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,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

H. JOSEPH ESCHER III
STEVEN B. WEISBURD
DECHERT LLP
One Maritime Plaza
Suite 2300
San Francisco, CA 94111
(415) 262-4500

STEVEN G. BRADBURY
Counsel of Record
RANI A. HABASH
DECHERT LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 261-3483
steven.bradbury@dechert.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The Rule 29.6 Statement for Petitioners was set forth at p. iii of the Petition and there are no changes to that statement.

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REPLY BRIEF

Respondent concedes she was "acting as agent for her mother under authority granted by the power of attorney" when admitting her mother to petitioners' nursing home, and that as part of the admissions process, she signed an optional arbitration agreement "whose scope encompasses the [personal injury and wrongful death] claims at issue here." Opp. 1. Furthermore, the Kentucky Supreme Court specifically affirmed that the parties' arbitration contract was subject to the Federal Arbitration Act ("FAA"), Pet. App. 10a-12a, and it accepted that "[u]nder the FAA, state courts as well as federal courts are obliged to honor and enforce [such] agreements to arbitrate." *Id.* at 12a (quoting *Vaden v. Discover Bank*, 556 U.S. 49, 71 (2009)). That should be the end of the matter.

Yet the court below announced two new rules of Kentucky law that circumvented the FAA and thwarted the enforceability of the arbitration contract executed by respondent. The first holds that general powers of attorney in Kentucky are presumed to exclude the authority to agree to arbitration. *See* Pet. App. 18a-19a. This rule singles out arbitration for disfavored treatment and is therefore squarely preempted. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746-48 (2011). The second holds that no prior arbitration agreement signed by a decedent may be enforced to require arbitration of the wrongful death claims of the decedent's beneficiaries, even if, as respondent concedes here, Opp. 1, the agreement was unmistakably intended to and does "encompass" those claims. *See* Pet. App. 28a-34a. This ruling has the effect of foreclosing arbitration for a class of tort claims in Kentucky, and for that reason is also preempted. *Marmet*

Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203-04 (2012) (*per curiam*).

The rulings at issue represent two of the most widely invoked "devices and formulas" lately contrived by state courts for avoiding arbitration. *Concepcion*, 131 S. Ct. at 1747 (internal quotation marks omitted). Both issues continue to produce irreconcilable outcomes from different States, including in decisions handed down since the petition was filed. This conflict is particularly pronounced in the nursing home industry, where the fact pattern presented here is common. Without resolution by this Court, this fractured legal landscape will thoroughly undermine the FAA's national mandate for consistent enforcement of arbitration agreements.

A. The Kentucky Supreme Court's Power-of-Attorney Ruling Singles Out Arbitration for Disfavored Treatment in Contravention of the FAA and this Court's Case Law.

Respondent argues that the Kentucky Supreme Court's power-of-attorney ruling was an "unremarkable" and "arbitration-neutral" application of "general principles of agency law." Opp. 3, 4. That is not so.

1. The Kentucky court's reasoning on the power-of-attorney issue demonstrates that the rule of construction adopted below is arbitration-specific and springs from the view that an arbitration agreement has negative consequences and is something to be avoided.

The critical passage in the court's opinion placed dispositive reliance on comment h to Restatement (Third)

of Agency § 2.02, which the court declared to be "[o]f particular pertinence to this case" and which the court quoted in full. Pet. App. 18a. Comment h describes three categories of "collateral acts" so "fraught with major legal implications" adverse to the interests of the principal that no reasonable agent would believe the principal intended to authorize the commission of those acts. *Id.* (quoting Restatement (Third) of Agency § 2.02 cmt. h (2006)). Such collateral acts include "crimes and torts," acts that have "no prospect of economic advantage," and other acts that create significant negative legal consequences for the principal, "such as granting a security interest in the principal's property or executing an instrument confessing judgment." *Id.*

The court unabashedly declared: "We would place in this third category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law." *Id.* at 19a. It was directly on the basis of that stated reasoning that the court announced its new rule of construction disfavoring arbitration: "Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.*

Only after announcing this presumption against arbitration did the court address the optional nature of respondent's arbitration agreement and the several cases from other States that have focused on the optional-versus-mandatory distinction. *See id.* at 19a-20a. The Kentucky court observed that since the arbitration contract was "not a condition of admission to the nursing

home," it was properly treated as a "collateral agreement" (echoing the "collateral acts" language of comment h of the Third Restatement); hence, the court determined, the presumption against arbitration was not overcome here. *See id.*[1]

Because the rule of construction applied below is founded on and betrays a specific animosity toward arbitration, it is preempted by the FAA. *Concepcion*, 131 S. Ct. at 1746-47.

