No. 21-

IN THE

Supreme Court of the United States

SNH SE ASHLEY RIVER TENANT, LLC; FVE MANAGERS, INC.; FIVE STAR SENIOR LIVING INC. F/K/A FIVE STAR QUALITY CARE, INC.; SNH SE TENANT TRS, INC.; DIVERSIFIED HEALTHCARE TRUST F/K/A SENIOR HOUSING PROPERTIES TRUST; SNH TRS, INC.; AND CANDY D. CURE,

Petitioners,

v.

THAYER W. ARREDONDO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HUBERT WHALEY, DECEASED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) requires courts "to put arbitration agreements on an equal plane with other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017). That means that courts may not decline to enforce arbitration provisions based on rules that are specific to arbitration.

In this case, a principal granted an agent comprehensive powers of attorney to manage his affairs and make health care decisions on his behalf. The agent exercised her power to admit the principal into a senior living community. In connection with that admission, she signed an arbitration agreement on the principal's behalf. The South Carolina Supreme Court refused to enforce the arbitration agreement, holding that the powers of attorney authorized the agent to agree to arbitration only after a claim accrues, but never before. The court reached that conclusion only by reading the provisions in the relevant powers of attorney in severely constrained ways that it would not apply to any other contract.

The question presented is whether the FAA preempts the South Carolina Supreme Court's arbitration-specific approach to construing comprehensive powers of attorney to preclude an agent's power to agree to arbitrate future claims.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of petitioners SNH SE Ashley River Tenant, LLC, SNH SE Tenant TRS, Inc. and SNH TRS, Inc. is Diversified Healthcare Trust, formerly known as Senior Housing Properties Trust, which owns 100% of their stock. As of the date of this petition, approximately 18.70% of the total number of shares issued and outstanding, including warrants and options, of Diversified Healthcare Trust is owned by funds managed by BlackRock, Inc. Approximately 16.50% of the total number of shares issued and outstanding, including warrants and options, of Diversified Healthcare Trust is owned by funds managed by The Vanguard Group, Inc.

The parent corporation of petitioner FVE Managers, Inc. is Five Star Senior Living Inc., formerly known as Five Star Quality Care, Inc., which owns 100% of its stock. As of the date of this petition, approximately 34% of the total number of shares issued and outstanding, including warrants and options, of Five Star Senior Living Inc. is owned by Diversified Healthcare Trust.

RELATED PROCEEDINGS

Thayer Arredondo v. SNH SE Ashley River Tenant, LLC et al., No. 2019-001767 (South Carolina Supreme Court judgment entered March 10, 2021)

Thayer Arredondo v. SNH SE Ashley River Tenant, LLC et al., No. 2017-001298 (South Carolina Court of Appeals judgment entered August 14, 2019)

Thayer Arredondo v. SNH SE Ashley River Tenant, LLC et al., No. 2016-CP-10-5319 (Charleston County Court of Common Pleas order entered April 18, 2017)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

This is becoming a maddening, and unseemly, game of cat and mouse: This Court declares that it is impermissible to explicitly disfavor arbitration agreements. In response, lower courts find a device to achieve the same result. For example, they adopt legal rules that hinge on a defining feature of arbitration or interpret contract terms in the arbitration context differently than they would in any other context. This Court shuts down that route. Lower courts try another. And the game continues. This case is yet another round in this game of lower courts attempting to find ways to evade this Court's FAA precedents.

The fact pattern is familiar to the Court from *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1427 (2017): A principal executes a power of attorney to grant a trusted agent expansive authority to make decisions on the principal's behalf. The grant of authority is couched in the most expansive terms imaginable. Invoking that authority, the agent signs a contract agreeing to arbitrate future disputes. The agent then resists arbitration on the ground that the agent had no authority to agree to it. And the lower court refuses to enforce the arbitration agreement on that basis.

In *Kindred*, this Court rejected that result on the ground that the state court improperly applied an arbitration-specific constraint on the power of attorney. The court in that case had demanded an explicit statement that the agent was authorized to waive the principal's right to a jury trial. But lower courts (including on remand in one of the consolidated cases in

Kindred) have found an easy path to the same result. They have gone out of their way to invalidate arbitration agreements by applying extraordinarily contrived interpretations of validly executed powers of attorney. And they conclude that the initial grant of power—however expansive—was not specific enough to authorize an agreement to arbitrate future disputes.

That is precisely what the South Carolina Supreme Court did here: It negated two broadly worded powers of attorney to invalidate an arbitration agreement. For example, one power of attorney authorized the agent to "release" and "dispose of … *any … property*, *right or thing whatsoever*." Pet. App. 48a-49a (emphasis added). Yet the court ignored that provision—in a way it never would for any other contract. That same document granted the agent authority to "execute … *any and all instruments* or writing of every kind and description whatsoever … concerning *any or all* of my business affairs, property or other assets … *including all property* … and *choses in action*," i.e., causes of action. Pet. App. 48a (emphasis added). South Carolina law makes clear that such language covers property that is acquired later. Yet, the court below concluded that it does not cover causes of action that accrued later.

