NO. 12-652

IN THE

Supreme Court of the United States

BEVERLY ENTERPRISES, INC., ET AL.,
Petitioners,

v.

DONNA PING, EXECUTRIX OF THE ESTATE OF ALMA CALHOUN DUNCAN, DECEASED,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by this case are:

1. Does the FAA pre-empt application to arbitration agreements of a state decision that a person who has no property interest in a wrongful death action has no authority to bind the owner of the cause of action to an agreement to arbitrate it?

2. Does the FAA pre-empt a state decision that a person authorized to do things "necessary" to be done for the principal has no authority to bind the principal to an optional agreement to arbitrate disputes that might arise in the future?

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BRIEF FOR RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case arises from the death in 2006 of Alma Duncan, then seventy-nine years old, while under the care of Petitioners at their nursing home. The relevant facts of the case are straightforward. The court below found there was no significant disagreement about them. Pet. App. 3a.

In 1998, Ms. Duncan had executed a power of attorney granting certain powers to her adult daughter, Donna Ping (Respondent here in her representative capacity). In March of 2006, acting as agent for her mother under authority granted by the power of attorney, Ms. Ping admitted her mother to Petitioners' nursing home. During the admissions process Ms. Ping was offered an optional arbitration agreement whose scope encompasses the claims at issue here. In boldface type and in all capital letters, the document emphasized that is was "**NOT A CONDITION OF ADMISSION — READ CAREFULLY.**" *Id*. at 78a. The document emphasizes that the nursing home resident has the right to seek counsel concerning it, that the arbitration agreement is not a precondition to admission, and that it can be rescinded within thirty days. *Id*. at 81a. Ms. Ping signed the agreement as "Daughter/POA" and "Authorized representative." *Id*. at 82a.

The power of attorney in question gave Ms. Ping authority "to do and perform any, all, and every act and thing whatsoever *requisite and necessary* to be done, to and for all intents and purposes, as I might or could do if personally present, including but

not limited to" several enumerated powers. *Id*. at 74a (emphasis added). One of the enumerated powers was the power "[t]o make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me." *Id*. at 75a. The document also authorized Ms. Ping, generally, to do "any and every further act and thing of whatever kind, nature, or type *required* to be done on my behalf." *Id*. (emphasis added).

In 2006, in her capacity as personal representative pursuant to Kentucky's Wrongful Death Act, Ms. Ping brought claims for both wrongful death and for survival against Petitioners. The wrongful death statute, Ky. Rev. Stat. § 411.130, provides in pertinent part that

> [w]henever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it.

This provision was enacted pursuant to the specific power granted to the Kentucky General Assembly, in section 241 of the Kentucky Constitution, to provide for such a claim and to provide "how the recovery shall go and to whom belong."

Pursuant to that constitutional authority, the General Assembly created two claims, both brought by the personal representative. A survival claim, for damages suffered pre-death by the decedent, is prosecuted on behalf of the estate. Ky. Rev. Stat. §

411.140. A wrongful death claim, for damages suffered by other persons because of the loss of the decedent, is prosecuted "for the benefit of and [proceeds] go to" persons enumerated in the statute, Ky. Rev. Stat. § 411.130(2), unless such persons are not living. Ky. Rev. Stat. § 411.130(2)(e). As long as such persons are living—the case here—the wrongful death damages do not pass through the estate. *Id.*

The Kentucky Supreme Court did not enforce the arbitration clause, finding that the optional arbitration clause unambiguously was not "necessary" and therefore was not within the powers granted by Ms. Duncan to Ms. Ping. Additionally, it found that even if the clause had been enforceable against Ms. Duncan's estate with regard to the survival claim, it would not be enforceable against the statutory beneficiaries of the wrongful death claim, as there was no evidence that they had agreed to arbitrate their dispute.

REASONS FOR DENYING THE PETITION

In its decision below, the Kentucky Supreme Court routinely applied unremarkable doctrines of wrongful death and agency law to reach two unremarkable conclusions.

The Court found that a decedent who had no property interest in wrongful death actions owned by other persons had no authority to bind the owners of the causes of action to an arbitration agreement. Pet. App. 32a. In states like Kentucky, in which the wrongful death action is independent of the rights of the decedent, courts vest the decedent with no authority over the cause of action. *Id.* at 30a-32a. In states in which the cause of action derives from the

rights of the decedent, courts hold otherwise. Differing decisions flow from differing, arbitration-neutral doctrines regarding property rights in wrongful death claims, not from doctrinal confusion or hostility toward arbitration.

