No. 21-196

IN THE

Supreme Court of the United States

SNH SE ASHLEY RIVER TENANT, LLC, ET AL.,

Petitioners,

v.

THAYER W. ARREDONDO,
AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
HUBERT WHALEY, DECEASED,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The South Carolina Supreme Court, applying state law, concluded that the terms of a general durable power of attorney and a health care power of attorney did not authorize respondent to enter into an arbitration agreement with petitioners on her father's behalf. The question presented is whether the South Carolina Supreme Court's interpretation of the terms of those powers of attorneys is preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*.

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STATEMENT

1. This fact-bound case concerns the terms of two powers of attorneys that Hubert J. Whaley, now deceased, granted his daughter, respondent Thayer Arredondo. The first was a General Durable Power of Attorney (General POA), which authorized Ms. Arredondo to engage in specified "acts or things" on Mr. Whaley's behalf. Pet. App. 48a. The provision of the General POA at issue here authorized her to manage Mr. Whaley's "business affairs, property, or other assets." *Id*. In full (*see id*.), that provision of the General POA authorized her:

> To make, sign, execute, issue, assign, transfer, endorse, release, satisfy and deliver any and all instruments or writing of every kind and description whatsoever, whether sealed or unsealed, of, in or concerning any or all of my business affairs, property or other assets whatsoever, including all property, real, personal or mixed, stocks, securities and choses in action, and wheresoever situated, including, without limiting the generality hereof thereto, notes, bonds, mortgages, leases, deeds, conveyances, bills of sale, and assignments, endorsements, releases, satisfactions, pledges or any agreements concerning any transfers of the above or of any other property, right or thing.

The second power of attorney was a Health Care Power of Attorney (Health Care POA). This document granted Ms. Arredondo "full authority to make decisions for [Mr. Whaley] about [his] health care." *Id*. at 60a. It covered decisions relating to medical care and treatment, medications, and admission and discharge from facilities. *Id*. at 60a–61a. In addition,

as relevant here, paragraph 11(d) of the Health Care POA authorized Ms. Arredondo:

> "[t]o take any other action *necessary* to making, documenting, and assuring implementation of decisions concerning [Mr. Whaley's] health care, including, but not limited to granting any waiver or release from liability *required* by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

Id. at 61a (emphasis added).

2. In 2012, Ms. Arredondo admitted Mr. Whaley into an assisted-living facility operated by petitioners SNH SE Ashley River Tenant, LLC, et al. (hereafter, Ashley River). *Id.* at 2a–3a. She "signed various documents in connection with Whaley's admission," but Ashley River did not require Ms. Arredondo to execute an arbitration agreement as a condition for admission into the facility. *Id*. at 3a; *see also id*. at 16a. Rather, the arbitration agreement, which Ms. Arredondo signed, was presented to her after Mr. Whaley was admitted but on the same day. *Id*. at 3a.

Mr. Whaley died two years after being admitted to the Ashley River facility. *Id*. at 3a. Ms. Arredondo brought this action as a representative of Mr. Whaley's estate, alleging that "during his residency at the facility," Mr. Whaley "suffered serious physical injuries and died as a result of [Ashley River's] negligence and recklessness." *Id*. at 3a–4a.

Ashley River moved to compel arbitration of the dispute. *Id.* at 4a. Ms. Arredondo argued that the arbitration agreement was unenforceable on two grounds. First, she argued that she lacked authority under the General POA and the Health Care POA to execute the arbitration agreement on Mr. Whaley's behalf. *Id.* Second, she argued that the arbitration agreement was unconscionable. *Id.*

The South Carolina Court of Common Pleas agreed with both of Ms. Arredondo's arguments and declined to compel arbitration. *Id.* at 40a–47a. The court held that "Mr. Whaley never expressly conferred any authority [on Ms. Arredondo] to execute the arbitration agreement." *Id.* at 43a. The court also found the arbitration agreement unconscionable. *Id.* at 46a.

The South Carolina Court of Appeals reversed, *id.* at 27a–39a, and then the South Carolina Supreme Court unanimously reversed the court of appeals, *id.* at 1a–21a. The court held that Ms. Arredondo lacked authority under the General POA and Health Care POA to execute the arbitration agreement. The court did not reach the question whether the agreement was unconscionable.

