No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, dba WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, nka FOUNTAIN CIRCLE HEALTH AND REHABILITATION, *et al.*,
Petitioners,

v.

JANIS E. CLARK, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AND KENTUCKY JUSTICE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Julie Braman Kane
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, N.W.
Suite 200
Washington, DC 20001
(202) 965-3500

Kevin C. Burke
Jamie K. Neal
BURKE NEAL PLLC
2200 Dundee Road, Suite C
Louisville, KY 40205
(502) 709-9975
kevin@burkeneal.com
jamie@burkeneal.com

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
7916 Bressingham Drive
Fairfax Station, VA 22039
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, and the Kentucky Justice Association respectfully submit this brief as *amici curiae* in support of Respondents.

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits and personal injury actions. Throughout its history, AAJ has served as a leading advocate of the right to trial by jury, as well as for access to the courts and for the preservation of protections enjoyed by ordinary citizens that is afforded by the common law and state tort law.

In serving that purpose, AAJ represents its members and their clients in matters before the courts, Congress, and the Executive Branch. To that end, AAJ regularly files *amicus* briefs in cases that raise issues of vital concern to its members and their clients, including cases involving forced arbitration. *See, e.g., Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

The Kentucky Justice Association (KJA) similarly represents its members and their clients in improving the quality of legal representation for Kentucky

---

[1] The parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus,* its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

families by providing superior legal education and by keeping abreast of legislative and judicial proceedings. Members of the Kentucky Justice Association are dedicated to protecting the health and safety of Kentucky families, to enhancing consumer protection, and to preserving each and every citizen's right to trial by jury.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Neither the Federal Arbitration Act nor this Court's precedents override the Commonwealth of Kentucky's authority to insist that an agent cannot waive a principal's fundamental constitutional rights unless the agreement specifically cloaks the agent with that authority. After all, nothing in the FAA "purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

In this case, Kindred Nursing Centers seeks to expand the reach of the FAA to agency agreements that define the scope of an agent's authority and that do not involve or mention arbitration. Kindred effectively insists that state contract law that is not specific to arbitration must still be preempted if it has an adverse effect on whether a dispute will be arbitrated. While precedents do prevent state-law contract rules from discriminating against arbitration, the facts of this case do not present a case of differential treatment for arbitration. This Court should decline Kindred's invitation to inflate the preemptive scope of the FAA so that state law may not insist on affirmative grants of

authority when constitutional rights are waived through an agent.

Here, the powers of attorney at issue do not evince any intent on the part of the parties to arbitrate anything. More fundamentally, they do not authorize the agents to engage in any actions that constitute a waiver of constitutional rights. Instead, it can safely be assumed that in executing the agreements the parties to them did not contemplate an issue dealing with constitutional rights. Because an agent's consent to an arbitration agreement is only valid when the agent has received the requisite authority from the principal to submit any dispute to arbitration and because waiver of a constitutional right must be voluntary, intelligent and knowing, insistence that the authority to waive a constitutional right be manifest does not demonstrate hostility to arbitration but, instead, reflects a fundamental and commonplace feature of contract law that agreements be made with proper authority and reflect a meeting of the minds, a concern that takes heightened importance when fundamental constitutional rights are concerned.

ARGUMENT

I. THE FAA HAS NO APPLICATION TO THE TERMS OF A POWER OF ATTORNEY THAT DOES NOT DISCRIMINATE AGAINST ARBITRATION.

A. The Preemptive Scope of the FAA Applies Only to Arbitration Agreements and State-Law Rules That Discriminate Against Those Agreements.

In this case, Kindred Nursing Centers [hereinafter, "Kindred"] seeks an extraordinary, extratextual expansion of the preemptive scope of the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1 *et seq.* In doing so, Kindred asserts that Congress prohibited state-law rules from singling out arbitration for different treatment or for interpreting contracts in a manner that discriminates against arbitration. Pet. Br. 10-11. While that statement is true as far as it goes, it has scant relevance to the facts and circumstances presented in this case. Kindred myopically focuses on the *results* of the decision below because of its effect on arbitration and asserts that Kentucky has invented a rule designed to discriminate against arbitration. To the contrary, the Kentucky Supreme Court rested its decision on an entirely appropriate, non-arbitration rationale. After all, nothing in the FAA "purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen*, 556 U.S. at 630.