The court below also found that an agent authorized to perform "necessary" acts had no authority to enter an optional agreement designating an arbitral forum for resolution of subsequently arising disputes. *Id.* at 16a-20a. That decision also tracks results in other courts. Applying general principles of agency law, courts generally make the same finding when the agreement is optional and reach the opposite result when the agreement is mandatory, and therefore a condition of the receipt of medical care. Again, arbitration-neutral doctrine yields similar results in similar circumstances and differing results in differing circumstances. That is not hostility toward arbitration.

The questions presented here concern whether agreements to arbitrate exist, and, if so, whom they bind. These are matters of contract that the Federal Arbitration Act leaves, in the first instance, to state law. *Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624, 630 (2009) ("background principles of state contract law" govern these questions). Deference to state law ends only if state law discriminates against arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Petitioners effectively seek to have this Court resolve two questions of state law about which there is little disagreement in the states. It suggests radical interference with the decisional processes of state judiciaries. "[E]rrors in the application of state law are not a sound reason

for granting certiorari, except in the most extraordinary cases." *Leavitt v. Jane L.*, 518 U.S. 137, 147 (1996) (Stevens, J., dissenting). Neither of the state court's holdings here involves discrimination against arbitration.

I. THERE IS NO DISCRIMINATION AGAINST ARBITRATION IN THE LOWER COURT'S RULING REGARDING WRONGFUL DEATH CLAIMS.

Petitioners first suggest that the lower Court discriminated against arbitration by ignoring Petitioners' argument that because wrongful death claims "arise from" matters described in its purported arbitration agreement the ruling below is pre-empted by the FAA. Whether a claim arises from an arbitration agreement is a question of scope of arbitrability, subject to a presumption in favor of arbitrability. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). But neither question presented involves the scope of an arbitration agreement. Each involves the logically prior question of whether particular parties had agreed to arbitrate, a question resolved without favor to finding agreement. *Bd. of Trs. of the City of Delray Beach Police & Firefighters Retirement Sys. v. Citigroup Global Mkts., Inc.*, 622 F.3d 1335, 1342 (11th Cir. 2010) ("[W]e resolve this issue without a thumb on the scale in favor of arbitration because the 'federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.'") (citing *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002)); *Bybee v. Abdulla*, 189 P.3d 40, 47 (Utah 2008) ("While there is a presumption in favor of arbitration, that presumption applies only

when arbitration is a bargained-for remedy of the parties' as evidenced by 'direct and specific evidence' of a contract to arbitrate."). *See Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). Petitioners' reliance on the clarity with which the arbitration agreement purports to bind decedent's heirs and assigns, Pet. 3, and on whether a wrongful death claim arises out of death in its facility, Pet. 28, is misplaced. An arbitration agreement does not bind parties merely by reciting that they are bound. The court below was not faced with the analog of whether the decedent agreed to assign all right, title, and interest in the Brooklyn Bridge to Petitioners; it was faced with the question of whether the decedent had any right, title, or interest to assign.

This Court has recognized that wrongful death statutes and survival statutes create different property interests:

> The latter have been separately enacted to abrogate the common-law rule that an action for tort abated at the death of either the injured person or the tortfeasor. Survival statutes permit the deceased's estate to prosecute any claims for personal injury the deceased would have had, but for his death. They do not permit [as wrongful death statutes do] recovery for harms suffered by the deceased's family as a result of his death.

Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 576 n.2 (1974), *modified on other grounds by statute as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 n.1 (1990). *See* 1 Stuart M. Speiser & James E. Rooks, *Recovery for Wrongful Death* § 1:13 (4th ed. 2005)[1] ("The prime difference between the theories underlying the two types of statutes . . . is that the survival statute merely *continues* in existence the injured person's claim after death as an asset of his estate, while the usual wrongful death statute creates a *new* cause of action, usually for the benefit of decedent's statutory survivors.") (emphasis in original). Kentucky statutes establish both survival, Ky. Rev. Stat. § 411.140, and wrongful death, Ky. Rev. Stat. § 411.130, claims.