The state supreme court first explained that South Carolina law "look[s] to contract law when reviewing actions to … interpret a power of attorney." *Id.* at 6a (quoting *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577 (Ct. App. 2019)). Accordingly, the court examined the "specific language" of the General POA and the Health Care POA "to determine whether either document authorized Arredondo to execute a pre-dispute arbitration agreement." *Id.* The court "emphasize[d]" at the outset that its "analysis does not

turn upon the presence or absence of an explicit reference to arbitration or arbitration agreements in the powers of attorneys," an approach that this Court's decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), "forecloses." Pet. App. 6a. The court also recognized that a power of attorney cannot authorize an agent to execute a pre-dispute arbitration agreement if it is not "broad enough" to encompass that action. *Id.* at 8a.

With that framework in mind, the court turned to the specific language of the two powers of attorney at issue here. First, the court held that the authority granted to Ms. Arredondo by the General POA to manage Mr. Whaley's "business affairs, property or other assets" did not authorize her to enter into a pre-dispute arbitration agreement with Ashley River. *Id.* at 8a–13a. As the court explained, the reference to a "chose in action" as a property interest covered by the General POA does not encompass "a cause of action that did not exist at the time Arredondo signed the arbitration agreement." *Id.* at 9a. Drawing instruction from the Kentucky Supreme Court's decision on remand from this Court's decision in *Kindred*, the South Carolina Supreme Court observed that, although a pre-dispute arbitration agreement affects "'constitutional rights,'" it does not "concern a chose in action or any other property right." *Id.* at 11a (quoting *Kindred Nursing Ctr. Ltd. P'ship v. Wellner*, 533 S.W.3d 189, 194 (Ky. 2017) (internal quotation marks omitted), *cert. denied*, 139 S. Ct. 319 (2018)). The court also rejected the argument that the General POA authorized the arbitration agreement by granting Ms. Arredondo authority to "*transfer*[] … any other property, right or thing." *Id.* at 12a (emphasis modified). As the court explained, the arbitration

agreement effected a waiver of the parties' right to a jury trial, punitive damages, discovery under court rules, and appeal, none of which are "'transfers' of anything to anyone." *Id*.

Second, the South Carolina Supreme Court concluded that the Health Care POA did not authorize Ms. Arredondo to enter into the arbitration agreement with Ashley River. The court observed that paragraph 11(d) of the Health Care POA granted Ms. Arredondo the authority to "take any other action *necessary* to making, documenting, and assuring implementation of decisions" about Mr. Whaley's health care. *Id*. at 14a (emphasis added). The court agreed with Ashley River's "consistent[]" position (made in response to Ms. Arredondo's unconscionability argument) that Ms. Arredondo "was not required to sign the arbitration agreement," *id*. at 15a, because the agreement was "a 'voluntary standalone' agreement that was not a prerequisite for Whaley's admission into the facility," *id*. at 16a. The court cited decisions from Kentucky, Maryland, Georgia, Mississippi, Pennsylvania, and Wyoming holding that the decision to enter into such a "voluntary" arbitration agreement—*i.e.*, one that is not a mandatory condition of obtaining health care—is generally not a "heath care decision[]" covered by a health care power of attorney. *Id*. at 16a–18a (citing cases).

The state supreme court also held that other language in the Health Care POA did not confer the requisite authority on Ms. Arredondo to execute a pre-dispute arbitration agreement. Thus, although the Health Care POA authorized Ms. Arredondo to "grant any waiver required" by Ashley River, the court's conclusion that the arbitration agreement was not mandatory to receive admission to the facility

foreclosed the argument that the agreement was "required" by Ashley River. *Id*. at 18a.

Likewise, the court held that the provision authorizing Ms. Arredondo to pursue legal action to "force compliance" with Mr. Whaley's health-care decisions, "or to seek actual or punitive damages for the failure to comply," had "no significance" to the present tort action, which does not arise out a failure to comply with Mr. Whaley's "wishes." *Id*. at 19a. Further, the court concluded that Ms. Arredondo's general authority to "pursu[e] any legal action" to enforce Mr. Whaley's health-care decisions did not authorize entering into pre-dispute arbitration agreement because "executing a pre-dispute arbitration agreement has nothing at all to do with instituting legal proceedings." *Id*. at 20a (quoting *Wellner*, 533 S.W.3d at 193–94 (cleaned up)).

