No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS
LIMITED PARTNERSHIP, ET AL., PETITIONERS

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR THE AMERICAN HEALTH CARE ASSOCIATION AND THE KENTUCKY ASSOCIATION OF HEALTH CARE FACILITIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement.

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INTEREST OF *AMICI CURIAE*

The American Health Care Association (AHCA) is the Nation's leading association of long-term care and post-acute care providers, representing the interests of more than 12,000 non-profit and proprietary facilities. AHCA's members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled Americans who live in skilled nursing facilities, assisted living residences, subacute centers, and homes for persons with mental retardation and developmental disabilities. AHCA advocates for quality care and services for frail, elderly, and disabled Americans. In order to ensure the availability of such services, AHCA also advocates for the continued vitality of the long-term and post-acute care provider community.[*]

One way in which AHCA promotes the interests of its members is by participating as an *amicus curiae* in cases before this Court with far-ranging consequences for its members. Such cases include those involving application of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, in response to state judicial rulings inhibiting the use of arbitration to resolve disputes fairly and efficiently. *See, e.g.*, Br. *Amicus Curiae* for AHCA in Supp. of Pet'rs, *Clarksburg Nursing & Rehab. Ctr., Inc. v. Marchio*, No. 11-

[*] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The petitioners' and respondents' written consents to the filing of this brief have been filed with the Clerk.

394 (U.S. Oct. 28, 2011), 2011 WL 5189096; *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (per curiam) (granting *Clarksburg* petition in curve-lined cases where state court of last resort erroneously held that the FAA does not protect pre-dispute arbitration agreements covering claims of personal injury or wrongful death against a nursing facility, summarily vacating state court's judgment, and remanding for further proceedings).

The Kentucky Association of Health Care Facilities (KAHCF) is a non-profit trade association representing approximately 200 licensed and certified nursing facilities throughout Kentucky. Founded in 1954, KAHCF is the primary advocacy organization for nursing facilities in Kentucky. KAHCF's mission is to promote quality long-term and post-acute care services and supports through advocacy, member services, education, and quality-achievement recognition. KAHCF advocates for its members in legislative, regulatory, and judicial settings to further the overall goals of its membership.

AHCA, KAHCF, and their respective members have a significant interest in the question presented by this case, which is why AHCA and KAHCF previously filed an *amicus* brief supporting the petition for a writ of certiorari filed by Kindred Nursing Centers Limited Partnership, *et al.* (collectively, Kindred). The four-to-three decision of the Supreme Court of Kentucky at issue here held that powers of attorney authorizing attorneys-in-fact to enter into contracts do not include the authority to enter into one particular type of contract: arbitration agreements. Instead, the majority below ruled that in light of the Kentucky Constitution's protection of the right to a

trial by jury, powers of attorney must contain explicit, unambiguous language specifically authorizing the attorney-in-fact to enter into arbitration agreements.

That erroneous decision is emblematic of the struggle members of the long-term and post-acute care profession (collectively, LTC Profession) currently face in seeking judicial enforcement and protection of their federal arbitration rights. The majority decision below also is emblematic of the lengths to which certain state courts will go to impede the exercise of those rights by creating novel legal rules that single out arbitration for special, disfavored treatment in spite of the FAA's command that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

SUMMARY OF ARGUMENT

Kindred's brief explains in detail why the rule adopted by the majority below cannot be reconciled with the FAA or this Court's long line of decisions interpreting the statute's preemptive effect. Rather than repeat those arguments, AHCA and KAHCF wish to emphasize two additional reasons for reversing the judgment of the Supreme Court of Kentucky in this case.

First, the LTC Profession has long used arbitration as a means of obtaining dispute resolution that is both efficient and fair. No profession or industry is perfect. Humans and organizations can, and do, make mistakes. When disputes arise involving the LTC Profession, arbitration permits the parties to appoint subject-matter experts to serve as arbitra-

tors who can quickly resolve the issues such disputes often entail, including questions regarding the scope of professional duties of care, whether such duties were breached, and whether such a breach caused the injury complained of. Many members of the LTC Profession use arbitration agreements containing elements similar to the agreements at issue here, which grant the resident or resident representative a significant period of time to rescind the agreement and provide that the facility will incur most, and sometimes all, of the costs of arbitration. And as demonstrated by one recent study, such claimants often recover significant amounts, with the highest proportion of recoveries falling in the $25,000 to $250,000 range.