2. Contrary to respondent's argument, the power-of-attorney ruling was not and could not have been based on the ordinary and well-established principles of agency law. As the Kentucky court itself recognized, those principles hold that agents are generally authorized to perform all acts "done in connection with" the subject-matter "to which the authority primarily relates" and those acts that are "incidental to it" or "implied in the principal's manifestations to the agent." Restatement (Second) of Agency §§ 35, 37 (1958); Restatement (Third) of Agency § 2.02; *see* Pet. App. 16a-17a. Under these established principles, Mrs. Duncan's broadly worded power of attorney granted respondent ample authority to sign the arbitration contract.

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1. Holding that a general power of attorney only permits the agent to sign mandatory arbitration agreements puts health-care providers in a Catch 22 that effectively suppresses the availability of arbitration, contrary to the purposes of the FAA, since "requiring that prospective patients agree to arbitration as a condition to receiving health care services may lead to costly legal challenges that those agreements are unconscionable." *Dickerson v. Longoria*, 995 A.2d 721, 739 n.17 (Md. 2010).

In language conspicuously ignored by respondent, Mrs. Duncan's grant of authority stated:

> It is my intention and desire that this document grant to my said attorney-in-fact full and general power and authority to act on my behalf and I thus direct that the language of this document be liberally construed with respect to the power and authority hereby granted . . . in order to give effect to such intention and desire. The enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general and full power herein granted . . . .

Pet. App. 76a. The grant expressly included, without limitation, 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.

Whether construed "liberally" and without "limit or restrict[ion]," as Mrs. Duncan expressly intended, *id.* at 76a, or narrowly, as respondent urges, Opp. 2, this grant undoubtedly encompasses the authority to execute an arbitration agreement "regarding" Mrs. Duncan's "medical care" in petitioners' nursing facility and "related to" the "medical decision" to admit Mrs. Duncan into the facility.

3. Respondent zeros in on one word in the preamble clause to the power of attorney—"necessary"—and insists that because the arbitration agreement here was not a

mandatory condition of admission, it was not "necessary" in the strictest sense. *See* Opp. 15. This crabbed reading disregards Mrs. Duncan's expressed intent to grant "full and general power and authority to act on my behalf," and her instruction that none of the "specific items, rights, or acts or powers" enumerated in the document may be cited "to limit or restrict" the "general and full power herein granted." Pet. App. 76a. It also disregards the broad sweep of the relevant passage where the word "necessary" appears, which granted respondent "full and complete power and 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." *Id.* at 74a.

In the full context of the document, it is evident that respondent was given wide latitude to determine in her judgment what decisions and actions may be "requisite and necessary to be done" in connection with Mrs. Duncan's nursing care, to the same extent and in the same way that Mrs. Duncan herself "might or could do if personally present." *See* Restatement (Third) of Agency § 2.02 cmt. e (recognizing that a principal may "state[] the agent's authority in terms that contemplate that the agent will use substantial discretion to determine the particulars").[2]

2. Under respondent's version of "necessary," it would not even be clear respondent had authority to decide to admit her mother into petitioners' nursing home, since respondent presumably could have chosen a different long-term care facility or perhaps could have opted for home nursing care.

B. The Kentucky Supreme Court's Wrongful Death Ruling Categorically Forecloses Arbitration of an Entire Class of Claims in Direct Conflict with this Court's Interpretation of the FAA.

Respondent defends the Kentucky court's wrongful death ruling on the ground that it involved "no discrimination against arbitration," Opp. 5, and simply flowed from "basic concepts of property law," *id.* at 9. *See id.* at 8-9 (arguing that the wrongful death claim "is the independent property of the beneficiaries"). These assertions miss the mark.