Justice Few issued a concurring opinion, focused solely on the majority's definition of "chose in action." *Id*. at 22a. Tracing the history of that phrase, Justice Few concluded that a "chose in action" has "no precise meaning" in modern usage and advised lawyers to "avoid" using it in drafting powers of attorney. *Id*. at 25.

REASONS FOR DENYING THE WRIT

The South Carolina Supreme Court, applying state law, interpreted the terms of the particular powers of attorney at issue in this case to determine whether Mr. Whaley had conferred on Ms. Arredondo the authority to enter into a pre-dispute arbitration agreement on his behalf. The court's conclusion that Mr. Whaley did not confer that authority does not conflict with *Kindred* or with any other decision of this Court, or any other court. The state supreme court did

not employ any "device" that singles out arbitration agreements for disfavored treatment vis-à-vis other types of contracts, and its fact-specific evaluation of the language of the General POA and the Health Care POA does not raise any important federal question that warrants this Court's review. The petition for a writ of certiorari should be denied.

I. The South Carolina Supreme Court's decision does not conflict with any decision of this Court.

Ashley River suggests that the decision here conflicts with this Court's decisions in *Kindred*, *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), and *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015). That suggestion is incorrect.

A. In *Kindred*, this Court considered two powers of attorney that the Kentucky Supreme Court had interpreted to exclude the authority to enter into pre-dispute arbitration agreements. Beverly Wellner held one power of attorney, which authorized her to "institute legal proceedings" and make "contracts of every nature in relation to both real and personal property" on behalf of her husband. 137 S. Ct. at 1425 (internal quotation marks omitted). Janis Clark's power of attorney authorized her to exercise "'full power … to transact, handle, and dispose of all matters'" affecting her father and his estate, "including the power to 'draw, make, and sign in [his] name any and all … contracts, deeds, or agreements.'" *Id*. The Kentucky Supreme Court had concluded that "[t]he Wellner document … did not permit Beverly to enter into an arbitration agreement on Joe's behalf," while "the Clark power of attorney extended that far and beyond." *Id*. The court nonetheless held that "both

arbitration agreements … were invalid" because it concluded that "a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so," a rule that this Court denoted a "clear-statement rule." *Id.* at 1426.

This Court held that the Federal Arbitration Act (FAA) preempted Kentucky's clear-statement rule because the rule "fail[ed] to put arbitration agreements on an equal plane with other contracts." *Id.* at 1426–27. Because the clear-statement rule required specificity in order for powers of attorney to authorize agents to waive the right to a jury trial, the rule "hing[ed] on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* at 1427. For that reason, the Court concluded that the clear-statement rule impermissibly "singl[ed] out [arbitration] contracts for disfavored treatment." *Id.*

At the same time, the Court recognized that an agent cannot enter into an arbitration agreement on behalf of a principal if the terms of a power of attorney do not confer that authority on the agent. Thus, the Court recognized that the Kentucky Supreme Court's conclusion that the Wellner power of attorney was "insufficiently broad to give Beverly the authority to execute an arbitration agreement" would be valid if that interpretation were not tainted by reliance on the clear-statement rule. Accordingly, the Court vacated and remanded to allow the state court to determine "whether it adheres, in the absence of its clear-statement rule, to its prior reading of the Wellner power of attorney." *Id.* at 1429. On remand, the Kentucky Supreme Court confirmed that its interpretation of the Wellner power of attorney was "wholly independent of the clear-statement rule,"

Wellner, 533 S.W.3d at 194, and this Court denied review of that decision, *see Kindred Nursing Ctrs. Ltd. P'ship v. Wellner,* 139 S. Ct. 319 (2018).

In this case, the South Carolina Supreme Court explained that, in light of *Kindred*, its interpretation of the General POA and the Health Care POA "does not turn upon the presence or absence of an explicit reference to arbitration or arbitration agreements in the powers of attorney." Pet. App. 6a. The court therefore did not demand the type of clear statement that *Kindred* holds states may not require, but instead focused its analysis on "the specific language" of Mr. Whaley's powers of attorney "to determine whether either document authorized Arredondo to execute a pre-dispute arbitration agreement." *Id.* In other words, the court in this case engaged in the type of analysis that this Court expected state courts to engage in when it remanded the Wellner power of attorney to the Kentucky Supreme Court.

