No. 21-196

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

BRIEF OF ARGENTUM AND THE AMERICAN SENIORS HOUSING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Argentum is the leading national association exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. Since 1990, Argentum has advocated for choice, independence, dignity, and quality of life for all older adults. Argentum member companies operate senior living communities offering assisted living, independent living, continuing care, and memory care services. Along with its state partners, Argentum's membership represents approximately 75 percent of the professionally managed communities in the senior living industry—an industry with a national economic impact of nearly a quarter of a trillion dollars and responsible for providing over 1.6 million jobs.[1]

Based in Washington, DC, the American Seniors Housing Association (ASHA) represents approximately 500 organizations involved in the financing, development and operation of the full spectrum of housing and services for older adults—including active adult, independent living, assisted living, memory care, and continuing care (or life plan) communities. ASHA's members, both for-profit and not-for-profit, collectively own and/or operate approximately 750,000 senior living units across the United States. ASHA is focused on legislative and regulatory advocacy, and the organization supports research and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of the intention to file this brief over 10 days prior to the due date and all parties have consented to the filing of this brief.

national initiatives that advance high quality services for older adults so they can live with dignity in the setting of their choice.

Many of *amici*'s members enter into arbitration agreements that allow parties to resolve disputes promptly and efficiently while avoiding the high litigation costs associated with resolving disputes in court. They do so in reliance on the principles embodied in the Federal Arbitration Act (FAA) and this Court's precedents.

In *Kindred Nursing Centers Limited Partnership* v. *Clark*, 137 S. Ct. 1421 (2017), this Court held that the Kentucky Supreme Court's clear-statement rule—that a "power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so"—violated the FAA's mandate "to put arbitration agreements on an equal plane with other contracts." *Id.* at 1425, 1427 (emphasis in original).

Some courts have faithfully adhered to *Kindred* and this Court's other FAA precedents. But other courts, including the court below, have not. Instead, they have interpreted power-of-attorney documents in a singular, anti-arbitration fashion in order to avoid enforcing arbitration agreements, depriving *amici*'s members and other participants in the senior living industry of the benefits of arbitration.

Amici thus have a strong interest in this Court's review and reversal of the decision below to ensure that the FAA's pro-arbitration mandate applies uniformly nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

Lower courts are defying this Court's holdings in *Kindred*, and related FAA precedents—engaging in the very discrimination against arbitration agreements that Congress prohibited when it enacted the FAA. This Court's intervention is urgently needed.

The defiance began with the Kentucky Supreme Court's decision on remand from this Court. The Kentucky court enforced one of the arbitration agreements at issue, but, in a closely divided 4-3 ruling, the majority interpreted the second power of attorney, which was signed by Beverly Wellner, to exclude arbitration agreements. See *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Wellner*, 533 S.W.3d 189 (Ky. 2017), *cert. denied*, 139 S. Ct. 319 (2018).[2]

The *Wellner* power of attorney broadly authorized Wellner to make "contracts of *every* nature *in relation to* both real and *personal property*." 137 S. Ct. at 1425 (emphasis added). The *Wellner* majority acknowledged that as a matter of settled Kentucky law, the term "personal property" includes legal claims (and personal-injury claims in particular). But the majority nonetheless held that Wellner lacked authority to enter into arbitration agreements because, in its view, a pre-dispute arbitration agreement does not relate to the principal's legal claims but instead involves only his or her constitutional rights to a jury trial and to go to court. 533 S.W.3d at 194.

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[2] To avoid confusion, we refer to this Court's opinion as *Kindred* and the Kentucky Supreme Court's opinion on remand as *Wellner*.

Here, the power-of-attorney documents are even broader than the power of attorney in *Wellner*. See Pet. 5-7. The authority conferred on respondent Thayer Arredondo included the power to "execute any and all instruments * * * concerning any or all of [the principal's] business affairs, *property*, or other assets whatsoever, including *all property*, real, *personal*, or mixed * * * and *choses in action*." Pet. App. 48a (emphases added).