As this Court has explained, "agreements to arbitrate [may] be invalidated by 'generally applicable

contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011) (citation omitted).

For that reason, discerning the FAA's preemptive scope properly focuses on the arbitration agreement, its formation, and the defenses raised to it. This Court has explained that "the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 111 (2001). It embodies a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983), and "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood,* --- U.S. ---, 132 S. Ct. 665, 669 (2012). Thus, this Court has declared that "Congress precluded States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996).

These precedents reflect Congress's intent, as articulated in Section 2 of the FAA, which also acknowledges that arbitration agreements are not valid, irrevocable or enforceable when the agreement contravenes grounds that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Under Section 2's command, courts determine whether a valid arbitration agreement exists through application of "ordinary state-law principles that govern the formation of contracts." *First Options of*

Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). *See also Perry v. Thomas,* 482 U.S. 483, 492 n. 9 (1987) ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."). Thus, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Cassarotto,* 517 U.S. at 687 (1996). On the other hand, this Court has instructed that arbitration agreements may not be invalidated "under state laws applicable only to arbitration provisions." *Id*.

B. Third Parties Generally May Not Commit a Non-Party to Arbitration.

It is axiomatic that a third party generally may not commit a non-party to a contractual relationship, including to an arbitration agreement. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002), quoting *Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). There are of course exceptions to that general rule, such as where "'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Arthur Andersen,* 556 U.S. at 631, quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001).

Courts, however, "should be wary of imposing a contractual obligation to arbitrate on a non-contracting party." *Smith / Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.,* 198 F.3d 88, 97 (2d Cir. 1999), *cert. denied,* 531 U.S. 815 (2000). That wariness, along with the rules that prevent application to a non-party, reflect the fundamental principle that "a meeting of the minds [is] the most essential factor to constitute a binding contract." *Utilities Electrical Machine Corp. v. Joseph E. Seagram & Sons,* 187 S.W.2d 1015, 1018 (Ky. 1945). *See also Bowsher v. Merck & Co.,* 460 U.S. 824, 864 (1983) (White, J., concurring in part, dissenting in part) ("A contract, after all, is a meeting of the minds."); *Martin v. Ewing,* 164 S.E. 859, syl. pt. 1 (W. Va. 1932) ("A meeting of the minds of the parties is a sine qua non of all contracts.").

In fact, in most states, a meeting of the minds must exist with respect to *all essential terms*. *See, e.g., Ibe v. Jones,* 836 F.3d 516, 524 (5th Cir. 2016) (applying Texas law and requiring "'an offer and acceptance and a meeting of the minds on all essential terms.'") (quoting *Principal Life Ins. Co. v. Revalen Dev., LLC,* 358 S.W.3d 451, 454–55 (Tex. App.—Dallas 2012, *pet. denied*)); *EEOC v. Waffle House, Inc.,* 193 F.3d 805, 816 (4th Cir. 1999) (same, applying South Carolina law), *rev'd other grounds,* 534 U.S. 279 (2002). Generally applicable Kentucky contract law is stringent in this regard: "To create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract." *Conners v. Eble*, 269 S.W.2d 716, 717–18 (Ky. 1954). There "must be a meeting of the minds to effect assent." *Id.* Furthermore, "[a]ssent to be bound by the terms of an agreement must be expressed." *Ally Cat, LLC v. Chauvin*, 274

S.W.3d 451, 456 (Ky. 2009), *citing Courtney Shoe Company v. E.W. Curd and Son,* 142 Ky. 219, 134 S.W. 146 (1911); *Henry Clay Fire Ins. v. Denker's Executrix,* 218 Ky. 68, 290 S.W. 1047 (1927). This Court's jurisprudence takes that concept into account as it has held that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 374 (1974).