These and similar maneuvers are exactly the sorts of clever "devices" that this Court has condemned in the past. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011). It has prohibited "unique" interpretations of contractual language that would not extend to "contracts other than arbitration contracts." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47,

55 (2015). And it has held that courts may not adopt interpretive rules that are "tailor-made to arbitration agreements." *Kindred*, 137 S. Ct. at 1427. But as the opinion below demonstrates, lower courts are not getting the message.

Their recalcitrance is especially problematic in the context of powers of attorney. Aging or ailing people routinely use these instruments to grant broad authority to family members or trusted advisers. The agents then frequently engage in transactions with a large swath of the business community, including nursing homes and assisted living facilities. These businesses are entitled to—and need to be able to—rely on the agents' agreements to arbitrate. They should not be disadvantaged as compared to other businesses that enter into transactions directly with the principal.

This Court's plenary review—or summary reversal—is necessary to ensure the continued vitality of its precedents and to safeguard the preemptive force of the FAA as Congress prescribed. Lower courts should not be allowed to circumvent so easily Congress's policy favoring arbitration and this Court's directive that they place arbitration agreements on equal footing with other contracts.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of South Carolina is reported at 433 S.C. 69, and reproduced at Pet. App. 1a-26a. The opinion of the Court of Appeals of South Carolina is unreported and is reproduced at Pet. App. 27a-39a. The Court of Common Pleas' order

denying Petitioners' motion to compel arbitration is unreported and is reproduced at Pet. App. 40a-47a.

JURISDICTION

The Supreme Court of South Carolina entered judgment on March 10, 2021. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, Cl. 2, provides in pertinent part:

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

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

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

> law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Ms. Arredondo's father makes her his agent pursuant to comprehensive powers of attorney

On January 30, 2003, Hubert Whaley executed two power of attorney documents conferring comprehensive authority on his daughter, Thayer Arredondo, to act as his "attorney-in-fact" —an agent with power to manage his affairs and enter into agreements and transactions on his behalf. Pet. App. 48a-67a; *see* Pet. App. 53a, 65a.

The first document—a General Durable Power of Attorney (General POA)—began by granting Mr. Whaley's designated agent authority to act "in [his] name, place and stead … and with the same force and effect as if [he] were personally present and had executed or performed the same." Pet. App. 48a. It proceeded to enumerate categories of powers encompassed within that broad grant, including:

> To make, sign, execute, issue, assign, transfer, endorse, release, satisfy and deliver *any and all* instruments or writing *of every kind and description whatsoever*, whether sealed or unsealed, of, in or concerning *any or all of my business affairs, property or other assets* whatsoever, including *all property*, real, personal or mixed, stocks, securities and *choses in action*, and wheresoever situated, including, *without limiting the generality hereof*

> *thereto*, notes, bonds, mortgages, leases, deeds, conveyances, bills of sale, and assignments, endorsements, *releases*, satisfactions, pledges or any agreements concerning any transfers of the above or of *any* other property, *right or thing*.

Pet. App. 48a (emphasis added). The General POA further provided that Ms. Arredondo could "perform any other and further acts or things necessary, appropriate, or incidental thereto, with the same validity and force and effect as if [Mr. Whaley] were personally, present, competent, and personally exercised the powers [him]self." Pet. App. 52a.

The second document Mr. Whaley signed was a Health Care Power of Attorney (Health Care POA). The Health Care POA noted at the outset that "unless you state otherwise, your agent will have the same authority to make decisions about your health care as you would have," and it expressly "grant[ed] [Ms. Arredondo] full authority to make decisions for [Mr. Whaley] regarding [his] health care." Pet. App. 56a, 60a. The Health Care POA also specifically provided that Ms. Arredondo could "take *any* other action necessary to making, documenting, and assuring implementation of decisions concerning [Mr. Whaley's] health care." Pet. App. 61a (emphasis added). That included the authority to "grant[] any waiver or release from liability required by any … health care provider" and to "*pursu[e] any legal action* in [Mr. Whaley's] name … to force compliance with [his] wishes as determined by [his] agent, or *to seek actual or punitive damages for the failure to comply*." *Id.* (emphasis added). The Health Care POA provided space for Mr.

Whaley to specify limitations on the authority he conferred. He left it blank. Pet. App. 62a.

Ms. Arredondo admits her father into an assisted living facility and executes an arbitration agreement on his behalf

In October 2012, Ms. Arredondo decided to admit Mr. Whaley to Ashley River Plantation, an assisted living and community residential care facility owned and operated by Petitioners (collectively, "Ashley River"). Pet. App. 2a-3a. Mr. Whaley had been diagnosed with dementia and required significant assistance with daily functions. *Id.*

In connection with Mr. Whaley's admission, Ms. Arredondo signed an arbitration agreement on his behalf. The agreement provided that "any claims, controversies, or disputes arising between [Mr. Whaley and the facility] involving a potential monetary amount in excess of $25,000 shall be resolved exclusively by binding arbitration." Pet. App. 68a. The agreement specified that neither party would be "permitted to pursue court action regarding [such] claims, controversies, or disputes." *Id.* It said that its terms would extend to related parties, including Mr. Whaley's "family, heirs, guardian, executor, administrator and assigns," as well as the facility's "directors, officers, employees, representatives, or agents." Pet. App. 71a.

