court, consistent with Kentucky canons of interpretation for powers of attorney, interpreted the Wellner instrument both literally, and with regard to the objective understandings of a reasonable principal. See *Hackworth v. Hastings Industrial Co.*, *supra* (interpreting a power of attorney from the perspective of a reasonable principal, rather than from the perspective of a third party). The Wellner power of attorney language regarding property contracts was facially insufficient. While the lower court noted that Joe Wellner’s agent indeed had the authority to agree to arbitrate a dispute over property, including property in the form of a chose-in-action; it also noted that this was not in the nature of the agreement in question, and would not be understood by a reasonable principal so to be. The contract below did not involve property existent at the time of the contract’s execution, and thus the contract was not one fundamentally related to any property:

The distinction we made with respect to the ***pre-dispute*** arbitration agreement was not based at all on any aversion to an implied, rather than an express, power to waive constitutional rights. Beverly Wellner did not execute Kindred’s optional free standing pre-dispute

arbitration agreement *within the context of a lawsuit or claim* for the recovery of anything belonging to Joe Wellner. The act that required supporting authorization was her execution of the pre-dispute arbitration agreement *in the context of admitting him* to a nursing home. *That act was in no way connected to the pursuit of any claim of Joe's.*

Pet. App. 8 (emphasis in the original).

That is, an agreement to arbitrate regarding an existent claim is indeed a contract in relation to personal property. However, a pre-dispute agreement to arbitrate is not a contract “in relation to” property. “Property,” as used in the instrument language, refers to things, and not to a subject matter in the abstract. And before the factual predicate for an action arises, there exists no chose-in-action and no property. Such a legal conclusion necessarily stems from the Kentucky law of property.

In attempting to rebut this interpretation in their petition, Petitioners mischaracterize the distinction between pre-dispute and post-dispute agreements as follows:

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 possession at the time the power of attorney was executed but not future possession

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 principal bought the car in 2017 or 2019.

Pet. 16 (emphasis omitted).

This flimsy and seemingly desperate characterization by Petitioners should speak volumes. As ought to be self-evident, the focal distinction made by the Kentucky Supreme Court is the point in time at which an agent-executed arbitration agreement is reached, not the time at which the power of attorney is granted. The distinction is not between property held at the time of the power of attorney's execution, and property to be acquired thereafter; it is between property existent at the time a contract for arbitration is executed by the agent, and "property" speculated into existence, *e.g.*, before the factual predicate for a chose-in-action actually arises. The Kentucky Supreme Court's interpretation of the Wellner power of attorney would, for instance, certainly permit the attorney-in-fact to sell a car that the principal only afterward acquired. It would not however, permit the attorney-in-fact to agree to sell a car before the principal had actually acquired it.

The distinction made by the Kentucky Supreme Court is not only plausible, it is sensible. Indeed, Petitioners themselves correctly articulate the distinction: "The only possible basis for that distinction could be a

view that future legal claims that have not yet accrued cannot be considered ‘property.’” Pet. 15.

That is correct. *Cf. Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (loss of Social Security benefits not “property” such that every defeasance thereof implicates the Due Process Clause of the Fifth Amendment); *see also Aull v. Houston*, 345 S.W.3d 232, 236-237 (Ky.Ct.App. 2010) (loss of decedent’s disability pension not a loss accruing to decedent’s wrongful death beneficiaries falling under the remedy provided by KRS § 411.130).

Indeed, the Uniform Power of Attorney Act makes the exact same distinction, in a slightly different context. A general power of attorney under the Act with authority over stocks and bonds provides the broker the authority to buy, sell, and exchange a principal’s stocks and bonds on behalf of the principal. UNIF. POWER OF ATTORNEY ACT § 206. However, the Act distinguishes between existent stocks and bonds, to be purchased, sold, or exchanged; and “commodity futures contracts and call or put options on stocks or stock indexes.” UNIF. POWER OF ATTORNEY ACT § 102(14). Futures contracts are by default excluded. These do not facially fall under a Section 206 power of attorney without further elaboration, just as the Wellner agent here could not encumber a chose-in-action of Joe Wellner before the factual predicate supporting the chose-in-action had actually arisen.

A pre-dispute arbitration agreement is not a contract buying, selling, leasing, or otherwise related to

any property. That the Kentucky Supreme Court concluded that no lay principal would understand it as such is a reasonable conclusion. In sum, the lower court's interpretation of the Wellner power of attorney, found in *Extendicare Homes v. Whisman* (and previously-reviewed by this Court), fell under the instrument's black letter, and therefore the petition should be denied.