Yet the court below, perhaps emboldened by this Court's denial of review in *Wellner*, see Pet. App. 11a n.3, reached the same result as the Kentucky court in that case, see *id.* at 6a-20a. With little additional analysis, the court below "agree[d] with the rationale" in *Wellner* and adopted it as the court's own. *Id.* at 11a.[3]

But as Justice Hughes's powerful dissent in *Wellner* explains, that "rationale" makes no sense. It "divorce[s] an arbitration agreement from the reality of what it is and what it does" (533 S.W.3d at 196)—providing a mechanism for the resolution of *legal claims*. Echoing this Court's holding that the clear-statement rule previously adopted by the Kentucky court was "arbitration-specific"—because its applicability outside the arbitration context reached only the legal equivalent of "black swans" (137 S. Ct. at 1427-28)—Justice Hughes explained that the analysis adopted below "returns to black swan territory by a different route." 533 S.W.3d at 197.

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[3] As the petition explains (at 31), the *Wellner* majority's invocation of waiver may have contributed to this Court's decision to deny review. See 533 S.W.3d at 192 n.3. No such concerns are presented here.

Courts across the country routinely address the enforceability of arbitration agreements entered into by attorneys-in-fact acting on their principals' behalf under written powers of attorney. If *Wellner*'s spread into South Carolina is left unchecked, *Wellner* and the decision below will provide a roadmap for other States hostile to arbitration to refuse to enforce valid arbitration agreements under the auspices of contract interpretation.

Finally, the immense practical importance of the question presented underscores the need for this Court's intervention. The use of powers of attorney is routine in the senior living context, as older or ailing adults entrust family members or other advisors with the authority to enter into transactions on their behalf. Senior living facilities and long term care providers rely on these delegations of authority when entering into contractual relationships with residents and their families.

Yet decisions like the one below, if allowed to stand, threaten to deprive all participants in the senior living industry—including facilities, their residents, and the residents' families—of the important benefits that arbitration provides. Instead, senior living facilities will be forced to engage in costly, burdensome, and unpredictable litigation in our overcrowded court system. And the increased costs of litigation will not be borne by facilities alone, but also by their residents and their families in the form of higher charges.

This Court's review is therefore essential.

ARGUMENT

I. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

This Court has made clear that Section 2 of the FAA blocks at least two routes that lower courts have utilized in attempting to invalidate arbitration agreements. First, "Congress precluded States from singling out arbitration provisions for suspect status," *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996), or from invalidating arbitration provisions on the basis of state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," *Kindred*, 137 S. Ct. at 1426 (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011)); see also *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987).

Second, Section 2 of the FAA precludes States from discriminating against arbitration agreements by interpreting contractual language in a "unique" manner that is "restricted to th[e] field" of arbitration. *DIRECTV, LLC* v. *Imburgia*, 577 U.S. 47, 55 (2015). Indeed, *Imburgia* makes clear that States may not avoid preemption by laundering their anti-arbitration goal through purported application of general principles of contract interpretation. As this Court has more recently recognized, "[j]ust as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,'" courts must be "alert to new devices and formulas that would achieve much the same result today." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018) (quoting *Concepcion*, 563 U.S. at 342).

The decision below is a paradigmatic example of both Section 2 violations.

First, just as in *Imburgia*, the South Carolina court's proclamation of neutrality must be viewed skeptically.

The court paid lip service to this Court's opinion in *Kindred*, proclaiming that its holding did not turn on the absence of an express mention of arbitration in the power-of-attorney documents. Pet. App. 6a-7a.

But the court then followed the Kentucky Supreme Court's opinion on remand in *Wellner*, which, as the dissent in that case pointed out, interpreted a broad power of attorney in a uniquely anti-arbitration fashion, reflecting "simply another attempt to single out arbitration for 'hostile' treatment under the guise" of contract interpretation. *Wellner*, 533 S.W.3d at 195 (Hughes, J., dissenting).

Here, for example, Ms. Arredondo's power of attorney granted her broad authority to "execute any and all instruments * * * of every kind and description whatsoever * * * concerning any or all of [the principal's] business affairs, *property*, or other assets whatsoever, including *all property*, real, *personal*, or mixed * * * and *choses in action*." Pet. App. 48a (emphases added).