The trial court refuses to enforce the arbitration agreement, but the intermediate appellate court reverses

In February 2014, Mr. Whaley was transferred from Ashley River to a local hospital. He passed away there six days later. Pet. App. 3a. Ms. Arredondo filed a wrongful death and survival suit against Ashley River in South Carolina state court. She alleged that the facility and its nursing staff had been negligent in caring for Mr. Whaley. Pet. App. 3a-4a. The complaint sought compensatory damages for Mr. Whaley's pain and suffering, medical expenses, funeral and burial expenses, and additional compensatory and punitive damages and attorney's fees. Pet. App. 3a-4a, 41a. Ashley River moved to compel arbitration pursuant to the arbitration agreement that Ms. Arredondo had signed. Pet. App. 4a, 41a.

The trial court denied the motion on two grounds. As relevant here, it held that Ms. Arredondo lacked authority to execute the arbitration agreement on Mr. Whaley's behalf because neither the General POA nor the Health Care POA "*expressly* conferred any authority" to agree to arbitration and thereby "waive [Mr. Whaley's] constitutional right to a jury trial." Pet. App. 43a (emphasis added). The court also held that the arbitration agreement was unconscionable given "the relative disparity of the parties' bargaining power." Pet. App. 46a.

The South Carolina Court of Appeals reversed on both grounds. It explained that the trial court erred in holding that a comprehensive power of attorney authorizes the agent to execute an arbitration

agreement only if arbitration is "specifically listed among the powers" conveyed. Pet. App. 29a. That "restrictive requirement," the court explained, conflicts with South Carolina law providing that "an act does not have to be specifically enumerated in a power of attorney in order for the agent to be authorized to perform the act on behalf of the principal." Pet. App. 31a (citing *First S. Bank v. Rosenberg*, 418 S.C. 170, 181 (Ct. App. 2016)). As important, the court also held that *Kindred* barred that approach, where this Court struck a near-identical "clear statement rule" on the ground that it "'singles out arbitration agreements for disfavored treatment,'" thereby "'violat[ing] the FAA.'" *Id.* (quoting *Kindred*, 137 S. Ct. at 1425).

The proper question, the Court of Appeals explained, is whether "the powers granted [by the power of attorney]," analyzed under general contract principles, "are broad enough to include" the act of signing an arbitration agreement. Pet. App. 31a. And here, the two powers of attorney clearly conveyed such authority. The General POA's "broad language" "granted Arredondo authority to execute all instruments concerning all types of property, including 'choses in action.'" Pet. App. 32a. Separately, the Health Care POA authorized Ms. Arredondo to "pursue legal action" and to "grant any waiver required by health care providers such as [Ashley River]." *Id.* The Court of Appeals therefore held that "the Powers of Attorney authorized Arredondo to waive the right to jury trial and execute an agreement selecting the forum in which any legal action would be taken." Pet. App. 33a.

The Court of Appeals also held that the trial court erred in invalidating the arbitration agreement as unconscionable. The agreement was "neither a surprise nor inconspicuous," it clearly "described … the trial rights a resident was waiving," and its terms "were not one-sided or oppressive." Pet. App. 34a-36a.

The South Carolina Supreme Court refuses to compel arbitration

The South Carolina Supreme Court reversed. Pet. App. 2a. It held that, despite their comprehensive terms, neither the General POA nor the Health Care POA gave Ms. Arredondo the authority to execute the arbitration agreement that she had signed. Pet. App. 5a-6a. Because that determination resolved the case, the court did not address unconscionability.

The court began by asserting that its "analysis does not turn upon the presence or absence of an explicit reference to arbitration or arbitration agreements in the powers of attorney"—the approach this Court rejected in *Kindred*. Pet. App. 6a. Instead, it rested its analysis on another version of the clear-statement rule.

The court acknowledged that "choses in action" are causes of action and property under South Carolina law. It held, however, that the term generally includes only causes of action that have already accrued. On that theory, the court held that the provision of the General POA authorizing Ms. Arredondo to execute "*any and all* instruments or writing of *every kind and description whatsoever*" concerning "*any or all*" of Mr. Whaley's "business affairs, property or

other assets whatsoever including" his "choses in action," did not convey authority to sign a pre-dispute arbitration agreement—that is, one encompassing causes of action that may arise in the future but have not necessarily accrued when the arbitration agreement is signed. Pet. App. 8a-12a. The court reasoned that arbitration agreements covering *future* disputes involve neither "chose[s] in action" nor any other property rights. Rather, they solely concern the constitutional right to a jury trial, and therefore cannot be executed under even the broadest grant of authority with respect to "choses in action" or property. *Id.*

In support of this conclusion, the court relied on the Kentucky Supreme Court's opinion in *Kindred Nursing Centers Ltd. Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017) (*Wellner*), on remand from this Court's *Kindred* decision. In that sharply divided 4-3 ruling, the Kentucky Supreme Court held that its earlier conclusion (that the power of attorney at issue did not authorize the agent to enter into arbitration agreements regarding causes of action not yet accrued) was entirely independent of the clear-statement rule that this Court rejected. The South Carolina Supreme Court relied on that limited decision to support its refusal to enforce the arbitration agreement here. It did not cite any South Carolina law or invoke any generally applicable principle of contract interpretation in support of its ruling.