Second, the plain-statement rule adopted by the majority below is plainly wrong. It not only ignores the fact that the Supremacy Clause of the United States Constitution requires a state constitutional provision to give way to contrary federal law, the majority's plain-statement rule is the opposite of what the rule must be under the FAA. In light of the emphatic federal policy in favor of arbitral dispute resolution, a power of attorney that authorizes an attorney-in-fact to enter into contracts must unambiguously *exclude* the authority to enter into arbitration agreements before such an instrument can be held not to convey such authority in a case subject to the FAA. That rule, which is consistent with the plain-statement rule adopted by this Court in the context of interpreting contract language controlling the scope of disputes subject to arbitration, puts arbitration agreements on equal footing with all other contracts as Congress intended.

Accordingly, the judgment of the Supreme Court of Kentucky should be reversed.

ARGUMENT

I. THE LTC PROFESSION HAS LONG USED ARBITRATION AS A MEANS OF OBTAINING DISPUTE RESOLUTION THAT IS BOTH EFFICIENT AND FAIR

A significant percentage of individuals who require care by the LTC Profession are incapable of contracting for themselves, whether because of such things as accidental injury or disability resulting from the normal aging process. Many individuals have planned for such an eventuality by preparing general powers of attorney that give designated individuals whom they trust authority to, among other things, enter into contracts on their behalf. The LTC Profession, in turn, depends on such powers of attorney to deliver timely care and to order its business affairs on a daily basis.

Arbitration agreements are a common and essential component of contracting in the LTC Profession. Like many industry sectors, the LTC Profession has long used arbitration agreements as a means of facilitating timely and efficient dispute resolution. *See, e.g.*, AON Global Risk Consulting, *American Health Care Association Special Study on Arbitration in the Long Term Care Industry* 5 (June 2009) (describing history of LTC Profession's use of arbitration agreements and benefits of same), *available at* https://www.ahcancal.org (last visited Dec. 11, 2016). The two arbitration agreements at issue here even share certain attributes of the model arbitration agreement AHCA makes available to its members nationwide. For example, in addition to not being a condition of admission to the nursing facility, each

arbitration agreement is a document separate from the admission agreement and grants the resident or resident representative 30 days to rescind the arbitration agreement. J.A. 19, 26. Like the arbitration agreements at issue here, it also is common for arbitration agreements in the LTC Profession to provide that the facility will pay all or most of the costs of arbitration, including the arbitrators' fees. *See* J.A. 17, 24 (provisions in arbitration agreements at issue here providing that the facility will pay all such fees up to five days of hearing, with subsequent fees being divided equally between the parties); *see also, e.g.*, *Carter v. SSC Odin Operating Co.*, 976 N.E.2d 344, 349 (Ill. 2012) (describing arbitration agreement providing that nursing facility would pay all arbitration fees).

Moreover, disputes involving the LTC Profession are particularly well-suited for resolution using arbitration. When such disputes arise involving residents or their representatives, they most often sound in tort and involve an alleged breach of the professional standard of care. Many such cases are limited in temporal scope and focus on relatively modest factual disputes, as well as disagreements in expert testimony regarding the scope of the professional duty in question, whether it was breached, and whether any such breach proximately caused the injury complained of. The parties often are able to appoint arbitrators who have specialized expertise in resolving such disputes, including former judges.

Arbitration also provides a better mode of dispute resolution for the typical claimant than traditional court-based litigation. For example, a recent study performed by a leading provider of risk-management

and insurance services found that claims involving the LTC Profession that are subject to arbitration resolve three months faster on average than claims not subject to arbitration. AON Global Risk Consulting, *Long Term Care: General Liability and Professional Liability Actuarial Analysis* 10 (Nov. 2015), *available at* https://www.ahcancal.org (last visited Dec. 11, 2016). In addition, the same study found that such claimants can, and often do, recover significant amounts. As demonstrated by the following table reproduced from the study, almost 50 percent of claims subject to arbitration resulted in recoveries falling in the $25,000 to $250,000 range:

Indemnity Amount	Arbitration		Non-Arbitration	
No Payment	233	27.5%	267	20.2%
$1 to $25,000	106	12.5%	332	25.2%
$25,000 to $250,000	407	48.0%	541	41.0%
$250,000 to $1,000,000	95	11.2%	155	11.7%
Greater than $1,000,000	7	0.8%	25	1.9%
Total	848	100.0%	1,320	100.0%
Claims with Payment	615	72.5%	1,053	79.8%

Id. at 11. Accordingly, the contention made by some anti-arbitration advocates that arbitration involving the LTC Profession is somehow categorically unfair to claimants has no basis in fact.