Wrongful death claims themselves come in two types: claims that are independent of the survival claim (independent claims) and ones that derive from the survival claim (derivative claims). Speiser & Rooks, *supra*, § 1:9; *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258 (Ohio 2007) ("The majority of states treat wrongful-death actions as derivative of actions brought for the decedent's own injuries, and thus a recovery by the decedent or the decedent's estate extinguishes the beneficiaries' right to bring a wrongful-death action. Conversely, a smaller number of states hold that the pursuit by a decedent or a decedent's estate of personal injury claims does not affect subsequent wrongful-death claims.") (internal citations omitted). Independent

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[1] The predecessor to this treatise, Stuart M. Speiser, *Recovery for Wrongful Death* (2d ed. 1975 and Supp. 1989), has been cited approvingly numerous times by this Court. *See, e.g.*, *Miles*, 498 U.S. at 33.

claims are owned by the beneficiaries and redress harms they suffered; derivative claims vest the beneficiaries with rights to the survival claim. *Compare Peters*, 873 N.E.2d at 1261 ("Thus, when an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* leading to his or her death as well as a wrongful-death action *for the injuries suffered by the beneficiaries of the decedent as a result of the death*.") (emphasis in original) *with Ki v. State*, 78 S.W.3d 876, 879-80 (Tenn. 2002) (derivative) ("The plain language of Tenn. Code Ann. § 20-5-106(a) establishes that in a wrongful death suit only one right of action exists: the action that the decedent would have had, absent death, against the negligent wrongdoer . . . The decedent's survivors are only asserting the decedent's right of action on behalf of the decedent.").

Wrongful death and survival claims sometimes are required to be brought in one action by one personal representative, acting in trust for two different beneficiaries, the estate and the statutory beneficiaries. *See, e.g.*, Ohio Rev. Code 2125.02(A)(1); Mass. Gen. L. ch. 229(2); Ky. Rev. Stat. 411.130(1). As the Ohio Supreme Court explained in *Peters*, 873 N.E.2d at 1261, this procedural device does not affect the underlying ownership interests: "Although they are pursued by the same nominal party, we have long recognized the separate nature of these claims in Ohio."

The conclusion below that the decedent had no authority to bind beneficiaries to a predispute choice of forum agreement flows directly from the decedent's lack of property interest in the wrongful

death claim. The independent claim is the independent property of the beneficiaries, analogous to property that heirs own independently before they become beneficiaries of an estate. Derivative claims are analogous to property that passes to heirs through an estate: they are subject to control by the decedent. The highest courts of states in which the wrongful death claim is independent generally have found that a decedent's agreement to arbitrate does not bind the survivors pressing the separate wrongful death claim. Pet. App. 1a-35a; *Carter v. SSC Odin Operating Company, LLC*, 976 N.E.2d 344 (Ill. 2012), *petition for certiorari filed*, 81 USLW 3473 (Feb. 15, 2013); *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. 2009) (en banc); *Peters*, 873 N.E.2d at 1260-61; *Bybee*, 189 P.3d 40.[2] The highest courts in states that have derivative claims have applied the same basic concepts of property law to vest the decedent with power over the cause of action that derives from the decedent's rights. *Laizure v. Avante at Leesburg, Inc.*, No. SC10-2132, 2013 WL 535417, at *1 (Fla. Feb. 14, 2013) ("The question presented is whether an arbitration provision in an otherwise valid contract binds the signing party's estate and heirs in a subsequent wrongful death case. For the reasons more fully explained below, we hold that it does. Our decision flows from the nature of wrongful death actions in Florida, which we conclude is derivative for purposes of the issue presented in this case.") (footnote omitted); *In re Labatt Food Serv. L.P.*, 279 S.W.3d 640, 644 (Tex. 2009); *Cleveland v. Mann*, 942 So. 2d 108, 118-19

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[2] The issue is pending before the Supreme Judicial Court of Massachusetts. *Johnson v. Kindred Healthcare, Inc.*, No. SJC-11335 (Mass. Nov. 21, 2012).

(Miss. 2006); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 665 (Ala. 2004). In doctrinally consistent fashion, a release of all claims executed by the decedent releases the claims of the beneficiaries in states with derivative claims, *see, e.g.*, *In re Labatt Food Service, L.P.,* 279 S.W.3d at 644 ("[W]e long ago held that a decedent's pre-death contract may limit or totally bar a subsequent action by his wrongful death beneficiaries."), and does not in states with independent claims. *Thompson v. Wing*, 637 N.E.2d 917, 920 (Ohio 1994) (finding no bar to independent claim and discussing differences in results between states with independent and derivative claims (citing *Restatement (Second) of the Law: Judgments* § 46 cmt., at 17-20 (1982))).