The court found the Health Care POA also did not confer the requisite authority, though it focused only on a subset of its key provisions. The court started with the provision granting Ms. Arredondo authority to "pursue legal action" to "'force compliance with [Mr.

Whaley's] wishes as determined by [Mr. Whaley's] agent, or to seek actual or punitive damages for the failure to comply.'" Pet. App. 19a-20a. The court stated that "pursuing legal action" encompasses only the power to make litigation decisions within the context of an instituted suit, not the power to preemptively agree to arbitrate future claims. Pet. App. 19a-21a. It also held that a suit alleging negligence in caring for Mr. Whaley is "unrelated to forcing compliance with Whaley's health care wishes." *Id.* The court also found it irrelevant that the Health Care POA specifically authorized Ms. Arredondo to grant waivers to health care providers. That authority, the court explained, applied only to actions "*necessary* to making, documenting, and assuring implementation" of a decision concerning Mr. Whaley's health care, and the arbitration agreement here was not "necessary." Pet. App. 14a-18a.[1]

[1] Justice Few concurred separately to express his view that the term "chose in action," which appears in the General POA, "has no precise meaning in modern law" and therefore could not authorize Ms. Arredondo to execute an arbitration agreement. Pet. App. 22a. After summarizing the history of the phrase, he concluded that, today, "chose in action" is nothing but "a descriptive phrase with no precise meaning, a phrase we should stop using because it is not only vague and meaningless but also obsolete." Pet. App. 25a. Thus, in Justice Few's opinion, "the [General POA] does not grant any authority because the phrase ['chose in action'] does not mean anything." Pet. App. 26a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Disfavors Arbitration In Violation Of The FAA And This Court's Precedents.

A. The FAA and this Court's Precedents Require Equal Treatment of Arbitration Agreements and Other Contracts.

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements … and to place [these] agreements upon the same footing as other contracts." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); *accord Concepcion*, 563 U.S. at 339.

Congress achieved that goal with the command that arbitration agreements are "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. This Court has interpreted that "provision as reflecting both a liberal federal policy favoring arbitration and the fundamental [equal-treatment] principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339 (quotation marks and internal citation omitted). Under the FAA, courts must "enforce [arbitration agreements] according to their terms," just as they would do with any other contract. *Id.*

The FAA prohibits a "rule discriminating on its face against arbitration." *Kindred*, 137 S. Ct. at 1426; *see Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (the FAA prohibits "singling out

arbitration provisions for suspect status"). But hostility towards arbitration is not always so obvious. It is often disguised, "manifest[ing] itself in a great variety of devices and formulas" designed and employed to circumvent arbitration agreements. *Concepcion*, 563 U.S. at 342 (quotation marks omitted).

This Court has identified two such devices. The first involves attaching special legal significance to an attribute of a contract that is a defining feature of arbitration agreements. *Kindred* is illustrative. There, this Court reversed a Kentucky Supreme Court decision holding that a power of attorney does not authorize the legal representative to execute an arbitration agreement unless the document clearly states that the representative has the "specific authority to waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury." *Kindred*, 137 S. Ct. at 1425 (quotation marks omitted). That clear-statement rule covertly "single[d] out arbitration agreements for disfavored treatment" in violation of the FAA by "hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* at 1425, 1427. "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" equal-treatment requirement. *Id.* at 1427.

The second sort of device is to interpret the words of an arbitration clause in a way that the court would not do if those same words appeared in another contract. This Court exposed that device in *Imburgia*. There, this Court held that a California court's refusal to enforce an arbitration provision violated the FAA

because the decision rested on a "unique" interpretation of the relevant contractual language. *Imburgia*, 577 U.S. at 55. Since "California courts would not interpret contracts other than arbitration contracts the same way," the interpretation was impermissibly discriminatory. *Id.*

Regardless of which "device" is employed, a court's refusal "to put arbitration agreements on an equal plane with other contracts" displays the kind of judicial hostility to arbitration that the FAA flatly prohibits. *Kindred*, 137 S. Ct. at 1427.

B. The Decision Below Violates the FAA's Equal-Treatment Principle.

The South Carolina Supreme Court ignored the lesson of these cases when it reasoned that, because its "analysis does not turn upon the presence or absence of an explicit reference to arbitration … in the powers of attorney," *Kindred* does not apply and the FAA is not implicated. Pet. App. 6a. As these cases confirm, requiring an explicit reference to arbitration is unnecessary when one of the other, more subtle, devices is in play. The South Carolina Supreme Court applied both impermissible devices resulting in an opinion that improperly "singles out arbitration agreements for disfavored treatment." *Kindred*, 137 S. Ct. at 1425-26.