Under South Carolina law, as the court below readily acknowledged, legal claims (including tort claims) are personal property. Pet. App. 9a (citing *Ball* v. *Ball*, 430 S.E.2d 533, 534-35 (S.C. Ct. App. 1993), *aff'd*, 445 S.E.2d 449 (1994)). And the inclusion of the express term "choses in action" underscored the parties' intent to cover legal claims, with all parties

agreeing that the phrase means "cause[s] of action." *Ibid.*[4]

That should have been the end of the analysis. Because a legal claim is "property" and a "chose in action" under South Carolina law, it then follows that an arbitration agreement—which binds the parties to resolve any legal claims in arbitration, rather than in court—"concern[s]" the principal's property.

But the court below rejected this straightforward analysis. The court instead "agree[d] with the rationale of" the Kentucky Supreme Court's opinion on remand in *Wellner*, in which the majority concluded that a pre-dispute arbitration agreement—the most common kind of arbitration agreement—relates solely to the principal's "constitutional rights" of access to court and trial by jury and not to the principal's "personal property." Pet. App. 11a (quoting *Wellner*, 533 S.W.3d at 194).

That characterization of an arbitration agreement makes no sense, because the point of such an agreement is to address the resolution of the legal claims of the parties—claims that the court below conceded are property under South Carolina law. As the *Wellner* dissent put it, "[a]n 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." 533 S.W.3d at 195 (Hughes, J., dissenting).

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[4] This Court has also recognized "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

The concessions by the court below and by the *Wellner* majority that the powers of attorney authorized the formation of an arbitration agreement *after* a dispute arises (Pet. App. 9a) confirms the contrived nature of the asserted distinction between legal claims and constitutional rights to a jury trial and to go to court. The only possible basis for that distinction, which the court below expressly endorsed (Pet. App. 10a-11a), is a view that future legal claims that have not yet accrued cannot be considered "property."

But there is no indication that South Carolina courts apply that purported distinction to any other kind of property apart from legal claims. On the contrary, the South Carolina Uniform Power of Attorney Act codifies the common-sense proposition that the authority granted by a power of attorney over property includes property that the principal "acquires later." S.C. Code Ann. § 62-8-201; see Pet. 22.

It would be nonsensical to limit a power of attorney's authority to make contracts in relation to 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* possessions at the time the power of attorney was executed but not possessions that the principal acquired the next day. South Carolina courts would never hold that an agent's authority to sell a principal's car under a power of attorney signed in 2020 turns on whether the principal bought the car in 2019 or 2021.

The *Wellner* dissent therefore rightly criticized this line of reasoning. It explained that as a matter of logic and common sense, the right to "collect debts," for example, "manifestly includes future debts"—and the same is true of the authority to make contracts in

relation to personal property, which "includes future property of the principal whether a stock dividend, a check for a property insurance claim, an unexpected inheritance or a run-of-the-mill refund in a consumer class action." 533 S.W.3d at 198-99 (Hughes, J., dissenting).

Second, having adopted this special arbitration-specific, gerrymandered definition of contracts relating to property, the *Wellner* majority—and by extension, the court below (Pet. App. 11a)—went on to categorize arbitration agreements by recycling the very same arbitration-specific approach that this Court held impermissible in *Kindred*.

The Kentucky court majority held in its initial decision that a power of attorney authorized the holder to enter into an arbitration agreement only if the power clearly conferred that authority, because an arbitration agreement waived the "sacred" constitutional right of trial by jury. This Court held that rule invalid under the FAA, because it "hing[ed] on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred*, 137 S. Ct. at 1427. "Such a rule is too tailor-made to arbitration agreements," the Court explained, "to survive the FAA's edict against singling out those contracts for disfavored treatment." *Ibid.*

Yet the *Wellner* majority returned to this precise impermissible rationale on remand. Rather than characterizing an arbitration agreement as relating to property—as its precedents equating legal claims with property required—the *Wellner* majority characterized arbitration agreements *solely* by reference to the very same characteristics that this Court held out-of-bounds in *Kindred*: that an arbitration agreement

relates to the principal's "fundamental constitutional rights" of access to court and trial by jury. *Wellner*, 533 S.W.3d at 194; see Pet. App. 11a.