There can be no meeting of the minds when a party has not agreed to arbitrate a dispute, directly or through an agent. *See, e.g., Duenas v. Life Care Centers of Am., Inc.,* 336 P.3d 763, 774-75 (Ariz. Ct. App. 2014) (authorized agent's agreement to arbitrate dispute with nursing home during first two residencies did not govern claims arising out of resident's subsequent two admissions to facility, for which representative did not sign arbitration agreements, because the original agreements made each stay a separate event); *Siopes v. Kaiser Found. Health Plan, Inc.,* 312 P.3d 869, 877 (Haw. 2013) (injured employee not bound by employer's agreement to arbitrate insurance dispute with health plan when his enrollment "form did not contain an arbitration agreement or suggest that one existed, the Group Agreement containing the arbitration provision was not signed by [him], and there was no indication that [he received,] reviewed and understood its contents."); *Drury v. Assisted Living Concepts, Inc.,* 262 P.3d 1162, 1163 (Or. App. 2011) (son who signed assisted living residency agreement containing arbitration clause but was not decedent's guardian, conservator, personal representative, or trustee, could not bind estate to arbitration); *Johnson v. Pires,* 968

So. 2d 700, 702 (Fla. 4th Dist. Ct. App. 2007) (chief operating officer of company who signed arbitration agreement only in a corporate capacity is not bound as an agent to arbitrate individual claim against him); *Milon v. Duke Univ.,* 559 S.E.2d 789 (N.C.), *cert. dismissed,* 536 U.S. 979 (2002) (hospital could not compel arbitration of medical-malpractice claim when wife of plaintiff signed arbitration agreement for patient without authority). *Cf. Zurich Am. Ins. Co. v. Watts Indus., Inc.,* 417 F.3d 682, 688 (7th Cir. 2005) ("A corporate relationship is generally not enough to bind a nonsignatory to an arbitration agreement."). Kentucky law is in accord. *Ally Cat,* 274 S.W.3d at 456 (warrantor could not compel arbitration pursuant to warranty agreement where the signing party did not indicate her representative capacity on behalf of corporate real party in interest).

The Second Circuit has pioneered an inquiry, widely adopted elsewhere, that looks to five theories arising out of common law principles of contract and agency law, under which a signatory to an arbitration agreement may bind a non-party. Those five theories are: "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.,* 170 F.3d 349, 352 (2d Cir. 1999), *citing Thomson–CSF v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995). *See also Trippe Mfg. Co. v. Niles Audio Corp.,* 401 F.3d 529, 532 (3d Cir. 2005); *Javitch v. First Union Sec., Inc.,* 315 F.3d 619, 629 (6th Cir. 2003); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 417 (4th Cir. 2000). *But see Bridas S.A.P.I.C. v. Gov't of Turkmenistan,* 345 F.3d 347, 356 (5th Cir. 2003) (adopting six theories and

adding third-party beneficiary). In this case, only agency is at issue, and disposition of the Question Presented depends on the scope of the agent's authority.

II. THE KENTUCKY SUPREME COURT APPLIED A GENERAL RULE, NOT AN ARBITRATION-SPECIFIC RULE, IN DETERMINING THE SCOPE OF AN AGENT'S AUTHORITY.

A. Waivers of Constitutional Rights Must Be Voluntary, Knowing and Intelligent.

This Court should hold that Section 2's nondiscrimination principle does not preempt Kentucky's requirement that a power of attorney specify a waiver of constitutional rights in order for an agent to assume such authority. The decision below does not involve defenses only applicable to arbitration but a straightforward determination of the scope of an agent's authority to waive a principal's constitutional rights. Both this Court's and Kentucky's jurisprudence hold that constitutional rights are not waived unless it is done voluntarily, knowingly, and intelligently. *See, e.g., Montejo v. Louisiana,* 556 U.S. 778, 786 (2009); *Dunlap v. Com.,* 435 S.W.3d 537, 561-62 (Ky. 2013), *as modified* (Feb. 20, 2014). The jurisprudence has a venerable lineage unrelated to arbitration. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

In fact, in the context of a criminal prosecution, trial judges do not just take the word of the lawyer for the defendant that his client has waived constitutional rights to accept a plea bargain. Instead, the judge makes a pointed and extensive inquiry to make sure

that the defendant fully understands his rights and voluntarily waives them. For example, in *Jackson v. Commonwealth*, 113 S.W.3d 128, 130 (Ky. 2003), counsel for the defendant told the trial judge that the defendant had waived his right to a jury trial in favor of a bench trial. Upon review, the Kentucky Supreme Court found "[n]either the trial court nor defense counsel made any inquiry of [Defendant] regarding his consent to the waiver, nor did [Defendant] acknowledge the waiver personally on the record." *Id*. Relying on precedent that holds that "a trial court may not presume a waiver of the right to a jury trial from a silent record, and ... a court should not presume acquiescence in the loss of a constitutional right," *Marshall v. Commonwealth,* 60 S.W.3d 513, 522 (Ky. 2001), the *Jackson* Court, following federal precedent and seeking assurance that invited error had not occurred, remanded the case for an evidentiary hearing in which the prosecution had the burden to prove that a voluntary, intelligent, and knowing waiver took place. 113 S.W.3d at 131, 136.

