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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent struggles to offer a rationale for the decision below beyond anti-arbitration bias. She does not meaningfully dispute that the South Carolina Supreme Court ignored key language and read the powers of attorney in a manner that it would not employ outside the arbitration context. She acknowledges that the lower court imported the (anti-arbitration) rationale of *Kindred Nursing Centers Ltd. Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017). And she effectively concedes that, under the decision below, the only way her two exceptionally broad powers of attorney could authorize pre-dispute arbitration is by specifically saying so.

Recognizing the imperative of FAA preemption, Respondent instead interjects various objections to this Court's review. Respondent argues that all that matters is that the lower court *purported to* apply general contract-law principles and claimed it was not discriminating against arbitration—which supposedly means that this petition is only about error-correction of state law. She also argues that this case is not worth this Court's attention because no two powers of attorney are identical. This Court has consistently rejected such form-over-substance objections to review and has made clear that the FAA is not so easily evaded.

The decision below provides a blueprint to circumvent federal law and this Court's decisions, including *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017): Read exceptionally broad powers of attorney in such a unique and distorted way as

to effectively prohibit arbitration unless expressly authorized in the instrument. Such defiance of the FAA and this Court's precedents is legally improper and has real-world effects. This Court's review is warranted.

ARGUMENT

I. The Decision Below Raises An Important Federal Question Because It Violates The FAA And This Court's Precedents.

A. Respondent's Objections to Review Are Meritless.

Respondent concedes (Opp. 8-12) that the FAA prohibits the distorted interpretation of a power of attorney to invalidate an arbitration agreement, as well as any requirement that a power of attorney expressly authorize arbitration. *See* Pet. 14-15. Although the decision below effectively does both things, Respondent seeks to avoid the question presented by employing the standard pretense of those seeking to avoid arbitration: claiming that the petition seeks mere error correction of a state-law issue. Opp. 13, 16, 20. Respondent maintains that the FAA is not implicated where, as here, the lower court: (1) frames its interpretation as an application of "generally applicable contract-law principles"; and (2) disclaims that "its interpretation … turn[s] upon the presence or absence of an explicit reference to arbitration … in the powers of attorney." Opp. 9, 12-13. The FAA cannot be so easily circumvented.

Respondent's objections to review exalt form over substance and "would make it trivially easy" for the lower courts "to undermine the [FAA]—indeed, to wholly defeat it." *Kindred*, 137 S. Ct. at 1428. Although state "courts are the ultimate authority on [their state] law," it is for this Court to decide whether the application of "that state law is consistent with the [FAA]." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015). Fundamentally, the FAA requires that, "in applying general state-law principles of contract interpretation to the interpretation" of the powers of attorney, "due regard must be given to the federal policy favoring arbitration." *Volt Info. Scis., Inc. v. Bd. of Trs. of Stanford Univ.*, 489 U.S. 468, 475-76 (1989). The interpretation cannot be, as here, so askew that it fails to place "arbitration contracts on equal footing with all other contracts." *Imburgia*, 577 U.S. at 58; Pet. 13-15, 17-22, 24-28.

Respondent attempts to distinguish *Imburgia* on the ground that the decision below "framed its analysis as governed by generally applicable contract-law principles" as opposed to "an[] interpretive rule that disfavors arbitration agreements." Opp. 13. But that was exactly the problem in *Imburgia*. This Court rejected the claimed application of California "contract law" to reach a "unique" interpretation of the phrase "law of your state" in a consumer contract. *Imburgia*, 577 U.S. at 54-55. So too here, the South Carolina Supreme Court, purportedly applying state contract law, arrived at a unique interpretation hostile to arbitration. Rote invocation of general contract-law principles does not save the interpretation from FAA preemption. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (concluding that the "general

applicability" of the applied "*contra proferentem* rule" did not save decision from FAA preemption); *Imburgia*, 577 U.S. at 58 (same).