To be sure, an arbitration agreement relates to rights to a jury trial and to go to court. *Kindred*, 137 S. Ct. at 1427. But an arbitration agreement *also* relates to legal claims—which are property in both South Carolina and Kentucky—by specifying the mechanism for the resolution of those claims.

This Court recognized nearly half a century ago that an arbitration agreement is simply "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the *dispute*." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (emphasis added); see also, *e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (explaining that by entering into an arbitration agreement, a party "submits to the[] resolution [of claims] in an arbitral, rather than a judicial, forum"); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984) (explaining that the FAA prohibits States from requiring a judicial forum for the resolution of *claims* which the contracting parties agreed to resolve by arbitration") (emphasis added).

The two functions of an arbitration agreement—"waiver of a right to go to court and receive a jury trial" and establishing a mechanism relating to a form of property, legal claims—therefore cannot be separated; both are "primary characteristic[s] of an arbitration agreement." *Kindred*, 137 S. Ct. at 1427. The contrary holding below "divorce[s] an arbitration agreement from the reality of what it is and what it does." *Wellner*, 533 S.W.3d at 196 (Hughes, J., dissenting).

The decision below and *Wellner* also single out arbitration contracts based on characteristics unique to an arbitration agreement—precisely what this Court found unlawful in *Kindred*. As the *Wellner* dissent explained, the "narrow focus on the constitutional jury right to the exclusion of the reality of an arbitration agreement returns us to the realm of 'utterly fanciful contracts' where arbitration agreements exist in a vacuum independent of disputes and property rights." 533 S.W.3d at 197 (quoting *Kindred*, 137 S. Ct. at 1427). It reaches the same, illegitimate "black swan territory" of the Kentucky Supreme Court initial ruling in *Kindred* "by a different route": "narrow[ly] focus[ing] on the constitutional jury right to the exclusion of the reality of an arbitration agreement." *Ibid.*

In short, it is unthinkable that South Carolina courts would interpret the language in the power-of-attorney documents to exclude any other kind of agreement relating to an individual's legal claims or property. The decision below is thus preempted by the FAA every bit as much as the California Court of Appeal's contractual interpretation in *Imburgia*. And because the lower court's defiance of the FAA and this Court's precedents is so clear, the Court may wish to consider summary reversal. See Pet. 31-32.[5]

II. The Question Presented Has Tremendous Practical Importance.

The defiance of this Court's precedents reflected in the decision below provides ample reason for review. But the practical importance of the issue to the

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[5] As the petition persuasively explains (at 24-28), similar errors infect the portion of the decision below analyzing Ms. Arredondo's broadly written health care power of attorney.

senior living industry further confirms the need for this Court's intervention.

1. The use of powers of attorney is common in senior living transactions. Older or ailing adults use these instruments to allow family members or other trusted individuals to manage their affairs and enter into a wide array of transactions on their behalf. It is therefore common for senior living facilities to transact with their residents' agents rather than with the residents directly.

This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). Unreasoned, *ad hoc* departures from the FAA's principles like the holding below will create confusion about the application of arbitration agreements, defeat contracting parties' expectations, and spawn ancillary litigation over the scope of power-of-attorney documents or other conveyances of authority to contract on another's behalf.

For example, decisions from South Carolina's neighboring States, North Carolina and Georgia, appear to take a significantly less cramped view in construing documents granting authority to enter into pre-dispute arbitration agreements. See *CNL SF LLC* v. *Fountain*, --- S.E.2d ----, 2021 WL 4268081 (Ga. Sept. 21, 2021); *Mullen* v. *Saber Health Care Grp., LLC*, 2020 WL 5118038 (E.D.N.C. Aug. 31, 2020). In the guardianship context, the Supreme Court of Georgia recently held that entering into a pre-dispute arbitration agreement is among the powers "reasonably necessary" to a guardian's statutory authority to arrange for the welfare and care of his ward. *CNL SF*, 2021 WL 4268081, at *4. The court therefore reversed

the lower courts' refusal to enforce an arbitration agreement entered into by the guardian with a skilled nursing facility—even though, as here, the arbitration agreement was not a requirement of admission to the facility. *Ibid.*

As the Georgia Supreme Court explained, a contrary reading of the guardianship statutes would mean parsing out every contract term offered by the facility to determine whether that term is "necessary to secure care"—a wholly unworkable proposition. Instead, the court concluded, a guardian can more broadly "consider whether to enter into terms that are being presented by the care-provider," including an arbitration agreement. *Ibid.*; see Pet. 25-27 (explaining why the court below should have construed Ms. Arredondo's health care power of attorney in a similarly practical way).