Ashley River argues that the South Carolina Supreme Court (and the Kentucky Supreme Court in *Wellner*) "found an easy path to the same result" as the one produced by the clear-statement rule. Pet. 2. *Kindred*, however, does not preclude state courts from reaching a particular "result" when interpreting powers of attorney; it precludes them from applying a particular "rule" of interpretation that singles out arbitration agreements for disfavored treatment.

Although Ashley River accuses the state supreme court of applying "another version of the clear-statement rule," Pet. 10, what *Kindred* disapproved of was a *rule* that demanded specificity even where the principal's intention to delegate authority to waive the jury-trial right was manifest in the power of authority.

See Kindred, 137 S. Ct. at 1426 (noting that the Kentucky Supreme Court had held that "it would be impossible to say that entering into [an] arbitration agreement was not covered" by the Clark power of attorney (quoting *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 327 (Ky. 2015))). By contrast, the only "rule" that the South Carolina Supreme Court applied here was that South Carolina courts interpret powers of attorney under general contract-law principles, which "give effect to the intention of the parties" by "look[ing] to the language of the contract." Pet. 6a (internal quotation marks omitted). That generally applicable "rule" of contract interpretation does not single out arbitration agreements for disfavored treatment, as this Court recognized in *Kindred* itself. *See Kindred*, 137 S. Ct. at 1429 (stating that "nothing we have said disturbs" the conclusion that "the … power of attorney was insufficiently broad to give … authority to execute an arbitration agreement" so long as "that interpretation of the document is wholly independent of the court's clear-statement rule").

Ashley River also seeks to squeeze this case into the *Kindred* mold by suggesting that the South Carolina Supreme Court would have reached a different outcome if the General POA had "explicitly said that it was authorizing the representative to sign a 'pre-dispute arbitration agreement.'" Pet. 23. *Kindred*, however, does not preclude courts from giving effect to language in a power of attorney authorizing (or prohibiting) an agent to enter into an arbitration agreement. *Kindred* only prohibits courts from *demanding* that principals use specific language for that purpose. Had Mr. Whaley addressed arbitration specifically, South Carolina courts would

undoubtedly have enforced that provision consistent with their general approach of giving effect to the intention of the parties. That the state supreme court was required to ascertain Mr. Whaley's intent without the benefit of such specific language does not suggest that the court employed "a variation of the clear-statement rule this Court rejected in *Kindred*," as Ashley River contends. Pet. 23.

B. Perhaps recognizing that the South Carolina Supreme Court did not, in fact, "requir[e] an explicit reference to arbitration," Ashley River argues that the decision rests on "one of the other, more subtle, devices" that this Court's arbitration precedents disallow. Pet. 15. In particular, it suggests that *Concepcion* and *Imburgia* are analogous to this case. *Id*. at 2. That argument is baseless.

In *Concepcion*, the Court addressed a California law that considered collective-action waivers in consumer contracts unconscionable. 563 U.S. at 340. Although the state-law unconscionability rule was not confined to arbitration agreements, this Court held that it was preempted because it stood "as an obstacle to the accomplishment of the FAA's objectives," namely, the goal of "facilitat[ing] streamlined proceedings." *Id*. at 343–44. Ashley River does not even attempt to explain how the generally applicable contract-law principles that the court applied in interpreting Mr. Whaley's powers of attorney stand "as an obstacle to the accomplishment of the FAA's objectives."

In *Imburgia*, this Court addressed an arbitration agreement whose provisions declared the agreement inoperative if its class-action waiver was invalid under the "law of your state," there, California. 577

U.S. at 50. A state court of appeals interpreted "law of your state" to refer to California law as it would have existed without regard to *Concepcion*, and therefore concluded that the arbitration agreement was inoperative because the class-action waiver would have been invalid under state law but for *Concepcion*. 577 U.S. at 51–52. This Court recognized that the interpretation of "law of your state" was a state-law question for California courts to resolve. *Id.* at 54. The Court held, however, the FAA preempted the state court's interpretation of the choice-of-law provision to cover "*invalid* state law" because the Court concluded that "California courts would not interpret contracts other than arbitration contracts the same way." *Id.* at 55.