Respondent also argues that the decision below is consistent with *Kindred* because the South Carolina Supreme Court said that its interpretation of the powers of attorney did not turn on the absence of an express authorization to enter into arbitration agreements. Opp. 9. But "merely saying something is so does not make it so." *Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp.*, 559 U.S. 662, 675 n.7 (2010). Nor is *Kindred* so narrow. In addition to striking down Kentucky's rule requiring powers of attorney to authorize arbitration in so many words, *Kindred* makes clear that the FAA prohibits related tactics "covertly accompli[shing] the same objective." 137 S. Ct. at 1426. The conclusion that the two extraordinarily broad powers of attorney in this case, even taken together, do not authorize this arbitration agreement, confirms that the agreement "would undoubtedly have [been] enforced" only if "Mr. Whaley addressed arbitration specifically." Opp. 10-11. That is just the forbidden clear-statement rule in another guise.

Having no real answer to the petition's point that the decision below adopted *Wellner*'s blueprint for "singl[ing] out arbitration for 'hostile' treatment under the guise" of contract interpretation, *Wellner*, 533 S.W.3d at 195 (Hughes, J., dissenting), Respondent wrongly contends that "[t]his Court has already held that Kentucky's analysis of the Wellner power of attorney would pass muster under the FAA so long as it was 'wholly independent' of the clear-statement rule," Opp. 15. That assertion is demonstrably false. At no

point did this Court hold that the distorted reading of the Wellner power of attorney satisfies the FAA's equal-treatment principle. This Court instead remanded the case to confirm that the interpretation reflected no anti-arbitration bias.

B. The Construction of the Powers of Attorney in the Decision Below Violates the FAA.

As the petition explains (at 17-18, 24-25), and Respondent does not dispute, the General and Health Care POAs granted Respondent extraordinarily broad authority to manage Mr. Whaley's affairs. The powers of attorney are framed in comprehensive terms—precisely because an ailing Mr. Whaley needed Respondent to act for him. Given that powers of attorney do not get much broader than these, Respondent cannot successfully defend the decision below.

1. Respondent does not dispute that the South Carolina Supreme Court ignored the most important and expansive language in both documents—specifically, that: (1) the General POA authorized her to "release" and "dispose of … any … property, right or thing whatsoever" and 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," Pet. App. 48a-49a; and (2) the Health Care POA granted her "full authority to make decisions for [Mr.

Whaley] regarding [his] health care," Pet. App. 60a.[1] This language, disregarded below, indisputably authorizes the execution of an agreement to arbitrate legal claims, regardless of when they accrue. At no point does Respondent explain why *this* language is not enough, focusing instead on why *other* language isn't.

Respondent tries to excuse the lower court's failure to consider this critical language by asserting that the court correctly "focused on the clauses most pertinent to resolving the question before it," Opp. 16—specifically, (1) the General POA's authorization to execute agreements "concerning" Mr. Whaley's "business affairs, property, or other assets whatsoever, *including*" "choses in action," Pet. App. 48a, and (2) the Health Care POA's authorization to "take any *other* action necessary" to Mr. Whaley's health care, Pet. App. 60a-61a (emphasis added). But that is no response. The court ignored the above-stated more general language that by itself authorized the arbitration agreement here. Contrary to Respondent's arguments, the court clearly did not consider (much less "focus[] on") the key language revealing Mr. Whaley's intentions.

Respondent gets matters backwards in insisting that these broad conferrals of authority do not "override[] the specific terms" in other provisions. Opp. 22. That argument might be persuasive if the more specific provisions purported to withdraw authority

[1] *See also* Pet. App. 56a ("UNLESS YOU STATE OTHERWISE, YOUR AGENT WILL HAVE THE SAME AUTHORITY TO MAKE DECISIONS ABOUT YOUR HEALTH CARE AS YOU WOULD HAVE.").

granted elsewhere. But they do not. The narrower clauses (which the court misapprehended on their own terms, Pet. 17-28) all purport to confer authority. So they cannot undermine the more general provisions. If a principal broadly authorizes an agent to handle *all* matters relating to his finances and to take any *other* action necessary to preserve his credit rating, no one would argue that the agent cannot cancel the principal's magazine subscription simply because it may be unclear that the more specific clause authorizes that action. Clearly it relates to the principal's finances and so the subscription can be cancelled.