In addition, a federal court in North Carolina recently enforced an arbitration agreement entered into by the principal's attorney-in-fact under general and health care powers of attorney. *Mullen*, 2020 WL 5118038, at *3-4. The general power of attorney gave the plaintiff authority over the principal's "personal property." *Id.* at *3. In addition, the court relied on the documents' grant of authority "'to provide * * * *custodial care*'" and to "'authorize [] admission'" to nursing homes or other assisted living facilities, explaining that "the power to provide custodial care for [the principal] and to secure her admission to a nursing home necessarily implies the authority to sign arbitration agreements with assisted living facilities." *Id.* at *4.

More broadly, courts across the country have repeatedly addressed the enforceability of arbitration agreements entered into by attorneys-in-fact in recent

years.[6] As these cases demonstrate, the issues posed in this case are frequently recurring and vitally important.

While variations in state law and the text of powers-of-attorney documents and arbitration agreements may account for some of these divergent outcomes, lower courts across the country would benefit greatly from this Court's reaffirmation in the power-of-attorney context of the basic principle that arbitration agreements cannot be treated differently from other contracts. And review will prevent aberrant decisions like the one below and in *Wellner* from taking root in other States. As this Court has emphasized, because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 17-18 (2012) (per curiam).

2. Decisions like the one below not only generate uncertainty and undermine uniform application of the FAA, but they also threaten to deprive participants in

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[6] Compare, *e.g.*, *Heaphy* v. *Willow Healthcare, Inc.*, 491 P.3d 1165 (Ariz. Ct. App. 2021); *Cambridge Place Grp.* v. *Mundy*, 617 S.W.3d 838 (Ky. Ct. App. 2021); *Malvern Operations, LLC* v. *Moss*, 605 S.W.3d 291 (Ark. Ct. App. 2020); *Harrison* v. *Farmington Operations, LLC*, 2020 WL 3259521 (N.M. Ct. App. June 11, 2020); *Miller* v. *Life Care Ctrs.*, 478 P.3d 164 (Wyo. 2020); *Golden Gate Nat'l Senior Care, LLC* v. *Dolan*, 579 S.W.3d 874 (Ky. Ct. App. 2019) (declining to enforce arbitration agreements), with, *e.g.*, *CNL SF*, 2021 WL 4268081; *Silvera* v. *AristaCare at Cherry Hill, LLC*, 2021 WL 1186555 (N.J. App. Div. Mar. 30, 2021); *Mullen*, 2020 WL 5118038; *Dalon* v. *MS HUD Ocean Springs LLC*, 283 So.3d 90 (Miss. 2019); *Fiala* v. *Bickford Senior Living Grp.*, 32 N.E.3d 80 (Ill. Ct. App. 2015) (enforcing arbitration agreements).

the senior living industry of the benefits of their agreements to arbitrate.

This Court has repeatedly recognized that there are "real benefits to the enforcement of arbitration provisions," including "allow[ing] parties to avoid the costs of litigation." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122-23 (2001); see also, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Allied-Bruce*, 513 U.S. at 280 (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted).

Empirical evidence confirms that these benefits of arbitration apply in the senior living context and in resolving disputes involving health care.

For example, one study of resolved claims in the long term care context (including senior living facilities) reported outcomes of disputes resolved through arbitration and litigation. It found that 72.6% of claims subject to arbitration result in some payment, compared with 77.9% of claims without arbitration agreements. AON Global Risk Consulting, 2018 Long Term Care: General Liability and Professional Liability Actuarial Analysis 11, 50 (Oct. 2018).