III. Affirmatively Interpreting The Meaning And Effect Of A Power Of Attorney Should Be A Matter For The State Court.

Notably, Petitioners are asking this Court for relief qualitatively different from the petitioners in *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2016), or in *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996). In those cases, where contracts under State law were being considered, no one otherwise disputed that enforceable contracts existed, save for the presence of a flaw or flawed circumstance allegedly present in the contracts. In *DIRECTV*, the evinced intent of the contracting parties was to enter into an arbitration agreement, but the California State court interjected an obsolete provision into the contract to make it unenforceable. This Court's holding merely removed the lower court's peculiar interjection of that provision as discriminatory toward arbitration and violative of the FAA. This Court did not otherwise affirmatively interpret the California contract.

Likewise, in *Doctor's Associates*, there was no question that an agreement for arbitration existed, save for a drafting “flaw” created only by operation of a Montana statute, making the contract invalid as drafted and executed. Again, this Court merely acted to remove the obstacle to enforcement, holding that the Montana statute was preempted by the FAA. This Court did not affirmatively interpret a Montana contract.

Here, Petitioners are in effect asking this Court to ***affirmatively interpret*** a power of attorney, to declare affirmatively what powers are encompassed therein. Interpreting the meaning of a power of attorney is a task committed to the judiciary certainly, but at the end of the day, the court deciding what Joe Wellner’s power of attorney ***means***, should be the court of last resort of the State in question, *i.e.*, the Kentucky Supreme Court. Moreover, unlike *DIRECTV*, or *Doctor's Associates*, where a contracting party stood to lose a bargained-for contract right, Petitioners do not stand to lose ***a right***, as the instrument in question here is in fact another party’s power of attorney. *See Hackworth v. Hastings Industrial Co.*, 142 S.W. at 682 (third party’s subjective understanding of another’s power of attorney not dispositive of the instrument’s authority).

This Court should not wish to take on a role in interpreting powers of attorney in the several United States. Issuing a writ of certiorari in this case would open up this Court’s doors to parties seeking alternative interpretations of powers of attorney whenever a federal statutory scheme can be implicated and whenever

those parties are dissatisfied with a State court interpretation. This petition threatens to federalize a huge area of State law. The petition should be denied.

IV. Certiorari Is Not The Appropriate Vehicle For Relief.

Petitioners are asking for a writ of certiorari, in effect, for this Court to hold that the Wellner power of attorney encompassed sufficient authority to execute a pre-dispute arbitration agreement. This is improper. Rather, assuming *arguendo* the efficacy of the merits of their petition, Petitioners should be asking this Court for a writ of mandamus to compel the lower court to do as instructed: To determine whether its previous interpretation was tainted by the preempted clear-statement rule, *and*, if so, to reinterpret the power of attorney *ab initio*. SUP. CT. R. 20; *see also Deen v. Hickman*, 79 S.Ct. 1 (1958) (motion for a writ of mandamus granted, to compel the Texas Supreme Court to conform to this Court's decision holding that a jury finding of negligence was with sufficient reason); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978) (proper remedy to correct a lower court's failure to conform to this Court's mandate is by writ of mandamus served upon the lower court).

The purpose of a writ of certiorari is for this Court to review the legality of a lower court decision under federal law and/or the U.S. Constitution and to potentially vindicate an asserted right of the petitioner. *State of Washington ex rel. Grays Harbor Logging Co.*

v. Coats-Fordney Logging Co., 243 U.S. 251, 296 (1917). The legality of the lower court’s decision is not in question here. At root, the lower court was presented a “yes” or “no” question with this Court’s instruction to clarify a prior holding of the lower court in the same case. The lower court answered “no.” Surely this answer must be consistent with the FAA, or this Court would not have given the lower court that option. Furthermore, it is not for this Court to vindicate Petitioners’ asserted right to arbitration. If the lower court did not conform to its mandate, the remedy is not, as Petitioners appear to suppose, for this Court to interpret the Wellner power of attorney for itself.² The remedy is by writ of mandamus to the lower court. The petition should be denied.



² Petitioners’ citation to *Amgen Inc. v. Harris*, 136 S.Ct. 758 (2016), is misguided. In *Amgen Inc.*, this Court remanded to the U.S. Court of Appeals for the Ninth Circuit with instructions for that court to reconsider its prior decision ***in light of identified precedent of this Court***. Here, ***the lower court*** was charged simply with ***clarifying*** what it had done in ***its own prior decision***.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Kentucky should be denied.

Respectfully submitted,

ROBERT E. SALYER
Counsel of Record
WILKES & MCHUGH, P.A.
429 North Broadway
P.O. Box 1747
Lexington, KY 40588
(859) 455-3356
rsalyer@wilkesmchugh.com

and

JAMES T. GILBERT
COY, GILBERT, SHEPHERD & WILSON
212 North Second Street
Richmond, KY 40475
(859) 623-3877

Counsel for Respondent

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