In the course of its analysis, the *Jackson* Court found "some guidance in the federal courts' interpretation of Federal Rule of Criminal Procedure (FRCP) 23(a)." *Id*. at 132. Among the pertinent considerations imposed by the federal rule are whether the "defendant knowingly, voluntarily, and intelligently waive[d] his right to trial by jury" and whether the waiver was in writing. *Id., citing United States v. Robertson,* 45 F.3d 1423, 1431 (10th Cir. 1995), *cert. denied,* 516 U.S. 844, 116 (1995). The Kentucky Court noted that

> most United States Courts of Appeals have not required strict compliance with FRCP 23(a)'s "in writing" provision and have found the failure to secure the waiver in writing to be non-prejudicial in cases "where the record clearly reflects that the defendant 'personally gave express consent in open court, intelligently and knowingly.'"

Id. at 133 (footnotes and citations omitted).

To accomplish that voluntary, intelligent and knowing waiver, the federal appellate courts "strongly urge" trial judges "to engage the defendant in a colloquy concerning waiver of a jury trial" that is detailed in its description of the jury-trial and the consequences of waiver. *Id*. No doubt, this reflects this Court's insistence that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748 (1970). Kentucky has every right to be equally insistent about instruments allowing agents to waive state constitutional rights on behalf of principals.

B. Waiver Should Not Be Assumed from Silence.

Constitutional rights hold a special place in the pantheon of laws that govern our relationships. While status as a state constitutional right does not immunize a law from federal preemption, it does inform a state's ordinary contract rules, which are not subject to federal preemption. Kentucky chose uniquely strong language in delineating its jury-trial right.

Section 7 of the Kentucky Constitution provides that "[t]he ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate."

The special place that the jury-trial holds in American constitutional law is well documented. Only the right to trial by jury, not freedom of speech or freedom of religion, was "universally secured by the first American state constitutions." Leonard Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 281 (1960), *quoted in, Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting). The absence of a civil-jury guarantee from the new U.S. Constitution was "one of the strongest objections" taken against ratification. *Parsons v. Bedford,* 28 U.S. 433, 445 (1830) (Story, J.). *See also* Alexander Hamilton, Federalist No. 83, 495 (Clinton Rossiter ed., New Am. Lib. 1961) (calling it the objection that has "met with most success"). As Justice Story related, without the promise of a civil-jury trial, the Constitution never would have received ratification. Joseph Story, Commentaries on the Constitution of the United States 653 (R. Rotunda & J. Nowak eds. 1987) (1833).

As a result, this Court has long held that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt,* 293 U.S. 474, 486 (1935). That adherence to trial by jury has spawned an interpretative rule articulated by the first Justice Harlan for this Court, that, as a fundamental guarantee, "every reasonable presumption should be indulged against its waiver." *Hodges v. Easton,* 106 U.S. 408, 412 (1882). *See also Aetna Ins. Co. v. Kennedy to Use of Bogash,* 301 U.S.

389, 393 (1937) (footnoted omitted) ("as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.").

Kentucky's application of the same principles is consistent with this Court's jurisprudence. In *First Options,* this Court stated that

> given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

514 U.S. at 945. It is no stretch to hold similarly that courts ought to hesitate to interpret silence as to the waiver of constitutional rights in an agency agreement to permit waiver. The *First Options* Court acknowledged that an agreement that designates at least some issues for arbitration constitutes indicia that "the parties likely gave at least some thought to the scope of arbitration." *Id*. The same cannot be said of the agency agreements here, which were entirely silent on the waiver of constitutional rights or the authorization to submit disputes to arbitration, which would also constitute a waiver of the relevant constitutional rights.

Instead, it can safely be assumed that in executing the agreements the parties to them never contemplated an issue dealing with constitutional rights. Nearly a

decade ago, Kentucky's courts had held that a patient's health-care surrogate could not commit a patient to arbitration absent specific or apparent authority. *Mt. Holly Nursing Ctr. v. Crowdus,* 281 S.W.3d 809 (Ky. Ct. App. 2008), *rev. denied* (May 13, 2009).