Petitioners aver that the decisions of two state courts of last resort vary from this paradigm. Pet. 35. *Ruiz v. Podolsky*, 237 P.3d 584 (Cal. 2010), does not. In *Ruiz*, a statute requiring enforcement of arbitration agreements relating to health care claims was found to modify the otherwise-independent wrongful death claims. The court noted that the case required it "to reconcile the special health care arbitration statute with the wrongful death statute." *Id.* at 587. It acknowledged that numerous states in which the wrongful death cause of action is independent do not vest a decedent with power to bind beneficiaries, but said, "None of these cases, however, considered a medical malpractice arbitration statute of the kind" at issue. *Id.* at 591 n.2. That statute acknowledges the independence of wrongful death from survival actions, *id.* at 592 n.3, but requires enforcement against the statutory beneficiaries of arbitration agreements made between the decedent and a health care provider: "[H]ere the Legislature appears to have intended to

create through statute for public policy reasons a capacity of health care patients to bind their heirs to arbitrate wrongful death actions." *Id.* at 593. The legislature simply changed the legislatively-created property interests, vesting the decedent with authority to bind the statutory beneficiaries to arbitration agreements. *Compare Bybee*, 189 P.3d at 47 (finding arbitration agreement unenforceable against beneficiary of independent claim, and noting, "Absent a statute governing arbitration agreements, the fact that a contract contains an arbitration provision does not influence the threshold issue of who is bound by the contract terms.").

Allen v. Pacheco, 71 P. 3d 375 (Colo. 2003), turns on a finding that, as a matter of state arbitration law, it must resolve any ambiguities about the scope of an arbitration agreement, and that "scope" includes not just issues to be arbitrated but parties to be bound. *Id.* at 381 (finding that ambiguities must be resolved in favor of arbitration, and that binding a spouse is within the scope of the agreement). That finding, which does not distinguish between the scope of an agreement and the prior question of whether an agreement exists, is more favorable to arbitration than the FAA, *see infra* pp. 5-6, but nothing in the FAA either requires or precludes Colorado, as a matter of state law, from exhibiting this favoritism. *Arthur Andersen*, 556 U.S. at 631 n.5.

Petitioners assert that the state court's ruling regarding independent wrongful death claims is hostile to arbitration, Pet. 5-6, and that its ruling runs afoul of this Court's requirement that state law not prohibit "the arbitration of a particular type of claim." *Id.* at 6. Neither assertion is correct. As the

court explained, its ruling flows directly from a legislative enactment, Ky. Rev. Stat. § 411.130(2), which requires that the wrongful death action "shall be for the benefit of and go to the kindred of the deceased." Pet. App. 29a. This provision reflects no hostility toward arbitration and says nothing about whether wrongful death claims may be arbitrated. It affects only who must agree to arbitrate them. Petitioners cite *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011) as support for its assertion that Kentucky's rules—and, inferentially, the rules of other states with independent wrongful death claims—are impermissible obstacles to accomplishing the goals of the FAA. Pet. 27. *Concepcion* described "[t]he overarching purpose of the FAA" as being "to *ensure the enforcement of arbitration agreements according to their terms* so as to facilitate streamlined proceedings." 131 S. Ct. at 1748 (emphasis added).[3] It then illustrated what it

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[3] The FAA was passed not to favor arbitration over litigation but to obviate the unwillingness of courts to afford a party to an arbitration agreement the *remedy* of specific enforcement. This Court made that clear two years after *Moses H. Cone Memorial Hospital*, 460 U.S. 1, emphasized the Act's policy of favoring arbitration *agreements*:

> The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement-upon the motion of one of the parties-of privately negotiated arbitration agreements.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985).

considered an obstacle: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* Nothing about a rule that requires the owner of a cause of action to agree to arbitrate the action creates an obstacle to ensuring that arbitration agreements are enforced according to their terms. It merely requires consent of the party to be bound, a fundamental rule of contract that the FAA respects: "Arbitration under the Act is a matter of consent." *Volt Info. Sciences, Inc.*, 489 U.S. at 479.