Because the court below borrowed these devices mainly from the Kentucky Supreme Court's opinion in *Wellner*, we start there. *Wellner* was one of the consolidated cases before this Court in *Kindred*. In that case, the Kentucky Supreme Court refused to enforce

the arbitration agreement at issue on two grounds. First, it applied an impermissible clear-statement rule. Second, it concluded that the power of attorney was not worded broadly enough to authorize the agent to execute the arbitration agreement. *Id.* at 1425-26, 1429. In response, this Court directed the Kentucky Supreme Court to determine whether the unlawful clear-statement rule "influenced [that court's] construction of the *Wellner* power of attorney." *Id.* at 1429. If so, the court would have to "evaluate the document's meaning anew." *Id.*

On remand, the Kentucky Supreme Court again refused to enforce that arbitration agreement. It interpreted the power of attorney's broad authorization "to make, execute and deliver … contracts of every nature in relation to both real and personal property" to exclude the "pre-dispute arbitration agreement" executed in that case. *Wellner*, 533 S.W.3d at 193-94. It reasoned that such agreements relate only to the principal's "constitutional rights" to access the courts and to jury trials, and not "real or personal property" within the meaning of the power of attorney. *Id*. The court reached that holding even though Kentucky law defines "personal property" to include personal injury claims. *Id.*

In incorporating this logic wholesale into its opinion, the South Carolina Supreme Court adopted an analysis of both the General POA and Health Care POA that takes its "meaning precisely from the fact that a contract to arbitrate is at issue," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), and that impermissibly applies rules in the arbitration context that courts would never apply in other settings.

That was impermissible as to both power of attorney documents.

1. The General POA authorized Ms. Arredondo to agree to arbitrate Mr. Whaley's legal claims.

A power of attorney does not get much broader or more comprehensive than this General POA:

- It empowered Ms. Arredondo to act in Mr. Whaley's "name, place and stead, and to [his] use, and *with the same force and effect as if [he] were personally present and had executed or performed the same*." Pet. App. 48a (emphasis added).

- It authorized Ms. Arredondo to "release" and "dispose of *any … property, right or thing whatsoever*." Pet. App. 48a-49a (emphasis added).

- It authorized her to "sign" and "execute … *any and all instruments or writing of every kind and description whatsoever* … concerning *any or all* of [Mr. Whaley's] business affairs, property or other assets whatsoever, *including all property*, real, *personal* or mixed … and *choses in action*." Pet. App. 48a (emphasis added).

- It also authorized her "to perform *any* other and further *acts or things* necessary, appropriate, or incidental thereto, *with the same validity and force and effect* as if [Mr. Whaley] were personally present, competent, and personally

> exercised the powers [him]self." Pet. App. 52a (emphasis added).

Several of these provisions are more than expansive enough, on their own, to authorize signing the arbitration agreement. The arbitration agreement is plainly an "instrument[] or writing of [some] *kind and description whatsoever*" and it concerns Mr. Whaley's "*business affairs, property or other assets whatsoever*." It is also a "release[] … of any other property, *right* or thing." The court below did not address any of this language, which should have easily resolved the case.

That alone is a basis for reversing the opinion below: In no other context (outside of arbitration) would the court so cavalierly ignore the most important and expansive language granting the agent power. This language would have been decisive, for example, if Ms. Arredondo had signed an instrument canceling her father's driver's license or country club membership, or pledging to donate her father's future stock dividends to a charitable cause. By treating arbitration rights differently, the court below ran afoul of the rule against adopting a "unique" approach to interpreting an arbitration agreement. *Imburgia*, 577 U.S. at 55.

The court below only underscored the disconnect when it observed that the General POA "could have been drafted to give [Ms.] Arredondo the broad power … broad enough to authorize the execution of a pre-dispute arbitration agreement." Pet. App. 13a. It offered the example of the power of attorney in the other consolidated case in *Kindred*, the *Clark* case. The *Clark* power of attorney "provided the agent

power 'to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way,' and 'generally to do and perform for me and in my name all that I might do if present.'" Pet. App. 13a (quoting *Kindred*, 137 S. Ct. at 1429). But as is evident from the language above, the General POA here has almost exactly the same language, and is in some respects even broader.

Despite the breadth of the provision, the court below found a limitation in the phrase "*including all* property, real, personal or mixed … and *choses in action*"—fixating on the last item in the list. But that phrase is not limiting. The relevant question is whether an agreement to arbitrate a potential legal claim fits the description of an "instrument[] or writing of every kind and description whatsoever … *concerning any or all* of … [Mr. Whaley's] property or other assets whatsoever." Or whether an arbitration agreement qualifies as a "release[] … of the above or of any other property, *right* or thing." Of course it does.

In any other context, South Carolina courts would not treat the "including" language as limiting. *See, e.g.*, *Baker v. Chavis*, 306 S.C. 203, 208-09 (Ct. App. 1991) (explaining that the "use of the words 'shall include' clearly suggests the legislature did not intend to limit" the types of transactions mentioned in the statute, and collecting cases explaining that the word "including" is meant to be "illustrative" and not exhaustive); *see also West v. Gibson*, 527 U.S. 212, 217 (1999) ("[T]he preceding word 'including' makes clear that the authorization is not limited to the specified remedies there mentioned."). In the context of a power

of attorney authorizing the execution of a guaranty agreement, for example, the South Carolina Court of Appeals rejected the notion that "an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law." *First S. Bank*, 418 S.C. at 181. The rule the court below adopted was a special rule of construction that the court applied—impermissibly—just with respect to arbitration.