Contrary to Ashley River's repeated contentions (*see*, *e.g.*, Pet. 1–2, 14–15, 21), the South Carolina Supreme Court did not employ a "device" to disfavor arbitration agreements akin to the choice-of-law rule at issue in *Imburgia*. Ashley River asserts a conflict with *Imburgia* because it contends that the court here used an "arbitration-specific approach" to interpreting Mr. Whaley's powers of attorney that the court "would not apply to any other contract." Pet. i; *see also id.* at 2, 18–19, 27. In *Imburgia*, however, this Court concluded that the state court of appeals' interpretation of the choice-of-law provision was specific to arbitration agreements because, among other things, the interpretation conflicted with general principles of contract law set out by the California Supreme Court, 577 U.S. at 55–56 (citing *Doe v. Harris*, 302 P.3d 598, 601–02 (Cal. 2013)), and the state court of appeals did not frame its analysis in "generally applicable terms," *id.* at 57. In contrast, Ashley River has not identified any inconsistency

between the decision here and any other decision of the South Carolina Supreme Court, and it does not dispute—indeed, it ignores (*see* Pet. 10)—that the court framed its analysis as governed by generally applicable contract-law principles. *See* Pet. App. 6a. As explained below, Ashley River's complaints about the court's ruling stem not from any interpretive rule that disfavors arbitration agreements, but from Ashley River's disagreement with how the state supreme court applied generally applicable contract-law principles to the specific language of Mr. Whaley's powers of attorney.

II. The state supreme court's analysis of the specific powers of attorneys executed by Mr. Whaley does not raise an important federal question.

Whether Mr. Whaley authorized Ms. Arredondo to enter into a pre-dispute arbitration agreement is a question of South Carolina law, and the South Carolina Supreme Court is the final arbiter of the meaning of the General POA and the Health Care POA under that state's law. *See Imburgia*, 577 U.S. at 54 ("[T]he interpretation of a contract is ordinarily a matter of state law to which we defer."). The state supreme court's decision was confined to "the specific language" of Mr. Whaley's two powers of attorney, Pet. App. 6a, and "the facts of this case," *id.* at 20a. Therefore, unlike *Kindred*, *Concepcion*, and *Imburgia*, in which this Court examined state rules of decision whose impacts would have extended beyond the arbitration agreement at issue in the case, the decision here has little application to powers of attorney that use different language to delegate authority to agents to act on behalf of their principals.

Ashley River's extended discussion of why it believes the state supreme court erred in its interpretation of the General POA and Health Care POA does not raise an important federal question worthy of this Court's time.

A. With respect to the General POA, the key provision is the one that authorized Ms. Arredondo to manage Mr. Whaley's "business affairs, property, or other assets whatsoever, including … choses in action." Pet. App. 48a. The court focused on "choses in action" as the relevant property interest because the present litigation involves a claim for damages in tort. *See id.* at 9a. Although the court recognized that a chose in action "is a type of property interest or a proprietary right to a claim or debt," *id.*, it concluded that the arbitration agreement did not involve a chose of action because Mr. Whaley "did not possess a cause of action against [Ashley River] at the time the arbitration agreement was signed," *id.* at 10a. Unless a chose of action has come into being, the court explained, an arbitration agreement cannot involve Ms. Arredondo's management of "a chose in action or any other property right Whaley possessed," but only a prospective waiver of procedural constitutional rights in future disputes. *Id.* at 11a. And because no property rights are involved, the court further concluded that the provision of the General POA that authorized "transfers" of "any other property, right, or thing" did not authorize Ms. Arredondo to execute an arbitration agreement because the agreement did not entail the "transfer" of "anything to anyone." *Id.* at 12a.

Ashley River's attempt to elevate its criticisms of the state supreme court's analysis into a federal question fails. At the outset, Ashley River criticizes

the court for finding the Kentucky Supreme Court's analysis on remand from *Kindred* persuasive, claiming that both the Kentucky and South Carolina Supreme Courts "appl[y] rules in the arbitration context that courts would never apply in other settings." Pet. 16. This makes no sense. This Court has already held that Kentucky's analysis of the Wellner power of attorney would pass muster under the FAA so long as it was "wholly independent" of the clear-statement rule, 137 S. Ct. at 1429, and the decision on remand confirmed that it was, 533 S.W.3d at 194. South Carolina's agreement with Kentucky's analysis does not transform a permissible approach to interpreting contracts into impermissible discrimination against arbitration agreements.