Petitioners' assertion that the ruling below violates this Court's ruling in *Marmet Health Care Center, Inc., v. Brown*, 132 S. Ct. 1201 (2012), Pet. 28, is unavailing. *Marmet* dealt with a West Virginia rule, adopted as a matter of public policy, providing that "'an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.'" *Id.* at 1203. The court noted that the FAA "includes no exception for personal-injury or wrongful-death claims. It 'requires courts to enforce the bargain of the parties to arbitrate.'" *Id.* The court below, and courts like it, do not run afoul of *Marmet*. They merely require that a bargain binding on the parties exist. The Illinois Supreme Court, which in hardly arbitration-hostile fashion reversed a lower court's refusal to compel arbitration of survival claims while affirming the lower court's finding that owners of an independent wrongful death action were not bound to arbitrate, rejected an assertion that its decision was contrary to *Marmet*:

> Our holding in the present case that plaintiff, as a nonparty to the arbitration agreements, cannot be compelled to arbitrate a wrongful-death claim that does not belong to the decedent is not contrary to *Marmet*. Our holding, unlike the West Virginia court's holding, is not based on a categorical antiarbitration rule; it is based on common law principles governing all contracts. *Marmet* recognized the significance of common law contract defenses when it returned that case to the West Virginia court to consider the validity of the arbitration clauses under that state's common law. Moreover, *Marmet* noted that the FAA "'requires courts to enforce the bargain of the parties to arbitrate.'" (Emphasis added.) Plaintiff here is not a party to the bargain to arbitrate.

Carter, 976 N.E.2d at 360 (internal citations omitted). Nothing about this ownership doctrine precluded or now precludes petitioners and respondents from entering an enforceable agreement to arbitrate this claim. The only obstacle is the purely private matter of consent. There is no doctrinal confusion about these matters of state law and no hostility to arbitration that demands this Court's attention.

II. THERE IS NO DISCRIMINATION IN THE LOWER COURT'S RULING ON AGENCY

The ruling of the court below regarding agency also is an inquiry about consent. It addresses what

authority the decedent authorized an agent to exercise over her affairs. Reviewing the court's decision on that issue, and comparing it to the decisions of other courts, necessarily involves close analysis of particular language granting agency, the kind of fact-bound inquiry this Court typically eschews. *Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting).

Petitioners inaccurately characterize the decision below as creating a presumption that an agent authorized to deal with health care is not authorized to agree to arbitrate. Pet. 20. It does not. It simply rules that an *optional* arbitration agreement is not within the authority of an agent authorized in a power of attorney to do things "necessary" to provide health care to a principal. The highest courts of four other states have ruled in similar fashion. *State ex rel. AMFM, LLC v. King*, No. 12-0717, 2013 WL 310086 (W. Va. Jan. 24, 2013); *Dickerson v. Longoria*, 995 A.2d 721 (Md. 2010); *Koricic v. Beverly Enterprises-Nebraska, Inc.*, 773 N.W.2d 145 (Neb. 2009); *Mississippi Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211 (Miss. 2008). Conversely, the two state highest courts to have considered the whether an agent with a health care power of attorney can enter a binding arbitration agreement when the agreement is a mandatory condition of receiving health care, have enforced the arbitration agreement. *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876 (Tenn. 2007).[4] *Covenant Health Rehabilitation of Picayune, L.P. v.*

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[4] Petitioners argue that the decision from Tennessee, *Owens v. National Health Corp.*, holds otherwise. *Owens* is discussed *infra* pp. 18-20.

Brown, 949 So. 2d 732 (Miss. 2007); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005).[5] Rather than exhibiting animus toward arbitration all the state high courts that have addressed this issue have done what the Maryland court did: applied "general agency principles to a dispute concerning a nursing home arbitration agreement that had been signed by someone other than the nursing home resident." *Dickerson*, 995 A.2d at 734.

There is no doctrinal conflict in these cases, merely different results flowing from a critical difference of fact. They yield a consistent principle: an agent with authority to enter agreements necessary to another's health may agree to contract terms that are necessary to the provision of medical care, but not agreements that are unrelated to and expressly stated to be unnecessary to medical care.[6]

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[5] Both Mississippi cases, while enforcing arbitration clauses, had held certain liability-limiting provisions of the clauses to be unconscionable and severable. In *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009), the Mississippi Supreme Court found an identical clause unconscionable *in toto*. It specifically overruled the unconscionability findings in the two earlier cases but did not disturb their findings regarding agency. *Id*. at 706.