Even if the "including" clause were limiting, the parties agree—and the South Carolina Supreme Court correctly concluded—that "[a] 'chose in action' is a type of property interest or a proprietary right to a claim or debt," and "generally means 'cause of action.'" Pet. App. 9a-10a. That naturally includes "a claim for damages in tort." Pet. App. 9a (quoting *Chose in Action*, Black's Law Dictionary (11th ed. 2019) (emphasis omitted)). So even as improperly limited, this arbitration agreement still falls within the expansive description of "*any and all* instruments or writing *of every kind and description whatsoever* … concerning" a claim for damages in tort. Pet. App. 48a (emphasis added)

Yet, the South Carolina Supreme Court rejected this natural reading to hold that the General POA "did not authorize [Ms.] Arredondo to sign the arbitration agreement because the arbitration agreement did not concern a chose in action … [Mr.] Whaley possessed *at the time [Ms.] Arredondo signed it*." Pet. App. 11a-12a. The court did not explain where in the power of attorney it found that temporal limitation. It merely invoked "the rationale of the Supreme Court

of Kentucky" in *Wellner* that "[t]he only 'thing'" that was "affected by the pre-dispute arbitration agreement was [Mr. Whaley's] constitutional rights" to access the courts and to trial by jury, "which no one contends to be his real or personal property." Pet. App. 11a (quoting *Wellner*, 533 S.W.3d at 194).

This approach exhibits both prohibited devices of discriminating against arbitration. First, no South Carolina court would find that same limitation in any contract outside the arbitration context. *See Imburgia*, 577 U.S. at 56. When construing powers of attorney outside of the arbitration context, South Carolina courts have applied the traditional rules of contract interpretation to read a power of attorney as a whole document and give effect to the parties' intention. *See, e.g.*, *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577 (Ct. App. 2019) ("[South Carolina] courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney."); *Watson v. Underwood*, 407 S.C. 443, 454 (Ct. App. 2014) ("an action to interpret a power of attorney is similar to an action to interpret a contract"). Just like other type of contract, not every authorized act must be specifically spelled out in a power of attorney that otherwise sets out a broad and comprehensive grant of authority; nor does it matter whether potential claims that the agent is authorized to pursue arise immediately or in the future. *See First S. Bank*, 418 S.C. at 181.

To the contrary, when comprehensive powers of attorney authorize an agent to enter into contracts concerning any and all of the principal's property and assets, that authority necessarily extends to the ability to contract regarding property and assets acquired

in the future. The South Carolina Uniform Power of Attorney Act unequivocally states that "[a]uthority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed *or acquires later*." S.C. Code Ann. § 62-8-201 (emphasis added). Under these principles, no one would dispute that an agent with a general power of attorney could enter into agreements and transactions concerning "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." *Wellner*, 533 S.W.3d at 199 (Hughes, J., dissenting). The court below cited no South Carolina case limiting the term "choses in action" to legal claims arising from an already-existing dispute and no basis on which to distinguish "choses in action" from "stocks, securities … or … any other property, right or thing."

The very notion of temporal limitation—for any item on the list—would be absurd. The whole point of a power of attorney is "to deal with the principal's affairs in the manner stated whether or not a particular thing, event, type of property was in existence or even envisioned at the time of the [power of attorney's] execution." *Wellner*, 533 S.W.3d at 199 (Hughes, J., dissenting).[2]

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[2] Even more extreme is the concurrence's proposal essentially to excise the phrase "choses in action" from the agreement. *See supra* 12 n.1. There is no way that judge, or any other, would declare that an agent lacks the power to make decisions about any chose in action—i.e., any cause of action, existing or not—on the ground that there really is no such thing.

Second, the court below adopted an arbitration-specific rule—essentially a variation of the clear-statement rule this Court rejected in *Kindred*. On the one hand, the court found it insufficient that the General POA authorized the execution of an agreement that clearly qualified as an "instrument[] or writing … concerning any or all … property … and choses in action" or a "release[] … of any other property, right or thing." On the other hand, it allowed that the General POA would have been sufficient if only it had explicitly said that it was authorizing the representative to sign a "pre-dispute arbitration agreement." The word "arbitration" makes all the difference, which is exactly the approach this Court rejected in *Kindred*, 137 S. Ct. at 1425-27.

The consequence is to "divorce an arbitration agreement from the reality of what it is and what it does." *Wellner*, 533 S.W.3d at 196 (Hughes, J., dissenting). Any arbitration agreement that waives someone's constitutional rights to access the courts and to a jury trial but does not provide for the resolution of their legal claims "has no purpose—it just sits there as an executed document/contract clause of no real consequence." *Id.* at 195. "An arbitration agreement, regardless of when signed or whether characterized as pre- or post-dispute, has absolutely no reason to exist unless there is a current or potential claim to be pursued or defended against." *Id.*; *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (explaining that an arbitration agreement specifies "not only the situs of suit but also the procedure to be used in resolving the dispute").

The decision below places the parties' arbitration agreement within a class of "'utterly fanciful contracts' where arbitration agreements exist in a vacuum independent of disputes and property rights." *Wellner*, 533 S.W.3d at 196-97 (Hughes, J., dissenting) (quoting *Kindred*, 137 S. Ct. at 1428). And doing so highlights "the arbitration-specific character of the [court's interpretation], much as if it were made applicable to arbitration agreements and black swans," "reveal[ing] the kind of 'hostility to arbitration' that led Congress to enact the FAA." *Kindred*, 137 S. Ct. at 1428 (quoting *Concepcion*, 563 U.S. at 339).