Respondent misses the point by asserting that "this Court does not sit to superintend state courts in their application of state law to specific documents." Opp. 16. We are not asking this Court to correct the lower court's application of state law for its own sake, but to decide if the interpretation conflicts with federal law. To answer that question, just as in *Imburgia*, this Court looks to see if, as here, an aberrant application of state law reflects hostility to arbitration. As the petition explained (at 21), South Carolina courts read a power of attorney as a *whole* document when giving effect to the parties' intention. The court's failure to do so here, in a way that it would not do for a non-arbitration contract, reveals the impermissible targeting of arbitration.

2. Unwilling to grapple with the powers of attorney in their entirety—much less the two documents together—Respondent dwells on isolated provisions, hoping that this Court will join her in missing the forest for the trees. But that outcome-oriented deviation

from South Carolina law proves the conflict with the FAA.

Seeking to buttress the lower court's conclusion that unaccrued (or future) "choses in action" (i.e., causes of action) do not fall within the General POA's clause authorizing agreements concerning Mr. Whaley's "choses in action," Respondent cites Black's Law Dictionary for the proposition that a "chose in action" is the "right to bring an action," while a "future chose in action" is "[t]he prospect of becoming entitled to an interest or right." Opp. 15. But far from distinguishing the two concepts, the definitions only reaffirm the obvious: a "future chose in action" is a subset of the broader term "chose in action." And interpreting the General POA's use of the broader term to exclude the narrower, as Respondent suggests, impermissibly constricts the power of attorney in a "unique" manner "restricted to th[e] field" of arbitration. *Imburgia*, 577 U.S. at 55.[2]

So, where did the lower court get this temporal distinction between accrued and unaccrued causes of action?

It certainly did not come from the text of either document. The General POA authorizes agreements "of *every kind* and *description whatsoever* ... concerning *any or all* … property … and choses in action," and

[2] Respondent also relies on Justice Few's concurring opinion to support her view that "future chose in action" is not a "chose in action." Opp. 15. But a concurring opinion concluding that "the phrase ['chose in action'] does not mean anything" does not help Respondent. Pet. App. 26a; Pet. 12 n.1.

"*any* … property, right[,] or thing *whatsoever*." Pet. App. 48a-49a. And the Health Care POA gave Respondent "full authority to make decisions for [Mr. Whaley] regarding [his] health care." Pet. App. 60a. While Mr. Whaley could have preserved the claimed accrued-versus-unaccrued distinction in the portion of the Health Care POA that provided for "any limitations" on Respondent's authority, he left that part of the document blank. Pet. App. 60a-62a.

Similarly, the distinction is nowhere to be found in South Carolina law. On the contrary, "[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. Respondent retorts that authority regarding later-acquired property is distinct from the "authority to manage property on [the principal's] behalf before [the principal] acquired that property." Opp. 18. But that is a made-up distinction to justify the interpretation below. Unsurprisingly, Respondent cannot cite a single South Carolina case adopting that distinction, which (again) flies in the face of the documents' text. It also contravenes an expansive power of attorney's entire purpose, which 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 [its] execution." *Wellner*, 533 S.W.3d at 199 (Hughes, J., dissenting).

Ultimately, Respondent does not dispute that the distinction between accrued and unaccrued claims was imported directly from *Wellner*, which applied Kentucky law to circumvent an arbitration

agreement executed pursuant to a different and narrower general power of attorney. Here, where Respondent has two exceptionally broad powers of attorney, this myopic reading in *Wellner* makes even less sense. As the *Wellner* dissent explained and Respondent does not rebut, *Wellner*'s rationale "divorce[s] an arbitration agreement from the reality of what it is and what it does" by adopting a reading designed to circumvent pre-dispute arbitration agreements in virtually (if not) every circumstance where such agreements are not expressly authorized. 533 S.W.3d at 196 (Hughes, J., dissenting).