[6] Petitioners assert conflict based on decisions from lower state courts. Pet. 31-34. That conflict is limited, and it is a kind of conflict this Court leaves to the highest courts of the states to resolve. Petitioners rely, for example, on one California intermediate appellate court case. Pet. 32. Maryland's highest court exhaustively reviewed conflicting authority in California's intermediate appellate court and concluded, "That court has issued decisions that are difficult to reconcile." *Dickerson*, 995 A.2d at 737.

Mississippi decisions illustrate the neutrality of doctrine, as under the same doctrine the state's highest court has both enforced mandatory agreements and declined to enforce an optional one. In *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 218 (Miss. 2008), it found that an agent had no authority to bind a principal to an arbitration agreement when the agreement was not a condition of admission to a nursing home. It distinguished its decisions in *Covenant Health* and *Vicksburg Partners*, where it had found such authority because the agreement was "an essential part of the consideration for the receipt of 'health care.'" *Id.*

The Mississippi decisions are echoed in a pair of cases decided by the Georgia intermediate appellate court within fifteen days of each other and dealing with the scope of an agent's authority to agree to arbitrate, *Triad Health Management of Georgia, III, LLC v. Johnson*, 679 S.E.2d 785 (Ga. Ct. App. 2009), *cited in* Pet. 31, 33, and, subsequently, *Life Care Centers of America v. Smith*, 681 S.E.2d 182 (Ga. Ct. App. 2009), not cited by Petitioners. In *Triad Health Management*, the principal had vested general authority in an agent, including "'full power and authority to do and perform all and every act . . . necessary, requisite *or* proper to be done, as fully . . . as I might or could do if personally present,' and without specific limitation." 679 S.E.2d at 789 (emphasis added; compare with the language here, "requisite *and* necessary" (emphasis added)). The court found, "Under the circumstances of the transaction, which involved [the principal's] admission into a treatment facility while incapacitated, [the agent's] execution of the Admission Contract on behalf of his father was

'necessary, requisite or proper,' within the scope of the agency contemplated by the power of attorney." *Id.* In *Life Care Centers*, a health care proxy granted an agent "authority to make any decision you could make to obtain or terminate any type of health care." 681 S.E.2d at 742. The *Life Care Centers* court found no authority to enter an optional arbitration agreement, distinguishing this scenario from that present in *Owens v. National Health Corp.*, 263 S.W.3d 876 (Tenn. 2007), which the court categorized as dealing with a mandatory admissions agreement.[7] Petitioners suggest that, because of *Triad Health Management*, Georgia "may fall into the camp of States that stand opposite Kentucky on this issue." Pet. 33. As *Triad Health Management*, *LifeCare Centers,* and the Mississippi cases make clear—Petitioners put Mississippi in Kentucky's "camp," Pet. n.4—there are no camps. There is merely consistent interpretation of generally applicable principles of agency law.

Owens, as *LifeCare Centers* found, is consistent with the optional/mandatory distinction. In *Owens*, a durable power of attorney granted authority "to ASSIST [the principal] in making health care decisions, and to make health care decision [sic] for me if I am incapacitated or otherwise unable to make such decisions for myself," 263 S.W.3d at 879[8] (emphasis in original), including

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[7] The *Life Care Centers* court, 681 S.E.2d at 743 n.3, noted that the power of attorney in *Triad Health Management* was broader than that before it and that difference can be viewed as an alternative ground for the court's decision, but the absence of necessity is a touchstone.

[8] The instrument adopted the statutory definition of "health care decision," which is "consent, refusal of consent or

authority "to execute on my behalf any waiver, release or other document which *may be necessary* in order to implement" health care decisions. *Id.* at 880 (emphasis added). The contract governing admission to the nursing home and financial terms for the admission included an arbitration clause, with no indication that it was an optional, separate agreement, and the agent agreed to all terms of the contract. *Id.*

The court concluded that "an attorney-in-fact acting pursuant to a durable power of attorney for health care may sign a nursing-home contract that contains an arbitration provision because this action is *necessary* to 'consent . . . to health care.' Tenn. Code Ann. § 346-201(3)." *Id.* at 884 (emphasis added).[9] The *Ping* court, in contrast, concluded, "[Respondent] is not authorized to bind her mother to [Petitioners'] *optional* arbitration agreement." Pet. App. 19a (emphasis added).