In short, the court's interpretation of the General POA cannot "survive the FAA's edict against singling out [arbitration] contracts for disfavored treatment." *Kindred*, 137 S. Ct. at 1427.

2. The Health Care POA also authorized Ms. Arredondo to agree to arbitrate Mr. Whaley's legal claims.

These same arbitration-averse devices tainted the South Carolina Supreme Court's analysis of the Health Care POA. On any fair reading, that agreement separately and unambiguously authorized Ms. Arredondo to agree to arbitrate claims that Mr. Whaley might have against Ashley River because of any disputes relating to his care.

a. The Health Care POA, too, is couched in the most comprehensive and expansive of terms—with multiple broad provisions, each constituting a separate grant of authority:

- It "grant[ed]" Ms. Arredondo "*full authority* to make decisions for [Mr. Whaley] regarding [his] health care," amounting to "the same authority to make decisions" as Mr. Whaley would have had to make for himself. Pet. App. 56a, 60a (emphasis added).

- It directed that Ms. Arredondo's "authority to interpret [Mr. Whaley's] desires [was] intended to be *as broad as possible*." Pet. App. 60a (emphasis added).

- It left a spot to impose "any limitations" on Ms. Arredondo's authority, but it contained no such limitations. Pet. App. 60a-62a.

- It "authorized" Ms. Arredondo to "take any *other* action necessary to making, documenting, and assuring implementation of decisions concerning [Mr. Whaley's] health care," and to "grant[] any waiver … required by any … health care provider." Pet. App. 60a-61a (emphasis added).

- It authorized Ms. Arredondo to "pursu[e] any legal action in [Mr. Whaley's] name" and "to seek … damages for the failure to comply" with Mr. Whaley's "wishes as determined by" Ms. Arredondo. Pet. App. 61a (emphasis added).

Each of these powers individually—and certainly in combination—authorized Ms. Arredondo to agree to arbitrate Mr. Whaley's claims as part of a contractual relationship with a health care provider like Ashley River. To start at the most basic level, a contract

with a facility like Ashley River *is* a "decision[] for [Mr. Whaley] regarding [his] health care," especially if the grant of authority is understood to be "as broad as possible."

This expansive provision alone ends the inquiry. But the court below skipped right over it—starting its analysis with the provision that authorizes "any *other* action"—in a way that a court would never do with any other sort of contract. If, as part of the decision to admit Mr. Whaley into Ashley River, Ms. Arredondo had executed a residency agreement and an agreement to pay by direct deposit, and agreements ensuring that Mr. Whaley received well-balanced meals and suitable recreational services, these would all be "decisions … *regarding* [Mr. Whaley's] health care." No court in South Carolina would say that those ancillary agreements have nothing to do with his health care and are therefore unauthorized. They would not apply such a stingy reading in the face of a provision directing that the grant is to be read "as broad as possible" and that Ms. Arredondo is to have "the same authority to make decisions" as Mr. Whaley "would have," without "any limitation[]." By ignoring those provisions here, the court below impermissibly singled out arbitration for discriminatory treatment.

b. With each additional provision, the Health Care POA gets more and more specific on subsets of the powers granted. And each layer of specificity further embraces the power to sign this arbitration agreement. For example, the arbitration agreement qualifies as "any other action necessary to making, documenting, and assuring implementation of decisions concerning [Mr. Whaley's] health care."

Ignoring the provision's expansiveness, the court below focused on the word "necessary," which it found limiting. It held that the word authorizes Ms. Arredondo to sign only those documents that are "absolutely needed" as a "mandatory condition to admission." Pet. App. 14a-18a. Even if that is what the word means, of course, it would not limit the above-mentioned general provision (which explicitly said it was "without limitation") that the court below ignored. But regardless, that is no way to read this otherwise expansive clause. The obvious import of that language is to authorize anything that the *agent considers* necessary.

It is the very rare healthcare-related document or provision that is "absolutely needed" to provide health care. If the language were so limited, the limitation would swallow the rule. The power—which is supposed to be "as broad as possible"—would authorize almost nothing. Again, no South Carolina court would apply such a stinting reading to any other sort of ancillary agreement or provision within a health care contract. They would not cancel direct deposit or a contract for balanced meals or recreational programs as unauthorized because they were not "absolutely needed." Here, again, the court below applied unique—and uniquely prohibitive—rules specially crafted to avoid arbitration.

c. The court below executed a similar maneuver to limit Ms. Arredondo's equally expansive authority "to pursu[e] any legal action in [Mr.] Whaley's name." The court recognized this power "would necessarily encompass the power to make litigation-related decisions," including whether "to submit the pending

dispute to mediation or arbitration." Pet. App. 20a (quoting *Wellner*, 533 S.W.3d at 193). But it nevertheless held that this provision was inapplicable because "[Ms.] Arredondo did not execute the arbitration agreement in connection with an existing claim Whaley had against the facility," and thus it "did not constitute pursuit of a legal action." Pet. App. 20a-21a.