3. Respondent acknowledges (at 19) that, under the two powers of attorney, she could execute an agreement that waives Mr. Whaley's litigation rights (including the jury-trial right), just not one that provides for the resolution of a legal claim before it accrues. But, again, the notion that Mr. Whaley would have intended to surgically excise pre-dispute arbitration agreements from Respondent's otherwise complete contracting authority is absurd. There is no reason the parties would want or contemplate such a peculiar (and pointless) limitation, and Respondent posits none. And, as the petition explains (at 23-24), the idea that one could execute such a "fanciful contract[]" reconfirms "the arbitration-specific character" of the interpretation. *Kindred*, 137 S. Ct. at 1427-28.

The upshot of Respondent's position and the decision below is straightforward: In South Carolina, even a comprehensive power of attorney cannot authorize pre-dispute arbitration agreements unless it expressly authorizes such agreements. Indeed, if the General and Health Care POAs are not enough to

authorize arbitration in these circumstances, then only an express reference to arbitration would suffice.[3] Put simply, *Wellner* and the decision below improperly circumvent *Kindred* and the principles it reflects. Such defiance should not be tolerated.

II. Respondent's Flawed Objections Highlight The Need For Review In This Case Or, Alternatively, Its Suitability for Summary Reversal.

Respondent urges that "[t]his case … does not raise a question of any importance to anyone aside from the parties to this case" because "no two powers of attorney necessarily contain the same language." Opp. 22-23. That argument is not only meritless but unhelpful to Respondent. It is meritless because the unremarkable proposition that contracts can be drafted differently and apply only to contracting parties has never stopped this Court from reviewing decisions improperly targeting arbitration. That was, of course, true in *Imburgia*. And it is unhelpful to Respondent because it highlights why this Court's intervention is necessary. Were Respondent correct, this Court would never review cases where the lower

[3] *Kindred* concluded that pre-dispute arbitration was authorized by a power of attorney empowering the agent to handle "all matters affecting" the principal. 137 S. Ct. at 1426. Respondent insists that Mr. Whaley could have provided the requisite authority by using that exact same language. Opp. 16. As the petition explained (at 18-19), however, the power-of-attorney language here is at least as broad. And insisting that a power of attorney must say "all matters" to authorize pre-dispute arbitration still violates the FAA because it again disfavors arbitration and imposes yet another clear-statement rule.

courts "single out arbitration for 'hostile' treatment under the guise" of contract interpretation. *Wellner*, 533 S.W.3d at 195 (Hughes, J., dissenting).

Faced with the reality that, in the nursing home context and elsewhere, the business community frequently executes arbitration agreements with agents who derive their authority from powers of attorney, Respondent's only answer is that "[n]othing prevents a business from confirming that a power of attorney authorizes the agent to engage in the transaction at issue." Opp. 23. But that too is no answer. No reasonable person treating arbitration agreements and non-arbitration contracts alike would have thought that the sweeping powers of attorney here did not authorize the parties' arbitration agreement.

Unless this Court steps in, other courts will continue to build on the *Wellner* blueprint for circumventing arbitration in violation of the FAA where a power of attorney does not in so many words authorize arbitration. And 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., L.L.C. v. Howard*, 568 U.S. 17, 17-18 (2012) (per curiam).

Respondent does not dispute that this case presents a suitable vehicle to address the question presented or to summarily reverse. As the petition explains (at 31-32), the decision below achieves the same result rejected in *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam),

by invoking purported principles of state contract law rather than ostensible "public policy." But a lower court cannot achieve the same illicit result "target[ing] arbitration … by" different or "more subtle methods." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018). Because that is what happened here, summary reversal is appropriate.

CONCLUSION

This Court should grant the petition or summarily reverse.

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