It naturally follows, as the court below held, that an agent's consent to an arbitration agreement is only valid when the agent has specifically received the requisite authority from the principal. Insistence that the authority be manifest does not demonstrate hostility to arbitration but, instead, reflects a fundamental and commonplace feature of contract law that agreements be made with proper authority and reflect a meeting of the minds, a concern that takes heightened importance when fundament constitutional rights are concerned.

Kindred sets up a weak straw man argument to counter the claim that Kentucky has asserted a general rule involving constitutional rights. It asserts that the Kentucky Supreme Court's constitutional rights declaration "does not apply to other constitutional rights that are relevant to contracting—such as Kentucky's constitutional right 'of acquiring and protecting property.'" Pet. Br. 11, 25-26, citing Ky. Const. § 1 and adopting the view of the dissent below, Pet. App. 93a (Abramson, J., dissenting). The powers of attorney at issue here actually specified that the attorneys-in-fact were delegated authority to make contracts concerning property.[2] Given that the rule

---

[2] For example, in one of the consolidated cases, attorney-in-fact Belinda Whisman received specified authority to mortgage property and "to institute or defend suits concerning [the

announced concerning property rights was therefore observed in the subject powers of attorney, there would be no difficulty in doing so with respect to other constitutional rights, either specifically or more broadly.

Kindred attempts to evade this refutation of its argument by asserting that a cause of action is a species of personal property and thus within the authority of an attorney-in-fact to alienate. Pet. Br. 23, citing Pet. App. 36a. The court below properly addressed that argument, noting that the authority "to institute or defend suits concerning property rights" contained in the power of attorney, neither authorizes the initiation of an arbitration proceeding, nor permits the attorney in fact to waive a jury-trial, either through a bench trial over property rights or an arbitration proceeding. Pet. App. 30a-32a, 43a. Moreover, constitutional rights, as the Kentucky Supreme Court pointed out, "are decisively *not* 'personal property' as we have defined the term." Pet. App. 37a (emphasis in orig.).

Kindred also mistakenly asserts that this Court's decision in *Cassarotto* all but decides this case. Pet. Br.

---

principal's] property or rights." Pet. App. 14a. Another, Janis Clark, was authorized "[t]o lease, sell, or convey any real or personal property" of the principal, as well as mortgage any property," "retain and release all liens on real or person [sic] property," or "institute or defend suits concerning my property or rights." Pet. App. 18a-19a. Finally, the third one, Beverly M. Wellner, was authorized to "receive, take receipt for, and hold in possession, manage and control all property, both real and personal," including full power to "sell, mortgage or pledge, assign transfer, invest and reinvest" such property." Pet. App. 21a.

18. In *Casarotto,* this Court concluded that § 2 of the FAA preempted a state law requiring that, absent a conspicuous notice of an arbitration clause on the first page of the contract, the contract was not arbitrable. 517 U.S. at 681. Borrowing language from the equal-protection doctrine, the Court reasoned that States could not, consistent with § 2, "singl[e] out arbitration provisions for suspect status." *Id.* at 687.

The Kentucky Supreme Court's rule does nothing comparable to what was at issue in *Cassarotto*. Plainly, Kentucky's rule concerning the waiver of constitutional rights is not an arbitration-specific rule. In *Ping v. Beverly Enterprises, Inc.,* 376 S.W.3d 581 (Ky. 2012), *cert. denied,* 133 S. Ct. 1996 (2013), the Kentucky Supreme Court observed that a power of attorney required express authorization to settle claims or disputes, even outside the arbitration context, in order to assure that the right to open courts, secured by Ky. Const. § 14, is not inadvertently waived. *Id*. at 593. Certainly, no attorney can settle a client's case without specific approval.

While Kindred dismisses that array of other constitutional rights that may be waived but only explicitly through a power of attorney and are unrelated to arbitration as "inflammatory and unsupportable analogies," Pet. Br. 27, the assertion is without merit. *See, e.g., M.E.C. v. Com., Cabinet for Health & Family Servs.,* 254 S.W.3d 846 (Ky. Ct. App. 2008) (holding that social services agency had no authority to terminate parental rights merely due to parent's incarceration, when the agency failed to establish abuse and neglect or that termination was in the children's best interest). *See also* Ky. Rev. Stat.