II. THE PLAIN-STATEMENT RULE ADOPTED BY THE MAJORITY BELOW IS PLAINLY WRONG

The narrow majority of the Supreme Court of Kentucky held that, before Kentucky's courts will enforce an arbitration agreement entered into by an attorney-in-fact pursuant to a power of attorney, the power of attorney must contain an explicit, unambiguous statement specifically authorizing the attorney-in-fact to enter into arbitration agreements. Pet. App. 41a. Language vesting an attorney-in-fact with authority to enter into contracts is insufficient. *Id.* at 42a. The majority crafted its novel legal rule because the "drafters of [Kentucky's] Constitution deemed the right to a jury trial to be *inviolate*, a right that cannot be taken away; and, indeed, a right that is *sacred*, thus denoting that right and that right alone as a divine God-given right." *Id.* at 43a.

As Kindred's brief explains in detail (at 12–29), the rule adopted by the majority below cannot be reconciled with the FAA or this Court's jurisprudence interpreting the statute's preemptive force. At a more fundamental level, however, the "constitutional right" line of reasoning used by the majority below ignores the fact that the foundation for this Court's preemption jurisprudence—the Supremacy Clause of the United States Constitution—applies even if the contrary state rule is embodied in a state constitution.

In relevant part, the Supremacy Clause provides that the "Laws of the United States . . . 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*." U.S. Const. art. VI, cl. 2 (emphasis

added). From the earliest days of our Nation, the Supremacy Clause has been understood to require that a state constitutional provision must give way to a contrary federal law. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236–37 (1796) (opinion of Chase, J.) ("If the Constitution of a State (which is the fundamental law of the State, and paramount to its Legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the State Legislature, must not be prostrate?"). A contrary rule would create a "monster, in which the head was under the direction of the members." *The Federalist No. 44*, at 254 (James Madison) (George Stade ed., 2006).

In those instances in which this Court has adopted a plain-statement rule similar to that adopted by the majority below, it has done so in recognition of the fact that a default legal principle of great significance requires the use of express, unambiguous language if that default principle is to be overcome. For example, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Court was asked to decide whether Congress had granted a federal agency authority to promulgate rules with retroactive effect. In finding that Congress had not granted the agency such authority, the Court explained:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to

> promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Id. at 208.[†]

The default legal principle of great significance that controls here is not the Kentucky Constitution's language regarding the right to a jury trial. Instead, the default legal principle that controls is that arbitration is *favored* as a matter of federal law. As this Court has held time and again, the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution. The [FAA] supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (explaining that "due regard" must be given to the "federal policy favoring arbitration") (internal quotation marks and citation omitted); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam) (explaining that the FAA

[†] Other examples of this Court's use of plain-statement rules or their near equivalents have involved similar instances of needing to overcome a default legal principle of great significance. *See, e.g.*, *Cuozzo Speed Techs. v. Le*e, 136 S. Ct. 2131, 2140 (2016) (explaining that the "strong presumption in favor of judicial review" of agency action must be overcome by "clear and convincing indications") (internal quotation marks and citation omitted); *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.") (internal quotation marks and citation omitted).

"reflects an emphatic federal policy in favor of arbitral dispute resolution") (internal quotation marks and citation omitted); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (explaining that the FAA "embodies a clear federal policy" in favor of arbitration); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (explaining that by enacting the FAA, "Congress declared a national policy favoring arbitration").

This Court has previously applied what amounts to a plain-statement rule that promotes arbitration in recognition of the fact that arbitration is favored as a matter of federal law. For example, the Court has explained that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, *whether the problem at hand is the construction of the contract language itself* or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (emphasis added); *see also AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 650 (1986) (explaining that an order compelling arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"). The Court should adopt a similar plain-statement rule here that is the converse of the rule adopted by the majority below, such that a power of attorney authorizing an attorney-in-fact to enter into contracts on behalf of the principal must unambiguously *exclude* the authority to enter into arbitration agreements before such an instrument will be held not to convey such authority in a case subject to the FAA.

CONCLUSION

For the foregoing reasons and those contained in Kindred's brief, the judgment of the Supreme Court of Kentucky should be reversed.

Respectfully submitted.

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