Petitioners assert that this kind of analysis by the court below demonstrates "animus against

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withdrawal of consent to health care." Tenn. Code Ann. § 34-6-201(3).

[9] The decision in *Owens* does not elsewhere say that the agreement was mandatory, and the reported decision of the court from which the case was appealed does not clarify the issue, *Owens v. National Health Corp.*, No. M2005-01272-COA-R3-CV, 2006 WL 1865009 (Tenn. Ct. App. Nov. 20, 2006), but other courts that have interpreted it, have, like the court in *LifeCare Centers*, interpreted it as dealing with a mandatory clause. Pet. App. 19a-20a; *Dickerson*, 995 A.2d at 740-41. Because the arbitration clause was part and parcel of the admission agreement and was not presented as an optional add-on, that interpretation seems obviously correct.

arbitration." Pet. 22. By implication, Petitioners assert that the highest courts of Mississippi, Maryland, and Nebraska—which have all declined to enforce arbitration agreements entered outside the scope of an agent's authority—share that animus. It is certainly not how those courts describe their approach to arbitration issues. The Mississippi court, in making the assertedly unfriendly decision, noted, "Courts have long recognized the existence of 'a liberal federal policy favoring arbitration agreements.' As such, '[a]rbitration is firmly embedded in both our federal and state laws.'" *Mississippi Care Center*, 975 So. 2d at 214 (internal citations omitted). The Nebraska court has elsewhere acknowledged the policies of the FAA: "There is a liberal federal policy favoring arbitration, grounded in the FAA, which provides that contract provisions directing arbitration shall be enforceable in all but limited circumstances." *Good Samaritan Coffee Co. v. LaRue Distrib., Inc.*, 748 N.W.2d 367, 375 (Neb. 2008). In Maryland, state law is perhaps even more emphatic than the FAA about arbitration policy. This 1974 statement precedes much of this Court's arbitration jurisprudence: "[T]he General Assembly established a policy in favor of the settlement of disputes through the arbitration process and ended the ambivalence of courts under the common law. Not only suits to enforce an arbitrator's award, but also suits to compel arbitration and suits to stay court action pending arbitration, are now to be viewed as 'favored' actions." *Bel Pre Med. Ctr., Inc. v. Frederick Contractors, Inc.*, 320 A.2d 558, 565 (Md. Ct. Spec. App. 1974); *see Allstate Ins. Co. v. Stinebaugh*, 824 A.2d 87, 93 (Md. Ct. Spec. App. 2003) ("We have recognized that the Maryland Uniform Arbitration Act expresses the legislative

policy favoring enforcement of agreements to arbitrate.").

Petitioners condemn the lower court for its sensitivity to the important values at stake in agreeing to arbitrate and its consideration of them in applying agency doctrine. Pet. 23-24 (condemning court for finding that, for purposes of generally applicable agency law, arbitration has "significant legal consequences."). This Court, however, has required the same sensitivity in addressing the scope of an agent's authority to commit its principal to arbitrate. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), at issue was whether an arbitration clause in a collective bargaining agreement required a covered party to arbitrate a claim under the Americans with Disabilities Act. The court, applying general principles of agency law in the collective bargaining context, found:

> Not only is petitioner's statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear. . . . we held that such a waiver must be clear and unmistakable. "[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." . . .
>
> We think the same standard applicable to a union-negotiated waiver of employees' statutory *right to a judicial*

> *forum* for claims of employment discrimination. Although that is not a substantive right . . . *Gardner-Denver* at least stands for the proposition that *the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.*

Id. at 79-80 (emphasis added) (internal citations omitted). In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009), this Court recognized the continued force of the requirement of an unambiguous waiver. *See also Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002) ("An agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems—an openness this country has been committed to from its inception.").[10] The sensitivity to this concern does not demonstrate animus toward arbitration. It is merely a recognition, fully consistent with the FAA, that agreeing to arbitrate has significant legal consequences, something the arbitration agreement at issue here itself affirms, in all capital letters in boldface:

> **THE PARTIES UNDERSTAND AND AGREE . . . THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE**

[10] This Court has never considered whether federal power to compel enforcement of a waiver of the fundamental right of access to courts, inherent in any arbitration agreement, is conditioned on some heightened standard of consent, a question that would be raised by a grant of review in this case.

GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.

Pet. App. 80a-81a.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 18, 2013 Respectfully submitted,

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