1. The ruling is an interpretation of the State's wrongful death statute that categorically prevents the arbitration of wrongful death claims in Kentucky in contravention of the plain terms of the decedent's prior arbitration agreement. Any such rule of state law purporting to foreclose arbitration of a class of claims is contrary to the FAA as interpreted by this Court in *Marmet*, regardless of whether it singles out arbitration for discriminatory treatment. *See* 132 S. Ct. at 1203-04 (holding that the FAA preempts States from removing wrongful death claims from the permissible scope of arbitration agreements and distinguishing this categorical preemption principle from the arbitration-specific principle applied in *Concepcion*).

Declaring the heirs' wrongful death claims "independent" of the decedent's personal injury claims as a matter of state law cannot cleave the wrongful death claims from the express scope of an arbitration agreement where both types of tort claims involve the same "controversy thereafter arising out of" the nursing care covered by the agreement, 9 U.S.C. § 2. Any effort

by a state court to remove such wrongful death claims from the permissible scope of an arbitration contract is a "device or formula" for defeating arbitration preempted by the FAA pursuant to this Court's holding in *Marmet*.

2. Respondent half-heartedly suggests that the Kentucky Supreme Court may also have been invoking "background principles of state contract law" that are preserved by the FAA. Opp. 4 (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009)); *see also* Opp. 14 (quoting *Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344, 360 (Ill. 2012), *pet'n for cert. filed*, 81 U.S.L.W. 3473 (U.S. Feb. 15, 2013) (No. 12-1012)). But that is incorrect. The court's ruling turned on the nature of statutory wrongful death claims in Kentucky—in other words, it turned on tort law, not general principles of contract law. *See* Pet. App. 29a-32a. While it may be true under a State's tort law that "a wrongful death claim is separate and distinct from a cause of action the deceased could have maintained had he survived, this observation is not helpful in determining whether [as a matter of contract law] separate wrongful death claims are in fact included within the plain and ordinary meaning of the [arbitration] agreement." *Allen v. Pacheco*, 71 P.3d 375, 379 (Colo. 2003), *cert. denied*, 540 U.S. 1212 (2004). On that question, respondent has conceded that her arbitration agreement unambiguously "encompasses" her wrongful death claim. Opp. 1.

Indeed, the conclusion reached below runs counter to the usual rules of contract law. This Court has recognized in the context of arbitration agreements that "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 (internal quotation marks and citation omitted).

Here, it is disingenuous in the extreme for respondent to maintain she is not bound to arbitrate the wrongful death claim under these traditional contract principles when (i) she herself personally signed the arbitration contract as "Daughter/POA" and "Authorized Representative" of her mother, Pet. App. 82a; (ii) she unequivocally concedes before this Court that the arbitration contract "encompasses" the wrongful death claim, Opp. 1; (iii) she, the person who signed the arbitration agreement, is also the plaintiff acting as authorized "personal representative of the deceased" under the Kentucky wrongful death statute, Pet. App. 29a (quoting Ky. Rev. Stat. § 411.130(2) (1974)); and (iv) she herself is the prime beneficiary of the wrongful death claim as her mother's surviving next of kin, *id. See Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 664-65, 671 (Ala. 2004) (enforcing arbitration of "independent" wrongful death claims where the personal representative bringing the claims was the same person who signed the arbitration agreement as the decedent's attorney in fact).

C. Both Issues Presented in the Petition Continue to Arise Across the Nation Spawning Conflicting Decisions that Undermine the FAA and Require the Intervention of this Court.

The one point respondent's submission effectively demonstrates is that both issues raised in the petition recur frequently in courts across the country and continue

to produce conflicting rulings that frustrate the uniform enforcement of arbitration contracts. Indeed, the conflicts have only deepened since the petition was filed.