§ 625.043A (establishing that a parent can only voluntarily terminate parental rights by order of a Circuit Court, after a hearing).

Similarly, there is no basis under Kentucky law for an attorney-in-fact—even one with the authority "to do and perform for me in my name all that I might if present" or "to make any contracts or agreements that I might make if present"—to waive the principal's civil rights;[3] put a child up for adoption;[4] consent to abort a pregnancy;[5] or consent to an arranged marriage.[6] *Id*. As

---

[3] "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Parson v. Commonwealth*, 144 S.W.3d 775, 792 (Ky. 2004), quoting *Johnson*, 304 U.S. at 464.

[4] Adoption requires a Court order based on "voluntary and informed consent" of the natural parent, unless the parent has been "adjudged mentally disabled" for not less than one year or the parent's rights have been voluntarily or involuntarily terminated by the Court. Ky. Rev. Stat. § 199.500(1).

[5] Kentucky law requires "voluntary and informed written consent of the woman upon whom the abortion is to be performed or induced," except in cases of "a medical emergency or medical necessity." Ky. Rev. Stat. § 311.725(1) & (4).

[6] In Kentucky, no "marriage shall be solemnized without a license therefor." Ky. Rev. Stat. § 402.080. The marriage license can only be issued by a county clerk and must include a "statement signed by both parties swearing that, to the best of their knowledge, the information provided on the form is correct." *Id*. at § 402.100. And marriage is "prohibited and void" with "a person who has been adjudged mentally disabled by a court of competent jurisdiction." *Id*. at § 402.020.

a matter of state law, the attorney-in-fact instruments in this case would not bind the principal in any of the specified circumstances because generally applicable state law requires more.

C. Kentucky's Ruling Reflects Firmly Established Principles of State Law Concerning Powers of Attorney.

Kentucky has long held that a power of attorney must be strictly construed. *See U.S. Fidelity Co. v. McGinnis,* 145 S.W. 1112, 1114 (Ky. 1912) ("a formal instrument conferring authority will be strictly construed, and can be held to include only those powers which are plainly given and those which are necessary, essential and proper to carry out those expressly given."). In fact, "[p]owers of attorney delegating authority to perform specific acts, and also containing general words, are limited to the particular acts authorized." *Id*. Kentucky law further places a number of authorities off-limits. For example, Kentucky law prohibits an attorney-in-fact from ever having the authority to make a will for the principal, *Smith v. Snow*, 106 S.W.3d 467, 470 (Ky. App. 2002) (citing *Spalding v. St. Joseph's Industrial School for Boys*, 54 S.W. 200 (Ky. 1899)). Unlike many states, Kentucky has not adopted the Uniform Power of Attorney Act. *Rice v. Floyd*, 768 S.W.2d 57, 60 (Ky. 1989). The Uniform Act gives specific powers to attorneys-in-fact to compromise or settle claims and to submit claims for alternative dispute resolution.[7] That authority is

---

[7] *See* Summary of Uniform Power of Attorney Act, available at Uniform Law Commission website, http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney (last visited January 5,

absent here. Given these restrictions, Kentucky law requires that those dealing with attorneys-in-fact do so at their own peril. *Harding v. Kentucky River Hardwood Co*., 265 S.W. 429, 432 (Ky, 1924) ("Whenever one man presents himself as the agent of another, it is the duty of all who may have transactions with him, in his representative character, to inquire into the extent of his authority, and they must deal with him at their peril.")

Nothing in the lone statute governing attorneys-in-fact, Ky. Rev. Stat. § 386.093, mentions the civil or constitutional rights of the principal. As the Kentucky Court of Appeals has explained, "incompetent adults are *entitled to court oversight*, via guardianship proceedings, to guarantee their interests are protected because they are not able to do so themselves." *GGNSC Stanford, LLC v. Rowe*, 388 S.W.3d 117, 123 (Ky. App. 2012) (citing Ky. Rev. Stat. § 387.500(2)) (emphasis added).