Importantly, those claimants who obtained relief in arbitration tended to receive larger amounts: Of the claims that resulted in payment, over 60% of payments exceeded $25,000 for claims subject to arbitration, compared to only 55% of payments for claims not subject to arbitration. *Id.* at 11.

In addition, a 2020 survey of parties and attorneys who participated in arbitrations under the Kaiser Foundation Health Plan's arbitration system—which

covers more than 8 million members in California—showed that ***90*** percent of the respondents who went through arbitrations that year reported that the arbitration system was as good or better than the state court system. Annual Report of the Office of the Independent Administrator of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System for Disputes with Health Plan Members, January 1, 2020 – December 31, 2020 at 51, http://www.oia-kaiserarb.com/pdfs/2020-Annual-Report.pdf.

Empirical evidence from the consumer and employment contexts further supports these conclusions.

First, arbitration is generally faster and more efficient than litigation. Recent empirical studies in both the consumer and employment context found that claims in arbitration are resolved more quickly than claims in court.[7] Another study found that awarded arbitrations took an average of just 11 months to decision, versus an average of 26.6 months to verdict in state court jury trial cases. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019); see also, *e.g.*, David Sherwyn et al., *Assessing*

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[7] See Nam D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration* 11, NDP Analytics (Nov. 2020), https://instituteforlegalreform.com/wp-content/uploads/2020/11/Final-Consumer-Arbitration-Paper.pdf (arbitrations in which the consumer-plaintiff prevailed averaged 299 days, while cases in court required an average of 429 days); Nam D. Pham & Mary Donovan, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* 11-12, NDP Analytics (May 2019), https://instituteforlegalreform.com/wp-content/uploads/media/Empirical-Assessment-Employment-Arbitration.pdf (reporting an average of 569 days for arbitrations in which the employee-plaintiff prevailed, compared to 665 days for cases in court).

the Case for Employment Arbitration: A New Path for Empirical Research, 57 Stan. L. Rev. 1557, 1572-73 (2005) ("few dispute the assertion that arbitration is faster than litigation"); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004) (reporting findings that arbitration was 33% faster than analogous litigation).

Second, both common sense and empirical evidence confirm that arbitration is cheaper than litigation, particularly for the individuals bringing claims. In the consumer and employment contexts, arbitration costs very little or nothing for many individuals—all or virtually all of the fees are borne by the business. See Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003) (reporting that 61 percent of employee claimants paid no arbitration fees). And because of arbitration's decreased procedural complexity, it is also cheaper for individuals to present their claims. Accordingly, the cost savings of arbitration allow individuals to bring small-value claims that would be priced out of court and larger claims that would be substantially reduced by contingency fees. See Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 791-92 (2008).

Third, claimants tend to fare just as well or even better in arbitration than they do in court. A recent study in the employment context found that employees were three times more likely to win in arbitration than in court. Pham, *Fairer, Faster, Better*, *supra*, at

5-7 (surveying more than 10,000 employment arbitration cases and 90,000 employment litigation cases resolved between 2014 to 2018). The same study found that employees who prevailed in arbitration "won approximately double the monetary award that employees received in cases won in court." *Id*. at 5-6, 9-10. Similarly, a recent study in the consumer context found that consumer claimants win more often, and receive higher monetary awards, in arbitration than in court. Pham, *Fairer, Faster, Better II*, *supra*, at 7-10 (for cases that result in a decision, consumer claimants win 44% in arbitration compared to 30% in court, and the average award in arbitration is $68,198 in arbitration compared to $57,285 in court).

These findings are consistent with earlier surveys. One 2010 study found, for example, that plaintiffs who file consumer claims with the American Arbitration Association win relief 53.3% of the time, compared with a win rate of roughly 50% in state and federal court. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 897 (2010). As another scholar agreed in the employment context, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]"; rather, arbitration is "favorable to employees as compared with court litigation." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (quotation marks omitted; alterations in original).

In short, claimants in arbitration generally fare as well—if not better—in arbitration than in court, especially when settlements and the lower forum costs for claimants are taken into account. Decisions like the

one below, if allowed to stand, threaten to deprive senior living facilities, their residents, and their residents' families of the benefits of arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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