1. On the scope-of-authority issue, the Supreme Court of West Virginia recently held that a decision to sign an arbitration agreement covering disputes related to nursing home care is not a "health care decision" within the authority granted to a health care surrogate by state law. *State ex rel. AMFM, LLC v. King*, No. 12-0717, 2013 WL 310086 (W. Va. Jan. 24, 2013). The court strongly suggested that the same analysis would apply to a "medical power of attorney." *Id.* at *9 n.9 (citing the Kentucky Supreme Court's opinion in the present case).

The view that an agreement to arbitrate disputes arising out of the provision of medical care is not a "health care decision" is in direct conflict with the conclusion of the Tennessee Supreme Court in *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876 (Tenn. 2007), *cert. denied*, 555 U.S. 815 (2008), which explicitly rejected the argument that signing an arbitration agreement is a "legal decision, not a health care decision." *Id.* at 884-85. The Tennessee court reasoned that any such distinction "would be untenable," since "[e]ach provision of a contract signed by an attorney-in-fact could be subject to question as to whether the provision constitutes an authorized 'health care decision' or an unauthorized 'legal decision.'" *Id.* at 885.

In attempting to smooth over these fractured court decisions, respondent claims that state courts have maintained a consistent distinction between "optional" and "mandatory" arbitration agreements, *see* Opp. 15-19, but that assertion mischaracterizes the case law. *See*

Pet'n 32-33 (discussing cases). Moreover, several of the cases cited by respondent merely mention the optional or mandatory nature of the agreement without placing any weight on that distinction. *See, e.g.*, *Covenant Health Rehab. of Picayune, L.P. v. Brown*, 949 So. 2d 732 (Miss. 2007), *cited in* Opp. 15-16; *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005), *cited in* Opp. 16.

2. On the arbitrability of wrongful death claims, recent decisions from the highest courts of Illinois and Florida have reached diametrically opposing results under essentially identical statutes. *Compare Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344, 358-61 (Ill. 2012) (denying arbitration of wrongful death claims), *with Laizure v. Avante at Leesburg, Inc.*, No. SC10-2132, 2013 WL 535417 (Fla. Feb. 14, 2013) (granting arbitration).

The wrongful death statutes of Illinois and Florida are both "derivative" in the sense urged by respondent here, *see* Opp. 7-8: Both permit the decedent's beneficiaries to bring claims only if the decedent could have recovered damages if still alive, and both make the beneficiaries "bound by the decedent's actions and contracts with respect to defenses and releases." *Laizure*, 2013 WL 535417, at *8 (discussing Fla. Stat. § 768.19 (2008)); *see Carter*, 976 N.E.2d at 358 (discussing 740 Ill. Comp. Stat. § 180/1). Yet the two States' highest courts came down on opposite sides on the question of arbitrability. The Illinois Supreme Court invoked the purported "principle" that "a contract cannot bind a nonparty" as grounds to avoid following this Court's holding in *Marmet*, *Carter*, 976 N.E.2d at 359-61 (internal quotation marks and citation omitted), while the Florida Supreme Court adhered to the requirements of the FAA and enforced the plain terms of

the arbitration contract, which, just like the agreement at issue here, "expressly encompasses claims arising out of or relating to [decedent's] stay at the facility, including negligence and malpractice, and is expressly binding upon and includes claims brought by [decedent's] heirs," *Laizure*, 2013 WL 535417, at *4.[3] These contradictory decisions demonstrate the irrelevancy for FAA purposes of the distinction between "independent" and "derivative" wrongful death statutes.

More importantly, the stark conflicts among the state courts defeat the essential purpose of the FAA and urgently call for resolution by this Court.

3. The nursing home operator in the *Carter* case has filed a petition for certiorari raising the question whether the Illinois Supreme Court's wrongful death ruling is preempted by the FAA. *See SSC Odin Operating Co. LLC v. Carter*, No. 12-1012 (U.S. filed Feb. 15, 2013).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision below summarily reversed. In the alternative, the petition should be granted and the case set for argument.

Respectfully submitted,

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H. Joseph Escher III
Steven B. Weisburd
Dechert LLP
One Maritime Plaza
Suite 2300
San Francisco, CA 94111
(415) 262-4500

Steven G. Bradbury
Counsel of Record
Rani A. Habash
Dechert LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 261-3483
steven.bradbury@dechert.com

Counsel for Petitioners