That temporal limitation is wrong here for the same reason that it was wrong as to the General POA: Nothing in the text requires specific timing. If, as the court below acknowledged, the agent is authorized to make forum selection decisions, that authority must attach whether made before or after the claim arises. Consider any other contractual restraint on future claims: Choice of law, limitation of damages, negation of defenses, etc. There is no doubt that the Health Care POA grants the agent the power to make all these contractual commitments before an "existing claim" accrues. Only an arbitration-specific exception to that norm can yield a different outcome here.[3]

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[3] The court also suggested that the Health Care POA's specific grant of authority regarding legal action has no "significance in this case" because it authorized Ms. Arredondo to pursue legal action for specific purposes: "only to 'force compliance with [Mr. Whaley's] wishes as determined by [Mr. Whaley's] agent, or to seek actual or punitive damages for the failure to comply.'" Pet. App. 19a-20a. But the claim in this lawsuit falls squarely within that description. The entire thrust of this lawsuit is that Mr. Whaley wished to receive medical treatment that complied with prevailing standards of care and Ms. Arredondo is now filing a lawsuit "to seek … damages for failure to comply" with that wish. The court's conclusion therefore turns

II. The Question Presented Is Important And This Is A Perfect Vehicle.

The issue here is of tremendous practical importance. Aging or ailing people routinely sign powers of attorney to grant broad authority to family members or trusted advisers. The agents then frequently engage in transactions with a large swath of the business community, including nursing homes and assisted living communities. Arbitration agreements are common in these arrangements. It is important for these ubiquitous communities and their residents to "realize the benefits of private dispute resolution," such as "lower costs," and "greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

Powers of attorney are widely used in other contexts as well, including all manner of personal, financial, and real estate transactions. *See, e.g.*, *In re DeMore*, 844 F.3d 292, 294-95 (1st Cir. 2016) (mortgage executed under powers of attorney); *United States v. Spurlin*, 664 F.3d 954, 958-60 (5th Cir. 2011) (bankruptcy petition filed on behalf of spouse under general power of attorney); *Geriatrics, Inc. v. McGee*, 332 Conn. 1, 8 (2019) (power of attorney authorized the agent's use of the principal's social security and pension benefits to pay creditors); *Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 750 (Tenn. 2007) (power of attorney authorized agent to change

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again on a distorted interpretation of the Health Care POA's language that circumvents arbitration.

the beneficiaries of the principal's life insurance policy).

Businesses that sign contracts with agents are entitled to—and need to be able to—rely on the agents' commitments to arbitrate, particularly when the powers of attorney that authorize those commitments are as expansive as the powers of attorney here. They should not be uniquely disadvantaged as compared to other businesses that enter into transactions directly with the principal. This Court recognized the importance of faithfully applying powers of attorney when it granted certiorari in *Kindred*.

More broadly, time and again, this Court has had to remind the lower courts that the FAA "is a law of the United States" and that they have an "undisputed obligation" to enforce the law as written and to follow this Court's precedents interpreting it. *Imburgia*, 577 U.S. at 53. As this case illustrates, lower courts continue to disregard that admonition. This Court's intervention is necessary here for the same reasons that it was warranted in cases like *Imburgia* and *Kindred*: to reverse improper judicial hostility to arbitration and to deter further defiance of this Court's FAA precedents, upon which "private parties" often rely on "as authority" when drafting their contracts. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

Letting this decision stand will only encourage other lower courts to persist in flouting this Court's direction. That has already happened on this very issue. This Court found that the Kentucky Supreme Court had "flouted the FAA's command to place [arbitration] agreements on an equal footing with all other

contracts." *Kindred*, 137 S. Ct. at 1429. Yet, on remand that court reaffirmed its earlier conclusion by giving the narrowest possible reading to an expansive power of attorney. And the South Carolina Supreme Court adopted that opinion with little embellishment of its own. Such defiance of the Supremacy Clause should not be tolerated.

This Court may well have felt constrained to deny certiorari in *Wellner* because of vehicle problems. The Kentucky Supreme Court noted that "Kindred Nursing Centers did not challenge [the] construction of the Wellner POA beyond its criticism of the clear statement rule," and that under this Court's "mandate [in *Kindred*], if [the] original interpretation of the Wellner POA was wholly independent of the clear statement rule, then it must stand as the final decision." *Wellner*, 533 S.W.3d at 192 n.3.

In contrast, this case presents the perfect vehicle. Ashley River preserved its challenge to the South Carolina Supreme Court's aberrant construction of the powers of attorney, as well as the flawed reasoning that the decision below relied upon to disfavor arbitration in contravention of the FAA. Moreover, the question presented in this case forms the basis for the decision below, and this Court's review of it would be dispositive of whether there will be arbitration instead of in-court litigation.

III. This Case Would Be Appropriate For Summary Reversal.

The South Carolina Supreme Court's analysis so thoroughly defies this Court's precedents that this

case would be a suitable vehicle for summary reversal, as this Court has done several times recently under similar circumstances. *See, e.g.*, *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam); *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam).

In *Marmet*, for example, this Court summarily reversed a state high court's holding that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." 565 U.S. at 532 (citation omitted). This Court held that it was improper to single out "predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes" for hostile treatment. *Id.* at 531.

The only difference between this case and *Marmet* is that the South Carolina Supreme Court found a way to achieve the same result without invoking "public policy." It simply adopted the most cramped and artificially restricted construction of the scope of two broadly crafted powers of attorney. That makes this case suitable for summary reversal.

CONCLUSION

This Court should grant this petition for a writ of certiorari or, in the alternative, summarily reverse.

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