Ashley River's assertion (Pet. App. 20) that the court "did not explain" the "temporal limitation" of "chose in action" to presently held property interests is misguided. As the court noted, Pet. App. 9a, and as Justice Few explained in detail, *id.* at 22a–25a, a chose in action requires (in the tort context) the existence of a "cause of action," which Mr. Whaley did not possess until two years after Ms. Arredondo signed Ashley River's arbitration agreement. *See also*, *e.g.*, *id.* at 23a (Few, J., concurring) (explaining that, traditionally under South Carolina law, a "chose in action" described "'a thing' in the sense of an *existing right* in property that is not in the owner's current possession" (emphasis added)); *see also* Black's Law Dictionary (11th ed. 2019) (Westlaw) (definition of "chose") (distinguishing between a "chose in action," defined to include the "right to bring an action to recover a debt, money, or thing" and a "future chose in action," defined as "[t]he prospect of becoming entitled to an interest or right"). The South Carolina Supreme

Court accordingly had ample basis for concluding that "the arbitration agreement did not concern a chose in action or any other property right." Pet. App. 11a.

Turning to other language in the General POA, Ashley River accuses the South Carolina Supreme Court of "ignor[ing] the most important and expansive language granting the agent power." Pet. 18. The court, however, considered the entire provision granting Ms. Arredondo authority to manage Mr. Whaley's business and property interests, *see id.* at 8a, even while its analysis focused on the clauses most pertinent to resolving the question before it, *id.* at 9a–12a. More importantly, even if the state supreme court committed error, this Court does not sit to superintend state courts in their application of state law to specific documents. And although Ashley River asserts that the court's analysis would have been different in any "other context (outside of arbitration)," Pet. 18, it cites no authority to support its *ipse dixit*.

Ashley River also seeks to portray the General POA to be as broad as, or "even broader," than the Clark power of attorney that the Court did not remand in *Kindred*. Pet. 19. Not so. The Clark power of attorney extended to "*all matters affecting me* and/or my estate in any possible way" and applied to all "contracts, deeds, or agreements." *Kindred*, 137 S. Ct. at 1425 (emphasis added). The relevant provision of the General POA, in contrast, focuses on Mr. Whaley's "business affairs, property, or other assets," not "all matters." Pet. App. 48a. The General POA, therefore, is closer to the Wellner power of attorney ("contracts of every nature in relation to both real and personal property," *Kindred*, 137 S. Ct. at 1425) than it is to

Clark's, as the state supreme court explained. Pet. App. 13a.*

Petitioner's argument that the South Carolina Supreme Court read "including" to be a term of limitation in the General POA has no basis in the court's opinion. *See* Pet. App. 19. Therefore, Ashley River's reliance on a state court of appeals decision that holds that "including" is not a limiting term—even if a lower state court could constrain the state supreme court's analysis—is misplaced. *See id*. at 19–20 (citing *Baker v. Chavis*, 306 S.C. 203, 208–09 (Ct. App. 1991)).

Ashley River also relies on state court of appeals decisions to argue that the South Carolina Supreme Court's conclusion that a not-yet-accrued claim is not a property interest differs from how South Carolina courts would interpret contracts outside of the arbitration context. *See* Pet. 21. Those state court of appeals cases, however, do not address the phrase "chose in action" or the specific language that the state supreme court addressed in this case. And the principle for which Ashley River cites them—that

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* Petitioners mention two clauses in the General POA outside of the substantive provision addressing the management of Mr. Whaley's property. First, the prefatory clause authorizes Ms. Arredondo to act "with the same force and effect" as if Mr. Whaley had taken the action himself. Pet. 17 (quoting Pet. App. 48a) (emphasis removed). That clause, however, is not a grant of freestanding authority, but is limited to the "acts or things" identified in the General POA's substantive provisions. *Id.* at 48a. Second, a similar clause appearing at the end of the General POA (*see* Pet. 17–18 (quoting Pet. App. 51a–52a)), is likewise limited in scope, applying only where needed "to make the transfers described" in the General POA. Pet. App. 52a. As noted above, *see supra* pp.5, 14, executing an arbitration agreement does not involve a "transfer" of anything.

contract law applies to interpretations of powers of attorneys—is on all fours with the principle that the court applied in this case. *See id.* at 21 (citing *Stott*, 426 S.C. 568, 577 (Ct. App. 2019), and *Watson v. Underwood*, 407 S.C. 443, 455 (Ct. App. 2014)); *see also* Pet. App. 6a (invoking contract law to ascertain Mr. Whaley's intent).