Nearly thirty years ago, the Kentucky Supreme Court explained the important differences between statutory guardians and attorneys-in-fact, in a case that had *nothing* to do with arbitration agreements. In *Rice,* 768 S.W.2d at 60-61, conspicuously absent from Kindred's brief, the Kentucky Supreme Court held that a "durable power of attorney is not a substitute for the appointment of a guardian." As the Court explained in *Rice,* Ky. Rev. Stat. § 386.093 was designed to abrogate common law rules regarding attorneys-in-fact. *Id*. at 58.

2017) (showing that 21 states have adopted the Uniform Power of Attorney Act).

In identifying the different rights and responsibilities of an attorney-in-fact and a statutory guardian, the Court explained that it "was not the purpose of KRS 386.093 to permit an attorney-in-fact to undertake all the obligations of a legally appointed guardian." *Id*. at 59, citing Ky. Rev. Stat. §§ 387.500, 387.660. Indeed, the Court held that the "legal and personal requirements of a disabled person are not well satisfied by an attorney-in-fact as they might be by a guardian." *Id*. at 60. Thus, under Kentucky law, the "process of appointing a guardian or conservator is the legal means by which the court applies *due process* to avoid the possible invasion of *civil or legal rights* in regard to a partial disability." *Id*. at 59 (emphasis added) (also noting that "courts have always had the inherent duty to protect the rights and interests of incompetents," citing *Metcalf v. Metcalf*, 193 S.W.2d 446 (Ky. 1946)). The Court even noted that a person deemed "incompetent cannot be sued and an attorney-in-fact cannot defend an action on behalf of an incompetent ... Defense must be completed by a legally appointed guardian or committee." *Rice*, 768 S.W.2d at 60 (citing Ky. CR § 17.03).

Federal Courts in Kentucky have also recognized the significant distinctions between individuals acting under a power of attorney and statutorily-appointed guardians. *Gaddie v. SunBridge Healthcare Corp.*, 2009 WL 413126, at *2 (W.D. Ky. Feb. 18, 2009) ("there is a significant distinction between the powers of a guardian and a durable power of attorney"). Kindred glosses over the differences, but the cases it relies on further support the distinction. *See* Pet. Br. 22, citing *Preferred Care, Inc. v. Howell*, 2016 WL 4470746, at *3 (E.D. Ky. Aug. 19, 2016); *Preferred Care, Inc. v.*

Bleeker, 2016 WL 6636854, at *4 (E.D. Ky. Nov. 8, 2016).) For example, the Eastern District of Kentucky recently noted that "when a court must decide whether an attorney-in-fact has the power to do something, the court looks to the document to see what the principal has allowed." *Howell*, 2016 WL 4470746 at *4. But a "guardian, unlike an attorney-in-fact, receives his power from the state—not from the ward himself." *Id*. Therefore, "Kentucky law then defines what the guardian can do, and the court can further limit his power." *Id*. (citing Ky. Rev. Stat. § 387.660).[8]

Since the Kentucky Supreme Court's decision in *Rice*, the Kentucky legislature has amended the power of attorney statute, Ky. Rev. Stat. § 386.093, twice. *See* 1998 Ky. Acts 421; 2000 Ky. Acts 27. The only expansion of the substantive powers of an attorney-in-fact in those amendments is a 2000 change adding a provision that "a durable power of attorney may authorize an attorney in fact to make a gift of the principal's real or personal property to the attorney in fact or to others if the intent of the principal to do so is unambiguously stated on the face of the instrument." Ky. Rev. Stat. § 386.093(6). Thus, the Kentucky Supreme Court's holding that an attorney-in-fact is not equivalent to, and does not have the extensive powers

---

[8] Even before the decision below, the Kentucky Court of Appeals held that a statutorily-appointed guardian, who has "the broadest possible agency relationship," ***does*** have the authority to enter into an arbitration agreement on behalf of the principal. *LP Pikeville, LLC v. Wright*, 2014 Ky. App. LEXIS 57, *10 (Ky. App. Apr. 4, 2014). The Kentucky Supreme Court accepted *LP Pikeville* for discretionary review, but has stayed the case pending the outcome here. *Wright v. LP Pikeville, LLC*, 2014-SC-000238-DG.

of, a statutorily-appointed guardian is also the intent of the Kentucky Legislature. *See Benningfield v. Zinsmeister*, 367 S.W.3d 561, 564 (Ky. 2012) ("[W]hen a statute has been construed by a court of last resort and the statute is substantially reenacted, the Legislature may be regarded as adopting such construction.").

