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 CENTER, et al.,

Petitioners,

v.

JANIS E. CLARK, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Supreme Court Rule 25.6 allows Respondents here to address intervening materials that were not previously available. Following Respondents' initial filing on January 6, 2017, they received supporting *amici curiae* briefs. Respondents would like the opportunity to clarify their position, so there is no ambiguity. Notably, Petitioners have not yet replied to Respondents' brief.

As the American Association for Justice and the Kentucky Justice Association (collectively "AAJ") point out, Kindred "seeks to expand the reach of the FAA to agency agreements . . . that do not involve or mention arbitration." Br. for AAJ at 2. According to Kindred, any "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." *Id.*

In responding to Kindred's position, the AAJ states that "[t]he FAA has no application to the terms of a power of attorney that does not discriminate against arbitration." *Id.* at 4. Respondents' position, in contrast, is that the FAA does not apply to the terms of a power of attorney – period. The FAA has no application to either the powers of attorney or the contract formation issues, whether or not discrimination occurred.

II. ARGUMENT

A. The FAA does not apply to a power of attorney.

A plain reading of Section 2 reveals that the FAA speaks only of a "contract" or an "agreement" that contains an arbitration "provision." 9 U.S.C. § 2; *Breazeale v. Victim Services, Inc.*, ___ F. Supp. 3d ___, No. 14-CV-05266-VC, 2016 WL 4059258, *3 (N.D. Cal. July 27, 2016), *appeal filed*, No. 16-16498 (9th Cir. Aug. 25, 2016). Because neither power of attorney contains an arbitration provision, neither falls under the ambit of the FAA.

Under 9 U.S.C. § 2, a contract will trigger the FAA only if it (1) contains an arbitration provision, and (2) evidences a transaction involving commerce. *Herrera Cedeno v. Morgan Stanley Smith Barney, LLC*, 154 F. Supp. 3d 1318, 1324 (S.D. Fla. 2016). Defendants bear the burden of proving both prongs of the analysis. *Id.* at 1325. But because the powers of attorney do not contain a written arbitration provision, they do not fulfill these requirements. To be sure, "[t]he parties can't agree that Congress intended to reach a contract that it didn't intend to reach." *Breazeale*, 2016 WL 4059258, at *5. And the parties' "mistaken belief that the FAA applies to their agreement cannot make it so." *Id.* Thus, the FAA does not apply in this case, making the Kentucky Supreme Court's intentions and the effects on arbitration irrelevant.

B. The FAA does not reach contract formation issues.

Even if the FAA did apply to powers of attorney, it still does not extend to contract formation issues. The FAA's statutory framework applies only ***after*** a court has determined that a valid arbitration agreement was formed. The FAA may task judges with rigorously enforcing valid arbitration agreements, but it says nothing about the threshold issue of whether an arbitration agreement exists. David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1263 (2013).

Julius Henry Cohen – the FAA's drafter – made clear that the FAA would not infringe "upon the right of each State to decide for itself what contracts shall or shall not exist under its law." *Arbitration of Interstate Commercial Disputes: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924). Further, "whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made."[1] *Id.* So, the FAA can influence a contract's ***enforcement***, only after the State has found that a contract exists.

The Kentucky Supreme Court determined that the powers of attorney did not grant the agents authority to enter into an arbitration agreement on behalf of their principals. Thus, the arbitration agreements

[1] Cohen's statements are "one of the most important aspects of the [FAA's] legislative history." Horton, *Federal Arbitration Act Preemption* at 1259 (quotation omitted).

were never formed. In the eyes of the law, the agents' signatures were no different than the signature of a perfect stranger. The analysis ends there. Regardless of how the Kentucky Supreme Court came to its conclusion, the express wording of the FAA does not permit it to influence how state courts determine contract formation issues.

C. This Court's function is to apply the FAA, not rewrite it.

Petitioners will likely argue that "parties cannot circumvent the FAA by designating discriminatory state-law rules as rules of contract formation," including those relating to powers of attorney. Cert. Reply Br. 9. But it is not the role of the Court "to conform an unambiguous statute to what [it] thinks 'Congress probably intended.'" *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 n.6. (2009). That role is reserved for Congress itself. *See, e.g.*, *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458 (2007) ("The 'loophole,' in our judgment, is properly left for Congress to consider, and to close if it finds such action warranted.").

Respectfully submitted,

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