Ashley River also cites *First State Bank v. Rosenberg*, 418 S.C. 170, 181 (Ct. App. 2016), for the proposition that a power of attorney need not "specifically spell[] out" every authorized act that the agent may undertake. Pet. 21. Again, even if the state supreme court could be constrained by the state court of appeals, the decision here did not require an "explicit reference to arbitration or arbitration agreements" in the General POA, but simply asked whether the terms of the General POA "authorized Arredondo to execute a pre-dispute arbitration agreement." *See* Pet. App. 6a; *see also supra* p.14.

Citing the South Carolina Uniform Power of Attorney Act, S.C. Code Ann. § 62-8-201, Ashley River also contends that a power of attorney that authorizes an agent to manage "the principal's property and assets" necessarily extends to "property and assets acquired in the future." Pet. 21–22. The state supreme court, however, did not question Ms. Arredondo's authority to manage property that Mr. Whaley "acquires later." S.C. Code Ann. § 62-8-201. Rather, the court held that Ms. Arredondo lacked authority to manage property on Mr. Whaley's behalf *before* he had acquired that property.

Finally, relying on the dissenting opinion in *Wellner*, Ashley River argues that the South Carolina Supreme Court's interpretation for Mr. Whaley's

powers of attorney is "arbitration specific" because it somehow targets only "arbitration agreements and black swans," which *Kindred* held was impermissible. *See* Pet. 24 (citing *Wellner*, 533 S.W.3d at 196 (Hughes, J., dissenting), and quoting *Kindred*, 137 S. Ct. at 1428 (internal quotation marks omitted)). But Ashley River does not question Mr. Whaley's right to deny his agent the authority to enter into a pre-dispute arbitration agreement. The state supreme court's enforcement of Mr. Whaley's intent is not a rule of decision that disfavors arbitration agreements over other types of contracts, which is the type of "arbitration specific" rule about which *Kindred* was concerned. Moreover, the court's decision does not even have the effect of targeting arbitration agreements. It would not, for example, preclude Ms. Arredondo from agreeing to arbitrate Mr. Whaley's tort claims that have become a "chose in action," and it would not permit her to waive Mr. Whaley's litigation rights (such as the jury-trial right or the right to a particular forum) in non-arbitration contracts that do not involve his "business affairs, property or other assets." Pet. App. 48a. This case is thus far removed from the "slim set of both patently objectionable and utterly fanciful contracts" that *Kindred* held to be insufficient to prevent Kentucky's clear-statement rule from being arbitration-specific in its application. 137 S. Ct. at 1427.

B. The South Carolina Supreme Court also concluded that the Health Care POA did not authorize Ms. Arredondo to enter into a pre-dispute arbitration agreement with Ashley River. First, the court held that the arbitration agreement was not a requirement for Mr. Whaley's admission to the Ashley River facility and, thus, was not "necessary" or "required" within

the meaning of the Health Care POA. Pet. App. 14a–18a. Second, the court concluded that the Health Care POA did not authorize Ms. Arredondo to enter into agreements concerning litigation unrelated to enforcing compliance with Mr. Whaley's health-care decisions.

Although Ashley River contends that the state supreme court's interpretation of the Health Care POA represents the improper use of "arbitration-averse devices," Pet. 24, the only "device" it purports to identify is based on its claim that the court's interpretation was erroneous. Error correction is not a basis for this Court's review of a state supreme court decision applying state law.

Ashley River's arguments that the state supreme court erred are wrong in any event. Ms. Arredondo's authorities under the Health Care POA are detailed in paragraph 11 addressing "AGENT'S POWERS." Pet. App. 60a. The dispute below "focus[ed] solely" on paragraph 11(d), *id.* at 13a, which authorized Ms. Arredondo "[t]o take any other action *necessary* to making, documenting, and assuring implementation of decisions concerning [Mr. Whaley's] health care," *id.* at 14a (emphasis added). Ashley River argues that the state supreme court erred because it used a definition of "necessary" that was too strict, Pet. 27, but the court's decision rested on *Ashley River's* argument (made in the context of its defense to unconscionability) that "the arbitration agreement was presented to Arredondo as a 'voluntary standalone' agreement that was not a prerequisite for Whaley's admission into the facility." Pet. App. 16a. As the court recognized, *id.* at 15a, under any definition of "necessary," an *optional* arbitration agreement is not the type of document covered by

paragraph 11(d). The court, moreover, buttressed that conclusion by observing that courts in six other jurisdictions had reached similar results when interpreting Health Care POAs (*see id*. at 16a–18a)—an aspect of the court's opinion with which Ashley River fails to grapple.