Notably, *Rice* arose in the context of a dispute between the attorney-in-fact for Mayme Floyd, who had been appointed by way of a durable power of attorney, and Ms. Floyd's daughter, who sought to have herself appointed guardian of Ms. Floyd. 768 S.W.2d at 57. *Rice* did not arise in the context of any dispute regarding arbitration agreements. Thus, the limitations that Kentucky law places on attorneys-in-fact cannot be said to arise from, or even relate to, any disregard for arbitration. Kindred's misunderstanding of the state-law limitations on attorneys-in-fact, and Kindred's failure to require assent to arbitration by one with express authority, do not warrant a revision of Kentucky law to require contract formation between Kindred and an unauthorized agent.

D. Kentucky's Supreme Court Has Not Demonstrated Hostility to Arbitration.

Kindred's claim of Kentucky Supreme Court hostility to arbitration rings false in light of its jurisprudence. State law "favors the enforcement of arbitration agreements." Pet. App. 25a, citing *Ally Cat, LLC v. Chauvin,* 274 S.W.3d 451, 457 (Ky. 2009). It further recognized that "[d]oubts about the scope of issues subject to arbitration should be resolved in favor of arbitration." *Id*. at 24a-25a.

Justice Daniel Venters, who wrote the majority decision, has authored five decisions involving the FAA. The decision below is the ***only one*** of those decisions in which Justice Venters held that arbitration was not required. *See Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013) (applying the FAA and holding that merger clause in purchase agreement did not defeat later-entered arbitration agreement); *Schnuerle v. Insight Communs., Co. L.P.*, 376 S.W.3d 561, 565 (Ky. 2012) (holding "general arbitration provision is not unconscionable," applying *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and "comports with Kentucky's public policy preference favoring arbitration")); *Hathaway v. Eckerle*, 336 S.W.3d 83, 87-88 (Ky. 2011) (finding that choice of law provision in sales agreement selecting FAA is controlling and allows court to disregard Kentucky's Uniform Arbitration Act); *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 694 (Ky. 2010) (class action plaintiffs agreed to arbitration even though they did not directly sign arbitration agreement).

Schnuerle is particularly noteworthy. It arose from a service agreement between consumers and Insight Communications for broadband Internet services. Justice Venters, writing for the majority, first held that a choice of law provision in the service agreement selecting New York law was not enforceable because "Kentucky had the greater interest in" the issues. 376 S.W.3d at 567. Nonetheless, the Court went on to apply both Kentucky law *and* the FAA, ultimately enforcing an arbitration clause in the service agreements. Specifically, the Court explained that a "decision to invalidate or otherwise disregard the anti-class action provision of Insight's Service Agreements on grounds of

unconscionability would undermine the federal policy favoring arbitration, and would offend the preemption provisions of the Federal Arbitration Act." *Id*. at 573. Thus, Justice Venters, and the Kentucky Supreme Court as a whole, have a strong history of enforcing the FAA and supporting arbitration. Kindred's arguments that the Kentucky Supreme Court is a rogue court with an agenda to evade the FAA and federal law are completely unfounded.

Schnuerle also undermines Kindred's reliance on *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). *See* Pet. Br. 20-21. In *Imburgia*, this Court held that the FAA precluded the California Court of Appeal's interpretation of the term "law of your state" to exclude the preemptive force of federal law because "nothing in the [state court's] reasoning suggest[ed]" that a court in that state "would reach the same interpretation of 'law of your state' in any context other than arbitration." 136 S. Ct. at 469. However, *Schnuerle* confirms that the Kentucky Supreme Court has refused to enforce otherwise valid contractual choice of law provisions in favor of Kentucky law—*except* when the FAA applies.

Instead of demonstrating a hostility to arbitration, as the court below stated, the Kentucky "rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights regardless of the context in which they arise." Pet. App. 47a-48a.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
7916 Bressingham Drive
Fairfax Station, VA 22039
(202) 944-2874
robert.peck@cclfirm.com

Julie Braman Kane
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, N.W.
Suite 200
Washington, DC 20001
(202) 965-3500

Kevin C. Burke
Jamie K. Neal
Burke Neal PLLC
2200 Dundee Road, Suite C
Louisville, KY 40205
(502) 709-9975
kevin@burkeneal.com
jamie@burkeneal.com

Counsel for Amici Curiae

January 13, 2017