Ashley River also takes issue with the South Carolina Supreme Court's interpretation of paragraph 11(d)'s language authorizing Ms. Arredondo to "pursu[e] any legal action … to force compliance with [Mr. Whaley's] wishes … or to seek actual or punitive damages for the failure to comply." *Id.* at 14a. The court explained that this provision "is of no significance in this case" because it is focused on enforcing compliance with Mr. Whaley's wishes. *Id*. at 19a. In a footnote, Ashley River disputes this conclusion by characterizing its legal responsibility to adhere to "prevailing standards of care" as a "wish" that Mr. Whaley made to it. Pet. 28 n.3. Ashley River's curious reading of paragraph 11(d) does not demonstrate that the state supreme court erred, much less that this Court should get involved.

Further, as the state supreme court recognized (*id.* at 19a–20a), the language of this clause in paragraph 11(d) is similar to the language of the Wellner power of attorney at issue in *Kindred*, which authorized Beverly Wellner to "institute legal proceedings." 137 S. Ct. at 1425. As explained above, *Kindred* confirms that a state court can interpret this language as not authorizing pre-dispute arbitration agreements so long as the court does not use a clear-statement rule to put a thumb on the scale. *Id*. at 1429. The South Carolina Supreme Court faithfully followed that instruction here.

Ashley River's arguments based on provisions outside of paragraph 11(d) are insubstantial. *See* Pet. 25–26. That paragraph 11 of the Health Care POA generally granted Ms. Arredondo "full authority to make decisions for [Mr. Whaley] regarding [his] health care," Pet. App. 60a, neither overrides the specific terms of paragraph 11(d) nor answers the question whether a purely optional arbitration agreement involves a health-care decision. Similarly, that Ms. Arredondo's authority "to interpret [Mr. Whaley's] desires" is "as broad as possible," *id.*, is not a grant of authority to take any action not covered by the specific authorizations set forth in paragraph 11. Finally, the fact that Mr. Whaley did not expressly impose specific limits on Ms. Arredondo's authority under the Health Care POA, *id.* at 62a, does not answer the question of the scope of authority that he conferred on Ms. Arredondo under the plain terms of paragraph 11(d). And, in any event, none of these interpretive questions—all of which are specific to the language of the particular Health Care POA that Mr. Whaley signed—raise a question of federal law warranting this Court's review.

III. The South Carolina Supreme Court's decision does not have any significance beyond this case.

Ashley River does not dispute that the South Carolina Supreme Court articulated the correct standard for interpreting powers of attorneys: "ascertain and give effect to the intention of the parties" by "look[ing] to the language of the contract." Pet. App. 6a. Because no two powers of attorney necessarily contain the same language, the state supreme court's application of generally applicable contract-law principles to Mr. Whaley's powers of

attorney is not indicative of the result that South Carolina courts will reach when faced with a differently worded power of attorney. This case, therefore, does not raise a question of any importance to anyone aside from the parties to this case.

Ashley River responds with the unremarkable proposition that agents acting under powers of attorney engage in business transactions with "nursing homes and assisted living communities," and in "other contexts." Pet. 29. Ashley River's contention that the state supreme court's decision has widespread impact is without merit. Ashley River argues that nursing homes "should not be uniquely disadvantaged as compared to other businesses that enter into transactions directly with the principal." Pet. 30. A business that engages in a transaction directly with a principal, however, understands that the principal *always* possesses all of his or her own authority. A business that deals with agents likewise understands that agents possess only the authority that is granted to them by the document that creates the agency relationship. Nothing prevents a business from confirming that a power of attorney authorizes the agent to engage in the transaction at issue. Issues relating to the scope of an agent's authority are not limited to the arbitration context, and any disputes that arise inherently raise questions of state law that are committed to state courts for resolution. If a principal has not granted his or her agent the authority to enter into an arbitration agreement (or any other type of transaction), the FAA does not preclude state courts from giving effect to the principal's intention. Ashley River's suggestion to the contrary would not place arbitration agreements on an equal footing with other contracts; it would elevate

them above other types of agreements otherwise governed by state law. Nothing in the FAA or this Court's precedents justifies that outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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